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GREEN PAPER

The Presumption of Innocence

(presented by the Commission)

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The presumption of innocence is a fundamental right, laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union (CFREU). Article 6 of the Treaty on European Union (TEU) provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States.

The Commission is interested in whether the presumption of innocence is understood in the same way throughout the EU. The Green Paper will examine what is meant by the presumption of innocence and what rights stem from it. If consultation suggests that there is a need, we will consider including them in a proposal for a Framework Decision on evidence-based safeguards.

The Green Paper lists a number of questions (in boxes). Responses should be sent, preferably by 9 June 2006, to:

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1. WHY IS THE EU EXAMINING THE PRESUMPTION OF INNOCENCE?

1.1. Background

One of the EU's objectives is the creation of an "area of freedom, security and justice" (TEU, Article 2). In Tampere, in 1999, the EU's justice priorities were decided for the next five years¹. Of vital importance was that mutual recognition would be "the cornerstone" of that area and the main form of judicial cooperation. Mutual recognition of judicial decisions involves criminal justice systems at all levels. It only operates effectively if there is trust in other justice systems, if each person coming into contact with a foreign judicial decision is confident that it has been taken fairly. Tampere Conclusion 33 stated that "enhanced mutual recognition of judicial decisions [...] would *facilitate cooperation [...] and the judicial protection of individual rights*". An area of freedom, security and justice means that European citizens should be able to expect safeguards of an equivalent standard² throughout the EU. More effective prosecution achieved by mutual recognition must be reconciled with respect for rights.

The Programme of Measures to Implement the Principle of Mutual Recognition³ indicated areas in which European legislation to implement mutual recognition was desirable. It was "designed to strengthen cooperation between Member States but also to enhance the protection of individual rights". Mutual recognition depends on mutual trust. Through consultation, the Commission identified rights in respect of which increased visibility would enhance that trust. In 2003, a Green Paper on procedural safeguards was adopted⁴, followed in 2004 by a proposal for a Framework Decision⁵. Evidence-based safeguards, a subject not covered in those texts, were to be examined in a second consultation phase. This Green Paper on the presumption of innocence is part of that consultation on evidence. How the presumption of innocence is classified depends on the legal system. The Commission has included it under evidence-based safeguards. This is because some rights associated with the presumption of innocence are, in many legal systems, linked to evidence (such as oral testimony and documentary evidence).

The Commission's interest is two-fold, to assess whether cross-border cases present a particular problem in this area and also whether EU legislation would enhance mutual trust. The Commission plans a further Green Paper later this year more specifically focused on gathering/ handling evidence and criteria for admissibility. An experts' meeting will be convened in 2006 to discuss both Green Papers.

¹ Tampere European Council Presidency Conclusions, 15/16 October 1999

² Commission Communication, Towards an Area of Freedom, Security and Justice: "procedural rules should respond to broadly the same guarantees, ensuring that people will not be treated unevenly according to the jurisdiction dealing with their case" and "the rules may be different provided that they are equivalent". COM(1998)459, 14 July 1998

³ Council and Commission's Programme of Measures - OJ. C 12, 15.1.01

⁴ COM (2003) 75 of 19.02.03

⁵ COM (2004) 328 F of 28.04.04

In 2004, the Commission arranged for a study of the Member States' laws on evidence in criminal proceedings ("the Evidence Study")⁶. Where national legislation is referred to here, the information is from that study.

1.2. Legal Basis

The EU's criminal justice powers are conferred by Articles 29⁷ and 31 of the TEU.

Art. 31:

"Common action on judicial cooperation in criminal matters shall include:

[...];

- c) *ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation; [...];"*

Since judicial cooperation increasingly means mutual recognition, it is necessary to explore whether having common evidence-based safeguards would help to ensure compatibility in rules, increase trust and thus improve cooperation.

1.3. The Hague Programme

In 2004, the European Council adopted the Hague Programme, devoted to strengthening freedom, security and justice in the EU. One of its objectives is "to improve the common capability of the Union [...] to guarantee fundamental rights, minimum procedural safeguards and access to justice [...]"⁸. It concludes that "the further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings". This Green Paper is listed in the Action Plan to implement the Hague Programme⁹ under plans to strengthen justice.

In 2005, the Commission adopted a Communication on mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between Member States¹⁰ whereby it concluded that reinforcing mutual trust was the key to the smooth operation of

⁶ The study, "The Laws of Evidence in Criminal Proceedings throughout the European Union", is available from the European Commission, DG JLS/D3, Criminal Justice Unit, B-1049 Brussels, ref CMO.

⁷ Art 29 TEU: "[...] the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters [...]. That objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through:

- [...];
- closer cooperation between judicial and other competent authorities of the Member States [...] in accordance with the provisions of Articles 31 and 32;
- [...]."

