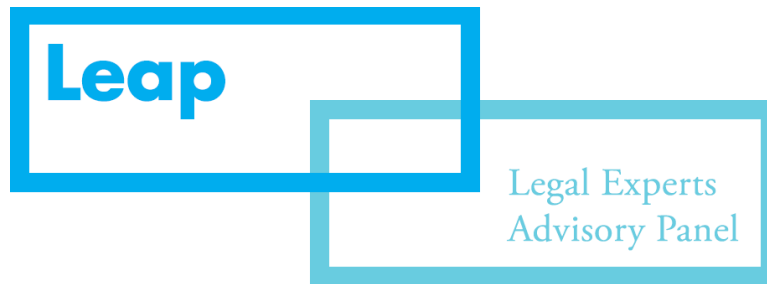


ROADMAP PRACTITIONER TOOLS



EU DIRECTIVE ON THE PRESUMPTION OF INNOCENCE: IMPLEMENTATION TOOLKIT



About Fair Trials

Fair Trials is an international human rights organisation with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Fair Trials' work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

About the Legal Experts Advisory Panel

The Legal Experts Advisory Panel (or LEAP) is an EU-wide network of experts in criminal justice and human rights which works to promote fair and effective judicial cooperation within Europe. There are currently over 155 organisational members, with representatives from law firms, CSOs, and academic institutions, covering all 28 EU Member States.

Through Fair Trials' coordination, LEAP is able to offer an expert view on a broad range of EU criminal justice topics, while also boosting cooperation between human rights defenders in cross-border work. LEAP's importance has been acknowledged by the EU, which has recognised the network's contribution to EU Justice.

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PRESUMPTION OF INNOCENCE TOOLKIT

I. INTRODUCTION

A. Background

1. In the last decade, the EU Member States have been cooperating closely on cross-border issues, principally through mutual recognition mechanisms such as the European Arrest Warrant ('EAW'). The effectiveness of such mechanisms relies on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights ('ECHR').
2. However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Procedural Rights Roadmap'.¹
3. Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives binding national authorities in all cases, including those which have no cross-border element. These cover the right to interpretation and translation,² the right to information,³ the right of access to a lawyer, the right to legal aid,⁴ the right to presumption of innocence and to be present at trial⁵ and the rights of children in criminal proceedings⁶ (the 'Roadmap Directives').

¹ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings ([OJ 2009 C 295, p.1](#)).

² Directive 2010/64/EU of the European parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, ([OJ 2010 L 280, p. 1](#)).

³ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings ([OJ 2012 L 142, p. 1](#)).

⁴ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty ([OJ 2013 L 290, p. 1](#)).

⁵ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, ([OJ 2016 L 65, p. 1](#))

⁶ Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, ([OJ 2016 L 132, p.1](#)).

4. This Toolkit discusses Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (the ‘Directive’). The presumption of innocence is a fundamental right and key element at the heart of fair trial rights protection under Article 6 of the European Convention of Human Rights (‘ECHR’) and Article 48 of the European Charter of Fundamental Rights, as well as in the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and a number of other international treaties and covenants.
5. The Directive covers the right not to be presented as guilty by public authorities before the final judgment, the requirement for the burden of proof to be on the prosecution and that any reasonable doubts on the guilt should benefit the accused, the right not to incriminate one-self, the right not to cooperate and the right to remain silent. It also covers the right to be present in trial, but as it will be explained below, this part of the Directive will not be addressed in this Toolkit.
6. The Directive differs from its Roadmap predecessor’s inasmuch as its provisions set out general principles of law, instead of providing the procedural framework for the protection of the rights of the suspect or accused person in the manner which we find in the other Roadmap Directives. This raises a number of challenges in relation to the effective transposition and implementation of the Directive, not least because most Member States already recognise and protect the presumption of innocence in law.⁷ From our experience, Member States might not see the need to review their existing law and be reticent to reform their national legislation. For example, after the Directive on the Right to Information was adopted, Cyprus did not amend its national law to comply with the Directive because the existing law in Cyprus had already established some of the rights set out by the Directive. However, as it was later proven, the law complied with the Directive only partially.⁸
7. This potential reticence on the part of Member States is particularly concerning in light of the fact that the Impact Assessment carried out by the European Commission prior to publication of its original proposal for the Directive found that, in practice, “there is insufficient protection of certain aspects of the principle of presumption of innocence of suspects and accused persons across the EU.”⁹ In the European Commission’s view, “the protection of the principle of presumption of innocence by the European Court of Human Rights (‘the ECtHR’) has not resulted in sufficient protection of suspects or accused persons in the EU.”
8. This was also noted by the LEAP Advisory Board during a meeting organised in March 2014 to discuss the European Commission’s proposal for the Directive. The Advisory Board highlighted that even where legal frameworks across most Member States refer to the principle and contain

⁷ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for measures on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings /*SWD/2013/0478 final*/, (“Impact Assessment”), p 13, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52013SC0478&from=en>.

⁸ <https://www.fairtrials.org/wp-content/uploads/2017/05/Letters-of-Rights-International-and-Comparative-Law-Research-Report.pdf>

⁹ Impact Assessment, p 4.

provisions that mirror those of the Directive, the main problem lies in the incoherent application of these norms in practice.¹⁰ It is therefore clear that in practice, the protection of the presumption of innocence is below the threshold of the Directive. Close scrutiny of national legislation is therefore required in order to strengthen the protection of the right in practice. For this reason, it is key to be in possession of a tool that provides guidance to stakeholders, practitioners, civil society organisations and other relevant actors throughout the pre-transposition period in order to ensure effective transposition and implementation in a manner consistent with the object and purpose of the Directive.

9. This Toolkit is intended to serve as a tool that LEAP members and other lawyers, NGOs, academics and interested parties can use to inform their contribution to the adequate transposition of the Directive into national law and effective implementation. Additionally, for the Roadmap Directives to have full effect, it is necessary to ensure that they are relied upon by the national courts. For this reason, this Toolkit will also identify ways in which the Directive can be used before national courts despite not having been transposed into national legislation.

II. OBJECTIVES OF THIS TOOLKIT.

10. As mentioned above, at the time of publication of this Toolkit, the deadline for transposition into national law is still a year away. However, with Member States under an obligation to ensure that the Directive is transposed into national law by 1 April 2018, the review of national law by the competent authorities to assess compliance with the Directive should be taking place in the coming year if it is not already underway. Fair Trials will be working with LEAP members and other criminal justice experts to ensure that the Directive is both transposed and implemented effectively.
11. This Toolkit aims to help the reader identify areas where current or proposed national law fails to meet the requirements of the Directive (read with other key international standards) so that these can be addressed in the pre-transposition period, leaving fewer problems for the courts to deal with subsequently. This is an exciting opportunity for practitioners, civil society organisations and any other actors to get involved and participate actively in the process of transposing the Directive via legislative reform and domestic litigation.
12. As it was shown in Fair Trials' report "Towards an EU Defence Rights Movement",¹¹ in recent years, LEAP has contributed to national legislative discussions relating to the implementation of the Roadmap Directives. In Lithuania, a submission made by Fair Trials and Lithuanian LEAP members, in consultation with LEAP member the Human Rights Monitoring Institute, was taken

¹⁰LEAP, Defence Rights in Europe: The Road Ahead, 2016, p 11, available at: <https://www.fairtrials.org/defence-rights-in-europe-the-road-ahead/>

¹¹ LEAP, Strategies for Effective Implementation Of the Roadmap Directives: Towards an EU Defence Rights Movement, 2015, para 29.

into account and some of the changes recommended were included in the final legislative text.¹² In Spain, Fair Trials wrote a joint letter with Rights International Spain and several other NGOs commenting on the draft legislative measure implementing the first two Roadmap Directives. Fair Trials also worked with LEAP member for England & Wales, JUSTICE, to contribute to a government consultation on the implementation of the Right to Information Directive, with some of our recommendations reflected in the adopted measures. This demonstrates that a lot can be achieved in terms of ensuring the effective implementation of the Directive if LEAP and other actors are actively involved in the transposition process.

13. This Toolkit provides an overview of the provisions of the Directive relating to the presumption of innocence and contains a review of the relevant case-law of the ECtHR that will help to interpret those provisions. Given that the Directive has not yet reached its transposition deadline, it does not yet have direct effect in Member States. Nonetheless, as has been discussed in the 'Using EU Law in Criminal Practice Toolkit' published by Fair Trials in 2015, there are a number of ways in which the Directives can be used for litigation at this stage.¹³ Thus, we encourage LEAP members to read this toolkit in conjunction with the 'Using EU Law in Criminal Practice Toolkit'.
14. This Toolkit also provides a number of case-examples of the type of situations that would constitute a violation of the rights protected under the Directive in practice. The aim is to identify the kind of situations that fall within the scope of the Directive and that, consequently, should be addressed by the current or proposed law that transposes the Directive.
15. Fair Trials and LEAP want to gain a better understanding of the challenges faced by lawyers in practice when defending the right of their clients to be presumed innocent until proven guilty at different stages of the criminal proceedings. Therefore, for each aspect of the right to presumption of innocence covered in the Toolkit, we have included a set of questions regarding the various issues that are at stake when ensuring the effective protection of the right in question, for the reader to reflect on. This is new for everyone, and we are keen to hear about what is working and what is not, how law-makers, police and courts are reacting, and what success you are having relying on the ideas and arguments put forward in our Toolkit. We invite LEAP members to get in touch with Fair Trials to share your responses and further thoughts. Fair Trials will also organise a series of meeting to discuss these issues in more detail.
16. LEAP members are aware that they are able to achieve more through partnerships and discussions with key local actors such as bar associations, police, judiciaries, universities and training bodies. Indeed, we hope that LEAP and all the actors within national legal systems can work together in the design of country-specific strategies for addressing the challenges identified as a result of the questions proposed in this Toolkit.

¹² Fair Trials and LEAP, Submission to the Legal Affairs Committee of the Parliament of Lithuania on the transposition of Directive 2012/13/EU on the right to information in criminal proceedings, 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Lithuania-Parliament-Submission-English1.pdf>

¹³ See Fair Trials, 'Using EU Law in Criminal Practice' Toolkit, 2014, p 12, available here <https://www.fairtrials.org/wp-content/uploads/Using-EU-law-A2L-FINAL1.pdf>

17. In summary, the objectives of this toolkit are to:

- A. Provide an overview of Directive's key provisions related to the ECtHR case-law;
- B. Provide guidance on how the Directive can be used during the pre-transposition period;
- C. Encourage LEAP members and their networks to identify problems with national law and practice which the Directive can address; and
- D. Provide a framework for developing strategies to inform reform in law and practice in order to transpose and effectively implement the Directive.

III. SCOPE OF THE TOOLKIT

18. This Toolkit covers those aspects of the presumption of innocence identified by the LEAP network as posing a particular challenge to the conduct of criminal defence. Thus, the toolkit focuses on (i) the right not to be presented as guilty by public authorities before the final judgment, (ii) the fact that the burden of proof is on prosecution and that any reasonable doubts on the guilt should benefit the accused, (iii) the right not to incriminate one-self, (iv) the right not to cooperate and (v) the right to remain silent. This Toolkit does not cover the right to be present at trial.

IV. THE DIRECTIVE AT A GLANCE

Provision	What it covers	Particular aspects
Article 1	Subject matter	<ul style="list-style-type: none"> Lays down common minimum rules concerning certain aspects of the presumption of innocence in criminal proceedings.
Article 2 Recitals 12-15	Scope	<ul style="list-style-type: none"> Applies to <u>natural persons</u> who are suspects or accused persons in criminal proceedings. Legal persons are not covered by the Directive. The Directive applies at <u>all stages of the criminal proceedings</u>, from the moment person is suspected or accused of having committed a criminal offence until the final decision on the determination of guilt has been reached. This Directive has broader temporal scope than the previous Roadmap Directives which only commence from when the suspect/accused is informed that they are suspected or accused.
Article 3	The general principle of Presumption of Innocence	<ul style="list-style-type: none"> Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.
Article 4 Recitals 16-19	Public references to guilt	<ul style="list-style-type: none"> Public authorities shall refrain from making public statements referring to the suspect or accused person as being guilty until guilt has been proved according to the law (1). This obligation is without prejudice to the acts of the prosecution which aim to prove the guilt of the suspect or the accused person, and to preliminary procedural decisions taken by competent authorities on the basis of incriminating evidence (1). Authorities shall be able to disseminate information on the criminal proceedings to the public only where strictly necessary for the purpose of the criminal investigation or in the public interest (3). Remedies shall be available for breaches of the obligation not to refer to suspects or accused persons as being guilty (2).
Article 5 Recitals 20-21	Presentation of suspects and accused persons	<ul style="list-style-type: none"> Suspects or accused persons shall not be presented in court or in public as being guilty through the use of measures of physical restraints (1). Measures of physical restraint could be applied when so required for case-specific reasons, relating to

		security or to the prevention of suspects or accused persons from absconding or from having contact with third persons (2).
Article 6 Recitals 22-23	The burden of the proof	<ul style="list-style-type: none"> • The burden of the proof for establishing the guilt of the suspects and accused persons is on the prosecution, notwithstanding any obligation of the judge or the court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence (1). • Any doubts as to the question of guilt is to benefit the suspect or accused person (<i>in dubio pro reo</i>) (2).
Article 7 Recitals 24-31	Right to remain silent and right not to incriminate oneself	<ul style="list-style-type: none"> • Suspects or accused persons have the right to remain silent and not to incriminate themselves (1) (2). • This shall not prevent the authorities from gathering, through legal powers of compulsion, evidence which has an existence independent of the will of the suspects or accused persons (3). • Cooperative behaviour of the accused person should be taken into account in sentencing (4). • The exercise of this right shall not be used against the suspects or accused persons and shall not be considered as evidence that they have committed the offence alleged (5). • With regards to minor offences, Member States may decide the conduct the proceedings, in part or in whole, to take place in writing or without questioning of the suspect or accused person, provided that this complies with the right to a fair trial (6).
Article 10 Recitals 44-45	Remedies	<ul style="list-style-type: none"> • Suspects and accused persons shall have an effective remedy if their rights under this Directive are violated (1). • Without prejudice to national rules and systems on the admissibility of evidence, the rights of the defence and the fairness of the proceedings must be respected when assessing statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself (2).

V. PROVISIONS OF THE DIRECTIVE

A. *Public references to guilt*

i. *General principles*

19. Article 4 of the Directive prohibits public authorities from making public statements which refer to a person as guilty unless or until guilt is proven according to law. Recital 17 of the Directive defines the term “public statements made by public authorities” as any statement which refers to a criminal offence made by an authority who is involved in the criminal proceedings in question, such as judicial authorities, police and other law enforcement authorities, or from another public authority, such as ministers and other public officials.

Example: Dan Grigoire Adamescu (Romania)

Mr Adamescu, the owner of a newspaper critical of the Romanian government, stood accused of corruption in Romania. During the course of the pre-trial proceedings, the judicial authorities made the following statements that failed to respect the presumption of innocence:

- In a decision to detain Mr Adamescu, the judge referred to “the seriousness of the illegal actions committed by him”, describing them as established facts rather than as yet unproved allegations.
- At an appeal hearing challenging his detention, the Court of Cassation cited as one of its main reasons for denying the appeal the fact that “the defendant[s] continue to deny committing the crimes of which they stand accused and to challenge the existence of any evidence that justifies a reasonable suspicion that they did, in fact, commit these crimes.”

20. Article 4 of the Directive covers judicial statements made during the pre-trial period, such as in relation to a decision to order pre-trial detention or to revoke pre-trial release, which portray the accused as guilty or rely upon an assumption that the accused has committed the offence in ways that trespass beyond facts established by evidence and despite the absence of a final conviction.

***Nešťák v Slovakia*, no. 65559/01, 27 February 2007¹⁴**

The suspect was arrested and questioned over a crime of robbery. During questioning the suspect confessed to planning and preparing the robbery but denied having taken part in the commission of the actual robbery. The court ordered his pre-trial detention on the basis of a strong suspicion that, if released, the accused would commit another offence in order to obtain money to pay off a financial debt, which had been the motivation for him to plan the robbery in the first place. The accused appealed the decision. The Regional court dismissed his appeal and found that the applicant

¹⁴ [Nešťák v Slovakia](#), no. 65559/01, 27 February 2007.

had a tendency to commit offences and that therefore the risk of him committing further offences was still justified. He had a debt which he could not repay and the evidence available indicated that this was the reason why he had decided to carry out the robbery.

The ECtHR considered that this statement by the Regional court had taken as proven that the applicant had committed the offence imputed to him, that his motive had been the need for money and that the way in which the offence had been committed indicated the extent to which the applicant was corrupt. Therefore, the ECtHR found that these statements amounted to a violation of the presumption of innocence of the accused because they clearly implied that the individual had committed the crime. In the absence of a final conviction, the guilt of the applicant had not been proved according to law and therefore courts should have refrained from referring to the suspect in a manner that suggest he had committed the crime in question.