⁸ Hague Programme, European Council Conclusions, 4/5 November 2004.

⁹ Action Plan Implementing the Hague Programme on strengthening freedom, security and justice in the European Union, (OJ C 198, 12.8.2005, p.1), point 4.2.

¹⁰ COM (2005) 195 f of 19.05.2005

mutual recognition. Proper protection of individual rights is a Commission priority and should give legal practitioners a stronger sense of belonging to a common judicial culture.

1.4. European Evidence Warrant

A draft Framework Decision on the European Evidence Warrant is under negotiation. Point (o) of The Hague Programme Action Plan, under “Pursuing implementation of the principle of mutual recognition” (Judicial Cooperation in Criminal Matters), timetables a second proposal “completing” the European Evidence Warrant in 2007. Once these proposals are adopted, evidence will cross borders using simplified request procedures. Should certain common minimum safeguards be in place to guarantee the rights of individuals, especially those involved in cross border criminal proceedings?

A proposal on evidence-based safeguards is planned for 2007 in the Hague Programme Action Plan¹¹. The Commission wants to know whether evidence-based safeguards are essential for mutual trust where exchange of evidence across borders is concerned.

2. WHAT IS THE PRESUMPTION OF INNOCENCE?

The “presumption of innocence” is mentioned in Art. 6(2) ECHR (The right to a fair trial): *“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”* and Art. 48 CFREU (Presumption of innocence and right of defence): *“1. Everyone who has been charged shall be presumed innocent until proved guilty according to law. 2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.”*

Guidance is found in the case-law of the European Court of Human Rights (ECtHR) as to what constitutes the presumption of innocence. It can only benefit a person who is “subject to a criminal charge¹²”. The accused must be treated as not having committed any offence until the State, through the prosecuting authorities, adduces sufficient evidence to satisfy an independent and impartial tribunal that he is guilty. The presumption of innocence “requires [...], that members of a court should not start with the preconceived idea that the accused has committed the offence charged”¹³. There should be no judicial pronouncement of his guilt prior to a finding of guilt by a court. He should not be detained in pre-trial custody unless there are overriding reasons. If he is detained in pre-trial custody, he should benefit from detention conditions consistent with his presumed innocence. The burden of proving his guilt is on the State and any doubt should benefit the accused. He should be able to refuse to answer questions. He should generally not be expected to provide self-incriminating evidence. He should not have his property confiscated without due process.

1. Do you agree with the list of what constitutes the presumption of innocence given here? Are there any other aspects not covered?

¹¹ Point (h) under "Approximation", Proposal on minimum standards relating to the taking of evidence with a view to mutual admissibility (2007).

¹² *X v. FRG* N° 4483/70 – application held inadmissible.

¹³ *Barberà, Messegué and Jabardo v. Spain*, A146 (1989) para 77.

2.1. Pre-trial pronouncement of guilt

A court or public official may not state that the accused is guilty of an offence if he has not been tried and convicted of it. “The presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law and [...] without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty”¹⁴. However, the authorities may inform the public of investigations and voice a suspicion of guilt¹⁵, as long as the suspicion is not a declaration of the accused’s guilt¹⁶ and they show discretion and circumspection.

2.2. Pre-trial detention

This is covered in the Green Paper on mutual recognition of non-custodial pre-trial supervision measures¹⁷ and will not be dealt with here. Detaining a suspect does not violate the presumption of innocence. Articles 5(1)(c) and 5(3) ECHR lay down exceptions to the right to liberty where this is for the purposes of bringing a detained person to court “on reasonable suspicion of having committed an offence” if the detention is for a reasonable period only. The ECtHR held that there is no automatic right to detention conditions different from those under which convicted persons are held¹⁸, as long as the conditions are reasonable¹⁹.

2. Are there special measures in your Member State during the pre-trial stage in order to safeguard the presumption of innocence?

2.3. The burden of proof

Generally, the prosecution must prove the accused’s guilt beyond reasonable doubt. The ECtHR held that “the burden of proof is on the prosecution and any doubt should benefit the accused. It also follows that it is for the prosecution [...] to adduce sufficient evidence to convict him”²⁰.

From the ECtHR case-law, the Commission has identified 3 situations where the burden of proof does not rest wholly on the prosecution: (a) strict liability offences, (b) offences where the burden of proof is reversed and (c) when a confiscation order is made.

(a) Here, the prosecution must adduce evidence to prove that the accused committed the physical act (*actus reus*) of the offence but does not have to show that he intended to act in that way or to produce that result. Such offences comply with the ECHR even though the State is exempt from proving that the accused had “a guilty intention” (*mens rea*). The ECtHR recognised that States have offences of strict liability in their criminal law²¹. For these offences, only the fact that the accused committed the act has to be proved, and if that is proved, there is a presumption which may operate against the accused person. It noted that

¹⁴ *Minelli v. Switzerland* A62 (1983) para 38.