***Allenet de Ribemont v France*, 10 February 1995, Series A no. 30815**

Mr Allenet de Ribemont was arrested in relation to a crime of murder. During the investigation phase, some of the highest-ranking officers in the French police and the Minister of Interior gave a press conference in which they clearly referred to Mr Allenet de Ribemont as one of the instigators and accomplice of an intentional murder, without any qualification or reservation.

The ECtHR found that these statements amounted to a violation of Article 6(2) ECHR because “this was clearly a declaration of the applicant’s guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority.”

21. The jurisprudence of the ECtHR is in line with the text of the Directive. The ECtHR has established that the presumption of innocence protected under Article 6(2) ECHR will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. In the leading case of *Minelli v Switzerland*,¹⁶ Mr Minelli complained that while the Swiss Court had discontinued the proceedings against the accused due to the expiration of time limitations to prosecute an offence, it held that Mr Minelli should bear two-thirds of the cost of the proceedings because in the absence of such time limitation, the existing evidence would "very probably have led to the conviction" of the accused. The applicant complained that these statements violated his presumption of innocence. The ECtHR agreed that, by including this statement in the reasoning of the decision, the Swiss Court had shown that it was satisfied of the guilt of Mr Minelli. Specifically, the ECtHR held that “[n]otwithstanding the absence of a formal finding and despite the use of certain cautious phraseology (‘in all probability’, ‘very probably’), the Chamber

¹⁵ [Allenet de Ribemont v France](#), 10 February 1995, Series A no. 308

¹⁶ [Minelli v Switzerland](#), 25 March 1983, Series A no. 62.

proceeded to make appraisals that were incompatible with respect for the presumption of innocence".¹⁷

22. The criteria set out by the ECtHR, establishes that a fundamental distinction must be made between statements that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question.¹⁸ In *Lutz v Germany*,¹⁹ the applicant complained about the refusal of the German court to reimburse his necessary costs and expenses following discontinuation of the criminal proceedings against him, which was justified by the German Court with statements indicating the probability that the defendant was guilty such as, "as the file [stood], the defendant would most probably have been convicted", the defendant "would almost certainly have been found guilty of an offence" and "the reasons for the order as to costs in the impugned decisions are [...] rightly confined to the finding that the defendant would most probably have been found guilty". In this case, however, the ECtHR concluded that there had been no violation of Article 6(2) ECHR because, on the basis of the evidence, in particular the applicant's earlier statements admitting the facts, the terms used by the judges described a state of suspicion rather than a finding of guilt. The ECtHR considered that the case differed from *Minelli* inasmuch as the Swiss courts directed that Mr Minelli should bear part of the costs of the proceedings and had ordered him to pay the private prosecutors compensation in respect of their expenses, thus treating him as guilty. However, in Mr Lutz's case, he did not have to bear the costs of the proceedings but only his own costs and expenses. The German courts, having regard to the strong suspicions which seemed to them to have existed concerning him, did not impose any sanction on him but merely refused to order that his necessary costs and expenses should be paid out of public funds. Lastly, the ECtHR held that it is established jurisprudence that Article 6(2) ECHR does not oblige the Contracting States, where a prosecution has been discontinued, to indemnify a person "charged with a criminal offence" for any detriment he may have suffered.²⁰

23. This issue was taken up in *Sekanina v Austria*.²¹

Sekanina v. Austria, 25 August 1993, Series A no. 266-A

Sekanina had been tried and acquitted for the murder of his wife, and then brought proceedings for reimbursements of cost and compensation for spending over a year in pre-trial detention. The claim for compensation had been dismissed on the ground that his acquittal had not dispelled the suspicion of his having committed the murder. The respondent State argued that the indications given by the national court simply referred to the continued existence of a suspicion, which in light of *Lutz v Germany*, are consistent with the presumption of innocence as long as they do not reflect the opinion that the person concerned is guilty.

¹⁷ *Ibid*, para 38.

¹⁸ [Matijašević v Serbia](#), no. 23037/04, para 48, ECHR 2006-X.

¹⁹ [Lutz v Germany](#), 25 August 1987, Series A no. 123

²⁰ *Ibid*, para 63.

²¹ [Sekanina v Austria](#), 25 August 1993, Series A no. 266-A.

The ECtHR unanimously distinguished the earlier case of *Lutz*, which concerned the discontinuance of the proceedings before a final determination of guilt, whereas the present case concerned proceedings following an acquittal. The ECtHR established that “[t]he voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final. Consequently, the reasoning of [Austrian courts] is incompatible with the presumption of innocence”.²² The ECtHR found a violation of Article 6(2) ECHR.

24. In contrast, the ECtHR found no violation in a very similar case, *Allen v United Kingdom*.

***Allen v the United Kingdom* [GC], no. 25424/09, ECHR 2013**

The applicant had been convicted of manslaughter of her child. Later, the Court of Appeal found that the new evidence might have affected the jury’s decision to convict Ms Allen and acquitted the applicant. The prosecution did not apply for a re- trial given that, by the time Ms Allen appealed her conviction, she had already served her sentence and a considerable amount of time had passed. Subsequently, her application for compensation for a miscarriage of justice was refused. In its reasoning, the High Court stated that “all that [the Court of Appeal] decided was that the new evidence created the possibility that when taken with the evidence given at the trial a jury might properly acquit the claimant. That falls well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice in this case.” The applicant argued that this reasoning of the High Court violated her presumption of innocence.

The ECtHR, in light of *Minelli*, *Lutz* and *Sekanina*, *inter alia*, stated that “examination of the Court’s case-law under Article 6(2) [shows] that there is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the ECtHR’s existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.”

The ECtHR, however, held that the applicant’s acquittal had not been based on the merits of the case in a true sense, as opposed to *Sekanina*, where the acquittal was based on the principle that any reasonable doubt should be considered in favour of the accused. Specifically, the ECtHR held that “although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued.”

Secondly, the ECtHR did not consider the language used by the domestic courts to have treated the applicant in a manner inconsistent with her innocence. “In assessing whether a ‘miscarriage of justice’ had arisen, the courts did not comment on whether, on the basis of the evidence as it stood

²² Ibid, para 30.

at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, they did not comment on whether the evidence was indicative of the applicant's guilt or innocence".²³

25. In *Allen v United Kingdom*, the ECtHR established that "even the use of some unfortunate language may not be decisive when regard is had to the nature and context of the particular proceedings".²⁴ Therefore, as it follows from the above, in order to determine whether a statement of a public authority constitutes a mere expression of a suspicion or a clear declaration that an individual has committed the crime in question, the ECtHR will analyse the context of the particular circumstances in which the impugned statement was made.²⁵

***Khuzhin and Others v Russia*, no. 13470/02, 23 October 2008²⁶**

A man was detained and accused of a crime of kidnapping and torture. A few days before the opening of the trial, a State television channel broadcasted a talk show with the lead investigator of the case and the prosecutor. The participants discussed the details of the case and made several statements about the accused's violent character and gave details of his criminal record. They referred to the circumstances in which the criminal acts took place as something that the accused would do. The prosecutor specifically said that the only choice the trial court would have had to make was that of a sentence of an appropriate length. Whilst the presenter stated that the accused will soon receive the punishment that he deserved, the mugshot of the accused and the casefile were being shown on the screen. Subsequently the show had been aired again on two occasions during the trial and once more several days before the appeal hearing.

The ECtHR found that the lead investigator and the prosecutor made statements that went beyond a mere description of the pending proceedings or a state of suspicion. Those statements unequivocally suggested that the accused was guilty and prejudged the assessment of the facts by the competent judicial authority. Given the high-profile of the two participants, their statements had the effect of encouraging the public to believe the accused to be guilty before he had been convicted according to law. Therefore, the ECtHR found that there had been a breach of the accused's presumption of innocence.

***Borovský v Slovakia*, no. 24528/02, 2 June 2009.**

In this case, the ECtHR found a violation of Article 6(2) ECHR as a result of the dissemination to the media of specific details in the police file that described the accused as guilty. The applicant's claims referred to the publication of statements by the deputy director of the Office of the Finance Police in a daily magazine. In particular, the police officer stated that "the action of the accused, if considered in its entirety, was a "premeditated fraudulent action" aimed at transferring the property of the company concerned to different companies."

²³ Ibid, para 134.

²⁴ *Allen v the United Kingdom* [GC], no 25424/09, para 126, ECHR 2013.

²⁵ *Borovský*, para 63.

See also *Adolf v Austria*, 26 March 1982, paras 36-44, Series A no 49.

²⁶ *Khuzhin and Others v Russia*, no. 13470/02, 23 October 2008.

In the ECtHR's view, that statement was not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicant, but gave an assessment of the position as if it were an established fact, qualifying the accused persons' action as "fraudulent" and as having been "premeditated", without any reservation. That statement implied that the accused had committed the crime and therefore there was found to be a violation of Article 6(2) ECHR.

ii. Exceptions to the general principle

26. According to Article 4(1) of the Directive, there are a number of exceptions to the above-mentioned general prohibition, such as in relation to: 1) the prosecutor's acts that aim to prove the individual's guilt (such as the indictment); and 2) preliminary procedural decisions by judicial or other competent authorities and which are based on suspicion or incriminating evidence (for example a decision on pre-trial detention). Additionally, Article 4(1) of the Directive shall not prevent authorities from providing information to the public about the ongoing criminal proceedings where strictly necessary for reasons relating to the criminal investigation or to the public interest. This includes, for example, the release of video footage of fugitives believed to be an imminent threat to the general public
27. These obligations reflect the standards already established by the ECtHR, which in its case-law has emphasised the need for authorities to be discreet and circumspect and to be selective in their choice of words when disseminating information to the public in order to preserve the presumption of innocence.²⁷
28. Examples of the type situations in which the dissemination of information about the proceedings would be strictly necessary are provided in Recital 18 of the Directive. Investigators may find it necessary in the interest of the investigation to release video materials calling for the public to help in identifying the perpetrator of the criminal offence. Additionally, information may be disseminated to the inhabitants of an area affected by an alleged environmental crime in order to preserve the safety of the public, and equally, the prosecution or another competent authority may provide information on the state of criminal proceedings in order to prevent a public order disturbance. According to Recital 18 of the Directive, the information provided must be objective and confined to situations in which this would be reasonable and proportionate, taking all interests into account. In any event, the manner and the context in which information is disseminated should not create the impression that the person is guilty before he or she has been proved guilty according to the law.²⁸

iii. Remedies

29. Article 4(2) of the Directive states that Member States must make sure that "appropriate measures" are available in the event of a breach of the obligation not to make public statements which refer to a person as guilty before that person has been found guilty in accordance with

²⁷ [Allen v the United Kingdom](#) [GC], no 25424/09, ECHR 2013.

²⁸ Recital 18, Directive.

law. This should be read in accordance with Article 10 of the Directive which states that suspects and accused persons should have an effective remedy in the event of violation of their rights under this Directive. In terms of remedies, the Directive does not provide guidance on what is specifically required and leaves Member States to decide what would be an appropriate remedy for a violation of Article 4(1) of the Directive.

30. The European Commission's Impact Assessment found that whilst only five Member States have special rules providing for a right of recourse, most Member States do not contemplate specific remedies for violations of the prohibition to make public references of guilt in their national laws. Nonetheless, despite not having specific remedies, some form of redress through a right to appeal or to financial compensation is available in all Member States.²⁹
31. The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial is to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded.³⁰ However, this remedial approach is bound to vary depending on the nature of the violation in question. For example, in the case of public references of guilt, there would be no evidence to exclude, so an appropriate remedy may be to order a retrial along with other measures such as a public retraction of any such statement, the removal of certain personnel (whether judicial or prosecutorial) from the case and a change of trial location. The stage at which the violation is identified and complained about should also inform the type of remedy that is appropriate for violations of this aspect of the presumption of innocence. The earlier that a violation of Article 6(2) ECHR is discovered, the more likely it is that it could be remedied within the course of the investigation. The outcome of the proceedings is also relevant given that a violation of the prohibition of public pronouncements may also require a remedy in the event of an acquittal.

Pre-transposition Questions

Are public references to guilt by judicial and law enforcement authorities prohibited in law in your jurisdiction? If so, what remedies are available when such public references are made?

From your experience, are public references to guilt a particular problem in your jurisdiction? Have you ever worked on any cases in which public references to guilt have been made?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed? Are there any other non-legislative solutions to the problems which you see in practice relating to public references to guilt?

Are there any questions relating to the prohibition on public references to guilt in relation to which you think the CJEU could usefully be asked to provide clarity?

²⁹ Impact Assessment, supra n 7, p 20

³⁰ See [Salduz v Turkey](#) [GC], no. 36391/02, ECHR 2008

B. Presentation of Suspects and Accused Persons

i. General principles

Article 5 of the Directive provides that Member States “shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty through the use of measures of physical restraint” in court or in public. This provision was included in the final text of the Directive after the suggestions made by LEAP in a position paper.³¹ LEAP suggested new wording requiring Member States to ensure that suspects “are not presented in court or to the media in ways that suggest their guilt, including in particular in prison clothing, handcuffs or the use of enclosures”, unless justified by specific security concerns. This was a response to LEAP members in the UK expressing concern about the use of the ‘dock’ - a glass box where suspects sit in court, often with police - and concerns voiced for some time by lawyers from Luxembourg about the systematic use of handcuffs in courtrooms.³² The European Parliament took on board some of LEAP’s suggestions, including the point on the presentation of the accused in wording almost identical to that proposed by LEAP in its briefings.³³

Example from LEAP member in Luxembourg

Three men accused of a serious crime were kept handcuffed and kept in a glass “box” throughout their trial. The handcuffs were only removed when the suspects testified.

Despite the suspects’ lawyer protesting the use of handcuffs in the absence of any suggestion of violence on the part of the suspects, other than the nature of the allegations, and the continuous presence of police in the courtroom to ensure safety, the judge and police refused, taking the position that every detained suspect must be kept in handcuffs in court, without individual determinations of their necessity being made.

32. As further explained in Article 6(2) and Recital 20 of the Directive, measures such as handcuffs, glass boxes, cages and leg irons should be adopted on a case-specific basis. This means that measures of physical restraint should be avoided unless their use is required to prevent suspects or accused persons from harming themselves or others; damaging any property; from absconding; or from having contact with third persons or witnesses.³⁴ This should be interpreted

³¹ Fair Trials and LEAP, Joint position paper on the proposed directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, November 2014, available at: <https://www.fairtrials.org/wp-content/uploads/Presumption-of-Innocence-PositionPaper2.pdf>.

³² JUSTICE, In the Dock – Reassessing the use of the dock in criminal trials, 2015, available at: <http://justice.org.uk/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf>.

³³ Position of the European Parliament, adopted at first reading on 20 January 2016 with a view to the adoption of Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P8-TC1-COD-2013-0407+0+DOC+PDF+V0//EN>

³⁴ Recital 20, Directive.

as imposing a requirement of an assessment of the particular circumstances of each case. Only when it has been determined that in a particular case there is a real security risk posed by the defendant, or it has been proven that there are strong reasons to believe that the defendant is likely to abscond or will attempt to contact third persons, the decision to adopt these type of measures could be justifiable.

33. The Directive builds on the jurisprudence of the ECtHR which has confirmed that the use of a dock, metal cages or glass boxes during legal proceedings undermines the rights of the accused person.³⁵ Nonetheless, the ECtHR has previously found that such measures violate the right of the defendant to be free from degrading treatment under Article 3 ECHR, rather than the presumption of innocence under Article 6(2) ECHR.³⁶ Additionally, the ECtHR has found that the use of docks, glass boxes and cages are in breach of Articles 6(1) and 6(3) ECHR inasmuch as they act as physical barriers that undermine the ability of the accused to participate in the hearing and represent an interference with his right to receive effective legal assistance.³⁷

***Ramishvili and Kokhreidze v Georgia*, no 1704/06, 27 January 2009**

During the court proceedings, the applicants had been kept in metal cages, surrounded by intimidating, hooded, armed guards. They claimed that they had been exposed to the public as criminals, and that such treatment had been degrading. A video recording of the hearing was broadcast live and several photographs were taken inside the courtroom.

The ECtHR found that such a harsh and hostile appearance of judicial proceedings could lead an average observer to believe that “extremely dangerous criminals” were on trial which thereafter undermined the principle of the presumption of innocence. Additionally, the treatment in the court room humiliated the applicants in their own eyes as well as in those of the public.

The ECtHR noted that the Government had failed to provide any justification for presenting the applicant in such a manner. It held that the imposition of such stringent and humiliating measures upon the applicants was not justified and therefore found that there had been a violation of Article 3 ECHR.