¹⁵ *Krause v. Switzerland* N° 7986/77, 13DR 73 (1978)

¹⁶ *Allenet de Ribemont v. France* A 308 (1995) paras. 37, 41.

¹⁷ COM(2004)562, 17.8.2004

¹⁸ *Skoogström v. Sweden* N° 8582/72 (1982)

¹⁹ *Peers v. Greece* N° 28524/95

²⁰ *Barberà, Messegué and Jabardo v. Spain*, A146 para 77 (1989).

²¹ *Salabiaku v. France* A 141-A para 28 (1988).

such presumptions should be “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”.

(b) Here, the prosecution must prove that the accused acted in a certain way and the accused must show that there is an innocent explanation for his actions. This is a heavier burden for the accused than (a) above. The ECtHR has said that this is acceptable for “less serious” offences²².

The Evidence Study showed that whilst the prevailing position in the EU was that the onus of proving an accused’s guilt rests on the prosecution, sometimes, in exceptional cases, such as document or regulatory offences, once the prosecution had proved the existence of a duty, the accused had a reverse burden to prove that he had complied with it. There were also occasions where the accused had to raise a defence (such as self defence, insanity or alibi) before the prosecution was required to disprove it.

(c) In the recovery of assets from an accused or third party, there may be a reversal of the burden of proof in the assumption that the assets are the proceeds of crime, which the owner of the assets must rebut, or there is a reduction in the standard of proof to the balance of probabilities, rather than the usual test of proof beyond reasonable doubt. Any recovery of assets must be open to challenge in court, reasonable and proportionate²³. Clearly, this applies also to cross border recovery of assets. Claims of *bona fide* third parties must be taken seriously where their right to property is jeopardised and States must ensure that there are mechanisms to protect them.

3. (a) In what circumstances is it acceptable for the burden of proof to be reversed or altered in some way?

(b) Have you experienced cross border cooperation situations in which the burden of proof created a problem?

2.4. Privilege against self-incrimination

The presumption of innocence includes the privilege against self-incrimination which is made up of the right of silence and not to be compelled to produce inculpatory evidence. The maxim *nemo tenetur prodere seipsum*, (“no person is to be compelled to accuse himself”) applies. The accused may refuse to answer questions and to produce evidence. The ECtHR²⁴ held that, although not specifically mentioned in the ECHR, the privilege against self-incrimination is a generally recognised international standard which lies “at the heart of the notion of a fair procedure”. It protects the accused against improper compulsion by the authorities, thus reducing the risk of miscarriages of justice and embodying the equality of arms principle. The prosecution must prove its case without resort to evidence obtained through coercion or oppression. Security and public order cannot justify the suppression of these rights²⁵. They are linked rights, any compulsion to produce incriminating evidence being an infringement of the right of silence. The State infringed an accused’s right of silence when it sought to compel him to produce bank statements to customs investigators²⁶. Coercion to co-operate with the

²² Ibid.

²³ *Welch v. UK* N° 17440/90 (9 February 1995), *Philips v. UK* N° 41087/98, (5 July 2001).

²⁴ *Heaney and McGuinness v. Ireland* N°. 34720/97 (21 December 2000)

²⁵ *ibid.*

²⁶ *Funke v France* A 256-A (25 February 1993).

authorities in the pre-trial process may infringe the privilege against self-incrimination and jeopardise the fairness of any subsequent hearing.

2.5. Right of silence

The right of silence applies to police questioning and in court. The accused should have the right not to testify and, arguably, the right not to disclose the nature of his defence before trial.

The laws of Member States recognise the right to remain silent during the investigative phase when being interviewed by police or an investigating judge. However, the way in which the accused is made aware of the right differs and an important aspect of protecting the right is that he should be *aware* of it. According to the Evidence Study, in most Member States, there is an obligation to advise him of his right to remain silent. That obligation is enshrined in legislation, case-law and constitutional provisions. A few Member States indicated that evidence obtained where the obligation had not been met might be regarded as inadmissible. Others stated that failure to advise an accused of his rights might constitute an offence or a ground of appeal against conviction.