34. In this aspect, the Directive goes a step further than the ECtHR by making it very clear that measures of physical restraint run counter to the presumption of innocence when applied with insufficient justification and without regard for the specific circumstances of the case.

35. According to Recital 21 of the Directive, suspects or accused persons should not be presented in court or in public wearing prison clothes when this would give the impression that the person is guilty.³⁸ This provision is reflective of the case-law of the ECtHR which has found violations of Article 6(2) ECHR when suspects or accused persons are presented in trial wearing prison

³⁵ [Ramishvili and Kokhreidze v Georgia](#), no 1704/06, para 100, 27 January 2009

³⁶ *Ibid*, paras 96-102.

³⁷ [Yaroslav Belousov v Russia](#), nos 2653/13 and 60980/14, paras 145-154, 4 October 2016.

³⁸ Recital 21, Directive.

clothing where no sufficient justification has been given by the respondent State. This is a matter where the ECtHR has been more firm in establishing such conduct as a violation of the presumption of innocence under Article 6(2) ECHR, as opposed to other measures of physical restraint (e.g. glass dock, cages, etc), which, as noted above, are more generally seen by the ECtHR as violations of Article 6(1) and Article 3 ECHR.

***Samoilă and Cionca v Romania*, no 33065/03, §§99-101, 4 March 2008³⁹,**

The applicant was presented to the court wearing prison clothes specific of persons that have been convicted. The Government maintained that it was only an administrative and preventive measure to ensure the hygiene of prisoners, which could not have the effect of influencing the impartiality of judges. The ECtHR found that having not been shown that the applicants did not have adequate clothing, the practice was without any justification and was likely to strengthen the public opinion of the applicants' guilt. Therefore there had been a violation of Article 6(2) ECHR.

***Jiga v Romania*, no. 14352/04, §§101-103, 16 March 2010⁴⁰**

The applicant was forced to appear before the court wearing prison clothes specifically for persons that have been convicted despite having his own clothes to wear. He was also led handcuffed to the courtroom. On the contrary, his co-accused was allowed to wear his own clothes. The respondent States sought to justify the presentation of the accused in prison uniform by claiming that it had been necessary given that the person concerned did not have his own clothing.

The ECtHR noted that the Government had not sufficiently demonstrated the necessity of the measure, which in its view, suggested that the order to present the applicant in prison clothing was lacking any justification. The ECtHR found that the appearance of the co-accused in his own clothes had been especially damaging to the applicant inasmuch as it was likely to give the public the impression that he was guilty. Therefore, the ECtHR found a violation of the presumption of innocence.

Pre-transposition Questions

Are there any legal provisions in your jurisdiction which regulate the way in which suspects and accused persons can be presented in court, in public and in the media? If so, what remedies are available when a suspect or accused person is presented as being guilty?

From your experience, is the presentation of suspects and accused persons as guilty a particular problem in your jurisdiction? Which measures of restraint, if any, are routinely used? Have you ever worked on any cases in which your client has been presented as guilty and in which you think that undermined the presumption of innocence?

³⁹ [Samoilă and Cionca v Romania](#), no 33065/03, paras 99-101, 4 March 2008.

⁴⁰ [Jiga v Romania](#), no. 14352/04, paras 101-103, 16 March 2010.

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the presentation of the accused? Are there any other non-legislative solutions to the problems which you see in practice relating to the presentation of the accused? Are there any questions relating to the presentation of the accused on which you think the CJEU could usefully be asked to provide clarity?

Fair Trials New Project

“The Importance of Appearances: how suspects and accused persons are presented in the courtroom, in public and in the media”

Fair Trials, together with the Hungarian Helsinki Committee, has recently developed a project intended to ensure the correct implementation of the Directive through reducing the number of instances in which suspects and accused persons are presented in court or to the public, including through the media, in ways that create a perception of guilt.

This project intends to increase the available knowledge on the use of restraining measures on suspects and accused persons in court or in public, and on the extent to which public officials respect the presumption of innocence in their public communications. It seeks to identify and disseminate transferrable good practices on the use of physical restraints on suspects and accused persons in Court and in public and how to communicate with the media about ongoing investigations or prosecutions without violating the presumption of innocence. Lastly, the project will focus in sensitising public authorities, the media and the wider public on the importance of the manner in which a suspect or accused person is presented in court or in the media and highlight the ways in which different practices can increase or decrease perceptions of guilt.

Please [contact](#) Fair Trials if you would like to learn more about how you can contribute to this project.

C. The Burden of Proof

i. General principles

36. Under Article 6 of the Directive, Member States are required to “ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution”. It further states that “[t]his shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.” Lastly, Article 6(2) of the Directive provides that “any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.”⁴¹

⁴¹ Article 6, Directive.

37. The Directive reflects the ECtHR jurisprudence, which in *Barberà, Messegué and Jabardo v Spain* held that Article 6(2) ECHR requires, inter alia, that the burden of proof is on the prosecution, and any doubt should benefit the accused.⁴² The ECtHR has further explained that the principle requires that it is for the prosecution to inform the accused of the case that will be made against him or her, so that s/he may prepare and present his or her defence accordingly, and to adduce evidence sufficient to convict him or her.⁴³

ii. *Exceptions to the general principles*

38. Recital 22 of the Directive establishes the following exceptions to the principle that the burden of the proof is on the prosecution:

- i. any ex officio fact-finding powers of the court, that is, any decision of the judges to adopt measures in search of inculpatory or exculpatory evidence;
- ii. the independence of the judiciary in the assessment of the existing evidence for determining the guilt of the accused; and
- iii. presumptions of fact or law concerning the criminal liability of a suspect or accused person.

39. Presumptions of fact or law exist in every criminal law system and are mostly applied with regards to traffic, drugs, tax related offences. Member States may penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence (i.e. if a person is found to be in possession of drugs at an airport, a presumption for intent of smuggling may be applied). However, these presumptions should be confined within reasonable limits. For example, the Directive establishes that they should be rebuttable, which means that the accused should be given the opportunity to challenge them and present exculpatory evidence. Additionally, presumptions of fact or law should be applied with due respect for the rights of the defence in any event and taking into account the importance of what it is at stake. This means that when applying presumptions of fact and law, Member States must consider whether the means employed are reasonably proportionate to the legitimate aim sought to be achieved.

40. As in the Directive, the ECtHR has not taken this to be an absolute principle. On the contrary, it permits the application of legal presumptions of fact or of law. In *Salabiaku v France*, the ECtHR established that the evidential burden may be shifted to the defence but the importance of what is at stake and the safeguards which exist to protect the rights of the defence must be considered when determining whether a reverse burden is acceptable.⁴⁴

***Salabiaku v France*, 7 October 1988, Series A no. 141-A**

In this case, the ECtHR was asked to consider the compatibility with Article 6(2) ECHR of a law reversing the burden of the proof in respect of certain elements of an offence. The applicant had been found in possession of illegal drugs at a Paris airport. At trial and on appeal he was convicted of smuggling which includes an element of knowledge or intent. The French Customs

⁴² [Barberà, Messegué and Jabardo v Spain](#), 6 December 1988, para 77, Series A no 146.

⁴³ Ibid.

⁴⁴ [Salabiaku v France](#), 7 October 1988, Series A no. 141-A

Code setting out the offences stated generally that “the person in possession of contraband goods shall be deemed liable for the offence” and that the accused may exculpate himself by establishing force majeure resulting ‘from an event responsibility for which is not attributable to him and which it was absolutely impossible for him to avoid’. The respondent State considered that under the Customs Code, an offence was committed by virtue of the "mere ("objective") fact" of "possession of prohibited goods when passing through customs", "without it being necessary to establish fraudulent intent or negligence" on the part of the "person in possession". It fell to the Public Prosecutor to furnish proof of this fact. The respondent State argued that the Customs Code did not establish an irrebuttable presumption of guilt, but "a rebuttable presumption of fact and liability". For the Government, this implied no more than "a sharing" of the burden of proof and not its "reversal".

The ECtHR specifically noted that presumptions of fact or of law operate in every legal system and that, in principle, such presumptions are not prohibited under the ECHR. However, the ECtHR held that the ECHR does require States to remain within certain limits. The duty of the ECtHR was then, to consider whether such limits were exceeded to the detriment of Mr Salabiaku.

The ECtHR found that the national court highlighted the fact that the accused had "showed no surprise" when the first package opened in his presence contained drugs. This attitude appeared to the national courts to establish the applicant's "bad faith" and it considered that there were "presumptions [...] sufficiently serious, precise and concordant to justify a conviction". The Court of Appeal noted that the applicant "went through customs with the trunk and declared to the customs officers that it was his property". As a result the national court considered that an inference could be drawn that he intended to commit the offence of smuggling.

The ECtHR concluded that the presumption created by the Customs Code and applied to the applicant was not irrebuttable. It found that the national courts had followed established case-law according to which once the fact of possession had been established by the prosecution, the burden shifted to the defence to prove that the accused could not have been expected to know about the goods in his possession. The national courts had examined all the evidence and had found him guilty without relying on the statutory presumption. For this reason, the **ECtHR found no violation of Article 6(2) ECHR**.

***Telfner v Austria*, no. 33501/96, 20 March 2001⁴⁵**

In this case, the applicant was convicted of an offence involving a hit-and-run driving incident. He chose to remain silent, and the prosecution relied entirely on the police's findings that the applicant, who was not at home at the time of the accident, was the main user of the car.

The ECtHR held that the prosecution had built its case by relying on very weak evidence against the accused and failed to prove in itself that he had committed the offence.⁴⁶ Therefore, in

⁴⁵ [Telfner v Austria](#), no. 33501/96, 20 March 2001.

⁴⁶ *Ibid*, para 17.

requiring the applicant to provide an explanation without having first established a convincing case against him, the national court had in effect shifted the burden of proof from the prosecution to the defence, which gave rise to a violation of Article 6(2) ECHR.⁴⁷

Pre-transposition Questions

Is the burden of proof in criminal cases regulated by law in your jurisdiction? What remedies, if any, exist in law for violations of the failure of the authorities to ensure that the burden of proof is on the prosecution?

Do you consider there to be particular problems relating to the reversal of the burden of proof in your jurisdiction? In what sort of cases does this happen? Have you ever worked on a case where this has happened?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the burden of proof? Are there any other non-legislative solutions to the problems which you see in practice relating to the burden of proof?

Are there any questions relating to the burden of proof on which you think the CJEU could usefully be asked to provide clarity?

D. Right to remain silent and right not to incriminate oneself

i. General principle

41. Article 7 of the Directive requires Member States to ensure that suspects and accused persons have the right to remain silent and the right not to incriminate themselves in relation to the criminal offence that they are suspected or accused of having committed. As confirmed in Recital 5 of the Directive, during the interrogations, individuals should not be forced to produce incriminating information, evidence or documents.⁴⁸ In essence, this provision protects the freedom of a suspect and accused persons to choose whether to speak or to remain silent when questioned.

42. As the ECtHR has stated, the right to remain silent and not to incriminate oneself are essential elements of the right to a fair trial. It is no coincidence that all the other rights protected under the Roadmap Directives (i.e. access to a lawyer, right to information, right to legal aid, etc.) are intended to bolster the protection of the rights to remain silent and not to incriminate oneself. Under the Right to Information Directive, suspects and accused persons must promptly be informed of their right to remain silent. The importance of informing a suspect of the right to remain silent is such that, even where a person willingly agrees to give statements to the police after being informed that his words may be used in evidence against him, this cannot be

⁴⁷ Ibid, para 18-20.

⁴⁸ Recital 25, Directive.

regarded as a fully informed choice if he has not been expressly notified of his right to remain silent. Equally, one of the benefits of the right to access a lawyer, protected by the Access to a Lawyer Directive, is that lawyers can help suspects and accused to understand and exercise their right to remain silent.

43. The ECtHR has held that, although not specifically mentioned in Article 6 of the ECHR, 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 criminal procedure under Article 6 ECHR.⁴⁹ This is, therefore, an area where the Directive codifies the approach of the ECtHR and states clearly that the right to remain silent and not to incriminate oneself are essential elements of the right to be presumed innocent until proven guilty. In *Saunders v the United Kingdom*, the ECtHR stated that the rationale of these rights “lies, inter alia, in the protection of the accused against improper compulsion by the authorities, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6.”⁵⁰

***Saunders v the United Kingdom*, 17 December 1996, Reports of Judgments and Decisions 1996-VI**

This case concerned a man who had been convicted of offences of conspiracy, false accounting and theft. During the investigation, the police relied on a domestic law which made it an offence to refuse to answer questions posed by Inspectors appointed by the Department of Trade and Industry, and provided that the answers to such questions would be admissible in court. Having been given the option of either incriminating himself or being found guilty of contempt of the court, the applicant agreed to answer questions and give statements during nine interviews, which were presented during his trial and taken into account in the assessment of guilt.

The applicant complained that he had been compelled to give statements, which violated his right not to incriminate himself, and that the use of the statements during his trial entailed a violation of his rights under Article 6(1) ECHR. The respondent State contended, inter alia, that there was a public interest in the honest conduct of companies and in the effective prosecution of those involved in complex corporate fraud. This latter interest required that those under suspicion should be compelled to respond to the questions of inspectors and that the prosecuting authorities should be able to rely in any subsequent criminal trial on the responses elicited.

The ECtHR rejected the argument of the respondent State that the complexity of large fraud cases and the public interest in securing a conviction justified the compulsion. The ECtHR stated that “the public interest cannot be invoked to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.” Additionally, the ECtHR held that “[t]he right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.

⁴⁹ [Saunders v the United Kingdom](#), 17 December 1996, para 68, Reports of Judgments and Decisions 1996-VI.

⁵⁰ Ibid.

In this sense the right in question is closely linked to the presumption of innocence contained in Article 6(2) of the Convention.⁵¹ Therefore the ECtHR found a violation of Article 6(1) and (2) ECHR.

44. In *Allan v the United Kingdom*, the ECtHR established that “[w]hile 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”.⁵² In fact, the said freedom of choice is undermined when a suspect has decided to remain silent and the authorities use deceitful tactics in order to influence them to give a confession or make other statements of an incriminatory nature which they were unable to obtain during the questioning.⁵³

***Heaney and McGuinness v Ireland*, no 34720/97, ECHR 2000-XII⁵⁴**

Under an Irish law in force at the time, whenever a person was detained in custody, police could demand a full account of the detainee’s movements and actions during any specified period and all information in his possession in relation to the commission of any offence. The law also provided that if the suspects or accused persons refused to cooperate, they would have been guilty of an offence and would have been liable to a conviction and imprisonment for a certain amount of time.

When the applicants were arrested, they were informed of their right to remain silent and not to incriminate themselves. However, when they chose to exercise these rights, they were informed by the police that, under the said law, they faced conviction and six month’s imprisonment. Both applicants continued to remain silent. Subsequently they were charged with the offence of membership of an unlawful organisation and of failing to account for their movements. The applicants were acquitted of the charge of membership of an unlawful organisation but each was convicted of failing to provide an account of their movements during a specified period under the said Irish law.

The ECtHR found that the “degree of compulsion” imposed on the applicants by the application of the relevant section of the Irish law with a view to compelling them to provide information relating to charges against them under that law in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent. The Government contended that the law was a proportionate response to the subsisting terrorist and security threat given the need to ensure the proper administration of justice and the maintenance of public order and peace. The ECtHR considered that the general requirements of fairness contained in Article 6 ECHR, including the right not to incriminate oneself, “apply to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex”. It concluded that the public interest

⁵¹ Ibid.

⁵² [Allan v the United Kingdom](#), no. 48539/99, para 50, ECHR 2002-IX

⁵³ Ibid.

⁵⁴ [Heaney and McGuinness v Ireland](#), no. 34720/97, ECHR 2000-XII

could not be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.

The ECtHR found that the security and public order concerns cannot justify a provision which extinguishes the very essence of the applicants' rights to silence and against self-incrimination guaranteed by Article 6(1) ECHR. Therefore, the ECtHR concluded that there had been a violation of the applicants' right to silence and their right not to incriminate themselves guaranteed by Article 6(1) ECHR and the right to be presumed innocent under Article 6(2) ECHR.

ii. Exceptions to the general principle

45. Article 7(3) of the Directive establishes that the exercise of the right not to incriminate oneself is without prejudice to any acts from the competent authorities directed to gather evidence that has been lawfully obtained through the use of legal powers of compulsion and which existed irrespective of the will of the suspects or accused persons. Under Recital 29 of the Directive, this includes materials acquired pursuant to a warrant, materials in respect of which there is a legal obligation of retention and production upon request of breath, blood or urine samples and bodily tissue for the purpose of DNA testing.⁵⁵

46. In order to determine what “legal powers of compulsion” means, it is necessary to turn to the jurisprudence of the ECtHR. In *Jalloh v Germany*, the Grand Chamber established that in order to determine whether the applicant’s right not to incriminate himself has been violated, the ECtHR will have regard, in turn, to the following factors:⁵⁶

- a) the nature and degree of compulsion used to obtain the evidence;
- b) the weight of the public interest in the investigation and punishment of the offence in issue;
- c) the existence of any relevant safeguards in the procedure; and
- d) the use to which any material so obtained is put.

J.B. v Switzerland, no. 31827/96, ECHR 2001-III

The applicant had been charged with an offence of tax evasion. On a number of occasions, he was asked to submit all the documents concerning the companies in which he had invested money. He failed to do so on each occasion and was fined four times. He alleged that the criminal proceedings against him were unfair and contrary to Article 6(1) ECHR in that he was obliged to submit documents which could have incriminated him.

The ECtHR held that the authorities had attempted to compel the applicant to submit documents which would have provided information as to his income in view of the assessment of his taxes. The applicant could not prove that any additional income which transpired from these documents from untaxed sources did not constitute the offence of tax evasion. Therefore the ECtHR found that the

⁵⁵ Recital 29, Directive.

⁵⁶ *Jalloh v Germany* [GC], no 54810/00, para 117, ECHR 2006-IX.

authorities were in breach of the right not to self-incriminate, and therefore, there had been a violation of Article 6(1) ECHR.

47. As regards the nature and degree of compulsion, the ECtHR has established that the use of compulsory powers in obtaining evidence is justified by the public interest in prosecuting crime, as long as it does not violate other rights such as the prohibition of inhuman and degrading treatment and torture under Article 3 of the ECHR.⁵⁷ This is also particularly relevant with regards to “the use to which the material so obtained is put”. The ECtHR has confirmed that the use of any evidence obtained in breach of Article 3 of the ECHR will render the proceedings unfair.

***Jalloh v Germany* [GC], no. 54810/00, ECHR 2006-IX.**

Upon his arrest on suspicion of involvement in a drug dealing offence, Mr Jalloh was seen swallowing a small plastic bag, which was believed to contain drugs. On authorisation of the public prosecutor, an emetic was forcibly administered in order to provoke the regurgitation of the bag. In the hospital, he was held down and immobilised by four police officers. By force, the doctor injected him with apomorphine and administered the emetic through a tube introduced into his stomach through the nose which resulted in Mr Jalloh regurgitating one bag containing cocaine.

The Grand Chamber stated that “in order to determine whether the applicant’s right not to incriminate himself has been violated, the ECtHR will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.” It then noted that although it was possible to consider that the bag of cocaine was evidence which existed with independence of the will of the accused, the use of which is generally not prohibited in criminal proceedings, the way in which that evidence was retrieved required a considerable degree of force which entailed a significant interference with his physical and mental integrity in a way that violated Article 3 ECHR. Therefore, given that the bag of cocaine was the decisive evidence for his conviction, there had been a violation of Article 6(1) ECHR.

48. With regards to the “weight of the public interest in the investigation and punishment of the offence in issue”, the ECtHR takes a case-by-case approach in order to determine whether States have struck a proper balance between the rights of the suspects and the need to preserve the safety of the public and the general interest in punishing the offender. Thus, in *Jalloh*, the ECtHR held that the decision to administer emetics by force was disproportionate and could not be justified when considering that it “targeted a street dealer who was offering drugs for sale on a comparatively small scale and who was eventually given a six-month suspended prison sentence and probation.”⁵⁸ According to the judgment in *Saunders*, “the public interest cannot be invoked

⁵⁷ Ibid, para 117.

⁵⁸ Ibid, para 119.

to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.”⁵⁹ Equally according to the ECtHR’s approach in and *Heaney and McGuinness*, “the security and public order concerns cannot justify a provision which extinguishes the very essence of the applicants’ rights to silence and against self-incrimination.”⁶⁰

49. On the existence of relevant safeguards in the procedure, in *Jalloh*, the ECtHR noted that the applicant had chosen to remain silent and refused to submit to a prior medical examination. He could only communicate in broken English, which meant that he was subjected to the procedure without a full examination of his physical aptitude to withstand it.⁶¹ Additionally, in *Salduz*, the ECtHR found that “early access to a lawyer is part of the procedural safeguards to which the ECtHR will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination.”⁶²
50. Article 7(4) of the Directive establishes that Member States may allow their judicial authorities to take into account cooperative behaviour of suspects and accused persons when sentencing. This provision raises concerns inasmuch as it could be used to incite suspects and accused persons to waive their right to silence and not to incriminate themselves in exchange for a shorter sentence. This has been a matter of concern for Fair Trials for some time given that it is possible that this provision could be used to justify lengthier sentences where someone has simply exercised their right to silence. Therefore, this is perhaps an area where judgments of the ECtHR or clarification from the CJEU might shed some clarity.
51. Article 7(5) of the Directive prohibits the drawing of negative inferences from the exercise of the right to remain silent and not to incriminate oneself by suspects or accused persons. Therefore the fact that a suspect or accused person has asserted his right to remain silent or the right not to incriminate oneself should not be used against him and should not, in itself, be considered to be evidence that the person concerned has committed the criminal offence concerned.⁶³ Notwithstanding, Recital 28 of the Directive states that “[t]his should be without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected.”⁶⁴ This means that the prohibition established in Article 7(5) of the Directive does not preclude the possibility of judges taking into account the silence of the accused to evaluate other evidence or for the purpose of sentencing, provided that, in doing so, the proceedings remain fair for the defendant.
52. According to the case-law of the ECtHR, the drawing of negative inferences from the accused’s silence is not incompatible with Article 6 ECHR, as long as judicial safeguards operate to ensure fairness. In the view of the ECtHR, the immunities afforded under the right to remain silent and

⁵⁹ *Sounders*, para 74.

⁶⁰ *Heaney and McGuinness*, para 58.

⁶¹ *Jalloh*, para 120.

⁶² *Salduz*, supra n 29, para 54, ECHR 2008.

⁶³ Recital 28.

⁶⁴ *Ibid.*

not to incriminate oneself cannot and should not prevent the accused's silence, in situations which clearly call for an explanation from him/her, from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution. The ECtHR's case law has confirmed that where evidence presented by the prosecution establishes *prima facie* that the accused has committed an offence, it is then permissible for a court to draw an inference of guilt from the accused's failure to provide an explanation exclusively where this is the only common-sense assumption to be made. For example in *John Murray v the United Kingdom*, the ECtHR found that it was compatible with Article 6(1) ECHR for the trial judge to draw an inference of guilt from the fact that the applicant had remained silent under police questioning and at trial.⁶⁵ In this case, the evidence against the applicant was very strong.

***John Murray v the United Kingdom*, 8 February 1996, Reports of Judgments and Decisions 1996-I**

The applicant had been arrested on suspicion of offences relating to terrorism. He chose to remain silent during the questioning despite being cautioned that if he did so, under a national law, a court, judge or jury may draw negative inferences. Subsequently, in concluding that the applicant was guilty, the trial judge drew adverse inferences against the applicant from the fact that he chose to stay silent.

The ECtHR held that its role was to assess whether the exercise by an accused of the right to silence cannot under any circumstances be used against him at trial or, alternatively, whether informing him in advance that, under certain conditions, his silence may be so used, is always to be regarded as "improper compulsion". The ECtHR found that on the one hand, it is incompatible with Article 6 ECHR to base a conviction solely on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the ECtHR also held that these immunities cannot and should not prevent the accused's silence from being taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.⁶⁶

The ECtHR noted that the drawing of inferences under the national law had been subject to an important series of safeguards designed to respect the rights of the defence and to limit the extent to which reliance can be placed on inferences.

Then the ECtHR noted that the national case law confirmed that the prosecutor must first establish a prima facie case against the accused. In this case, the ECtHR found that the evidence presented against the applicant by the prosecution was considered by the Court of Appeal to constitute a "formidable" case against him. In the ECtHR's view, having regard to the weight of the evidence against the applicant, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances. Therefore, the ECtHR found no violation of Article 6(2) ECHR.

⁶⁵ [John Murray v the United Kingdom](#), 8 February 1996, Reports of Judgments and Decisions 1996-I.

⁶⁶ *Ibid*, para 47.

iii. Remedies

53. Article 10 (2) of the Directive requires Member States to “ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.” Similarly to each of the previous Roadmap Directives, the Directive fails to explain how Member States should ensure that the rights of the defence and fairness of the proceedings are to be protected via an adequate remedy, leaving it to the discretion of the Member States to decide what the appropriate remedy should be.

Pre-transposition Questions

Are the rights to silence and the right not to self-incriminate protected in law in your jurisdiction? What remedies, if any, exist in law for violations of the right to silence and/or the right not to self-incriminate?

Do you consider there to be particular problems relating to the protection of the right to silence and/or the right not to self-incriminate in your jurisdiction? What are the key drivers of those problems?

Is legislative reform required in your jurisdiction in order to ensure that the Directive is adequately transposed in relation to the rights to silence and not to self-incriminate? Are there any other non-legislative solutions to the problems which you see in practice relating to those rights?

Are there any questions relating to the right to silence and/or the right not to self-incriminate on which you think the CJEU could usefully be asked to provide clarity?

VI. USING A DIRECTIVE BEFORE ITS TRANSPOSITION DEADLINE

54. The Directive entered into force on 29 March 2016 (twenty days after the date of its publication in the Official Journal of the EU). However, at the time of publication of this Toolkit, the deadline for transposition into national law (1 April 2018) is still distant. As such, the Directive is not yet binding on Member States and enforceable through the EU law principle of direct effect in national courts.

55. However, in this section we explain how the Directive may still have legal effect in the national context during the pre-transposition period. We review below some relevant case-law before setting out examples from three Member States in which the Roadmap Directives have been used in litigation, as you may wish to do with the Directive.

A. CJEU Jurisprudence

56. The CJEU has confirmed that, while Directives do not have direct effect prior to the transposition deadline, they are not completely without effect before that time. In *Kolpinguis*,⁶⁷ the CJEU confirmed that the duty of conforming interpretation could commence following the adoption of a directive and was not necessarily contingent upon the transposition deadline having been reached. In *Wallonie*,⁶⁸ the CJEU was asked whether Member States were precluded from adopting measures contrary to a directive during the period prescribed for its transposition. The CJEU said:

- It is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.
- During that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

57. These same foundations were then applied in subsequent cases developing the *Wallonie* principle, including the case of *Adeneler*,⁶⁹ which raised the question of the role of courts in interpreting legislation prior to the implementation deadline. The CJEU said:

- Given that all the authorities of the Member States are subject to the obligation to ensure that provisions of Community law take full effect, the obligation to refrain from taking measures that could potentially compromise the objective of a directive applies also to national courts.
- From the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive”.

58. In *Mangold*,⁷⁰ the CJEU gave a ruling which is considered controversial. The CJEU found that where a directive provides a more detailed articulation of a principle which is already established in EU law (in the case of *Mangold*, this was the principle of non-discrimination on the ground of age), then that EU law principle must be upheld irrespective of whether the transposition deadline of the directive in question has passed. Given that the Directive provides detailed guidance for Member States on the implementation of a fundamental right already protected in Article 48 of the EU Charter of Fundamental Freedoms, then a similar approach might apply.

⁶⁷ Case 80/86 *Kolpinguis Nijmegen*, [ECLI:EU:C:1987:431](#).

⁶⁸ Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne* ([ECLI:EU:C:1997:216](#)).

⁶⁹ Case C-212/04 *Adeneler* [ECLI:EU:C:2006:443](#).

⁷⁰ Case C-144/04 *Werner Mangold v Rüdiger Helm* [ECLI:EU:C:2005:709](#).

B. Some pre-deadline ideas

59. We think it will, realistically, be challenging to obtain positive results on the basis of the Directive prior to its transposition deadline (the same goes for other directives which may in due course be adopted further to the Roadmap). We propose some arguments below, though we would say clearly that some of these are very far-reaching.

Arguments based on the Wallonie doctrine

- ➔ The national authorities, both the investigative ones and the courts, are bound by the obligation now articulated in Article 4(3) TEU to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties’, which includes the Directive. The obligations under Article 288 to achieve the objectives of that directive have already come into being by virtue of that measure entering into force.
- ➔ Arguably, relying on *Kolpinguis*, the duty of national courts to interpret national legislation in conformity with a directive arises prior to a directive’s transposition deadline, so if the national law can be interpreted and applied in line with the Directive, it should be.
- ➔ More clearly established is the obligation of the Member State to refrain from taking, prior to the transposition deadline of a directive, measures liable seriously to compromise the achievement of the latter’s objectives after that deadline (*Wallonie*). This includes the courts, which are bound to refrain from adopting interpretations of national law in this period which would mean the results would not be achieved following the transposition deadline.
- ➔ Whilst the *Wallonie* case-law plainly refers to legislative measures, arguably, measures of a more particular nature (such as investigative actions) should also be avoided in the period prior to the transposition deadline of the Directive if they are liable seriously to compromise the objectives of the latter. So, in particular, if a person is to be questioned, doing so in a manner contrary to the Directive (e.g. by using unlawful powers of compulsion to elicit confessions against the right to not to incriminate oneself) would be to take a positive action such as to compromise the fairness of the proceedings, contrary to the objective of the Presumption of Innocence Directive.

Arguments based on the Mangold doctrine

- ➔ The right to be presumed innocent until proven guilty is an aspect of the right to a fair trial commonly recognised by all the constitutions of the Member State, and may be considered a general principle of EU law. This is confirmed by the Charter, of which Articles 47 and 48 protect the right to a fair trial and defence rights. The fact that the Directive confers a specific set of rights for enforcing the latter does not detract from the existence of the norm of primary law itself.

- ➔ The Charter right / general principle are already within the scope of EU law by virtue of the Directive, and although specific measures have not been taken yet to implement the latter, the Charter / general principle can nevertheless be relied upon by the individual, and conflicting national legislation set aside (indeed, if it conflicts it will have to be changed in the implementation process anyway).

CJEU reference?

- ➔ Seek a reference to the CJEU asking about the effects of the *Wallonie* and *Mangold* case-law in the context of criminal cases, in particular as to the extent to which a 'result' contrary to the Directive should be understood as including a conviction and application of penalties based on actions incompatible with the Directive, even though these are taken on the basis of measures applicable prior to the adoption of legislation implementing the latter.

Arguments based on ECHR effects

- ➔ Depending on the status of the ECHR in your jurisdiction, you may wish to argue that national laws are inconsistent with the ECHR. The Directive simply clarifies, codifies, and makes subject to EU law enforcement mechanisms obligations which exist anyway in the ECHR, and those obligations can therefore be invoked as ECHR norms in the manner foreseen by the national constitutional arrangements. For instance, if the national law generally permits the application of irrebuttable presumptions of facts or law with regards to certain criminal offences, you can say that – as clarified by the Directive – the ECHR standards clearly establish that these presumptions must be rebuttable; they should be applied on a case-by-case basis; and authorities should always strike a balance between the importance of what is at stake and the rights of the defence, so the courts should attach consequences to the inconsistency with the ECHR in accordance with the applicable constitutional arrangements.

VII. CONCLUSION

60. This Toolkit has been envisioned as a guide for practitioners, civil society organisations and any other actors as they get involved and participate in the process of transposing the Directive via legislative reform and domestic litigation. It provides an overview of the relevant provisions of the Directive and an examination of the relevant case-law of the ECtHR that should be used to interpret the Directive during the pre-transposition phase. The purpose is to provide guidance on how the Directive can be used during the pre-transposition period. It encourages LEAP members and their networks to identify problems with national law and practice which the Directive can address, with a view to provide a framework for developing strategies to inform reform in law and practice in order to transpose and effectively implement the Directive
61. This Toolkit will be circulated to thousands of lawyers across Europe, all of whom are invited to:
 - [Contact us](#), let us know how you are getting on with the transposition of the Directive in their respective jurisdictions.

- Let us know if courts issue positive decisions in light of the Directive. These can be of use to people in other countries.
- If questions of interpretation arise, consider the CJEU route: see the Using EU law toolkit, our 2014 paper on strategic approaches to the CJEU⁷¹ and our online training video on the preliminary ruling procedure in criminal practice.⁷²
- Visit our website www.fairtrials.org regularly for updates on key developments relating to the Directives, and news about in-person trainings.
- Come to us if you don't get anywhere with the courts, because we can explore other options like taking complaints to the European Commission.
- Get involved with pushing the issues in the domestic context: see our paper Towards an EU Defence Rights Movement⁷³ for concrete ideas on articles, litigation, conferences etc.

LEAP
Fair Trials
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⁷¹ Fair Trials, *Strategic approaches to litigation before the CJEU on the Roadmap Directives and EAW*, 2014, available at <http://www.fairtrials.org/wp-content/uploads/140818-CJEU-meeting-report.pdf>.

⁷² Available at <http://www.fairtrials.org/fair-trials-defenders/legal-training/online-training/>.

⁷³ Towards an EU Defence Rights Movement, supra n 10.