However, the right is not absolute. There are factors determining whether fair trial rights are infringed if a court draws adverse inferences from an accused's silence. Inferences should only be drawn after the prosecution has made out a *prima facie* case. The judge then has a discretion to draw inferences. Only 'common sense' inferences are permissible. The reasons for drawing them must be explained in the judgment. The evidence against the accused must be overwhelming; in that case, evidence obtained using indirect pressure may be used. The leading case on the subject is *Murray v UK*²⁷. The ECtHR concluded that, if there was a *prima facie* case and the burden of proof remained on the prosecution, adverse inferences could be drawn from a failure to testify. Requiring the accused to testify was not incompatible with the ECHR, although it would be if any conviction were based solely or mainly on a refusal to testify. Whether the drawing of adverse inferences from an accused's silence infringes the right to be presumed innocent is determined having regard to the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion involved. The prosecution evidence must be sufficiently strong to require an answer. The national court cannot conclude that the accused is guilty merely because he chooses to remain silent. Only if the evidence against him "calls" for an explanation which he ought to be in a position to give, then a failure to do so "may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty". Conversely, if the prosecution case has so little evidential value that it calls for no answer, a failure to provide one could not justify an inference of guilt. The ECtHR points out that the drawing of reasonable inferences from the accused's behaviour does not have the effect of shifting the burden of proof to the defence so as to infringe that aspect of the principle of the presumption of innocence.

The ECtHR has not ruled on whether the right applies to legal persons. The European Court of Justice (ECJ) has held that a legal person has no absolute right to remain silent. Legal persons must answer factual questions, but may not be compelled to admit to an infringement²⁸

4. (a) How is the right of silence protected in your Member State?

²⁷ *Murray v. UK*, N° 18731/91 (8 February 1996).

²⁸ *Orkem v. Commission*, Case 374/87, ECR 3283, paras 34-35

(b) Is there any difference in cross border situations?

(c) To what extent are legal persons protected by the right?

2.6. Right not to produce evidence

The principle that a tribunal should have access to all the evidence is overridden by the need for fairness and to minimise the risk that the accused will be convicted on his testimony²⁹. In defining the scope of the right, the ECtHR distinguished between material compulsorily acquired and that which exists independently of the suspect's will: "the right not to incriminate oneself is primarily concerned...with respecting the will of an accused person to remain silent. As commonly understood...it does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, acquired pursuant to warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing."³⁰

Where an order has been issued to produce a document or authorising a search and/or seizure of items, the order should specify the subject matter of the item in order to avoid general requests being used to justify "fishing expeditions" where a vague suspicion only exists.

The question arises whether the right not to produce evidence applies to legal persons. The Community Courts (ECJ and Court of First Instance) have held that it does not. The production of documents may be requested³¹.

5. (a) How is the right against self-incrimination protected in your Member State?

(b) Is there any difference in cross border situations?

(c) To what extent are legal persons protected by the right?

2.7. In absentia proceedings

Art. 6 ECHR confers the right on the accused "to defend himself in person". Definitions of *in absentia* vary. Several Member States have legislation allowing trials to take place in the absence of the accused, others make it mandatory for the accused to attend the trial and breaches of this obligation may be punished. The Commission will devote a Green Paper to *in absentia* proceedings and in the meantime, wishes to establish the circumstances in which it is possible for such proceedings to comply with the presumption of innocence.

6. (a) Are in absentia proceedings possible in your jurisdiction?

(b) Do these proceedings raise specific problems with regard to the presumption of innocence, in particular in cross border situations?

²⁹ *Saunders v United Kingdom* (N° 19187/91).

³⁰ *Ibid.*

³¹ *Mannesmannröhren-Werke v. Commission*, Case T-112/98, ECR 729, para 65; Opinion of AG in Case C-301/04 P, *Commission v. SGL*

2.8. Terrorism

An increase in terrorism in the EU has led to new national legislation to combat it in several Member States. Such counter-terrorist legislation must comply with the ECHR. On July 2002, the Committee of Ministers of the Council of Europe adopted Guidelines on Human Rights and the Fight against Terrorism³² and invited States to ensure that they were “widely disseminated among all authorities responsible for the fight against terrorism”. Art. IX (2) provides “a person accused of terrorist activities benefits from the presumption of innocence”. The commentary points out that the presumption of innocence may be infringed not only by a judge but also by other public authorities³³. The Guidelines specify restrictions to the rights of defence that are compatible with the ECHR and consistent with the presumption of innocence. These are restrictions on access to and contacts with counsel, arrangements for access to the case-file and use of anonymous testimony. However, “such restrictions must be strictly proportionate to their purpose and compensatory measures to protect the interests of the accused must be taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance”.

7. Does legislation in your Member State lay down special rules for terrorist offences? If so, please describe the provisions inasmuch as they relate to the presumption of innocence. Does this regime apply to other offences?

2.9. Duration

The presumption of innocence generally ceases upon a court’s finding of guilt. The Commission is interested in when this point is reached in different Member States. This could be after a first instance trial or only when a final appeal has failed.

8. At what point does the presumption of innocence cease in your Member State?

General questions

9. (a) Are you aware of problems in a cross-border context linked to the presumption of innocence other than those referred to above?

(b) To what extent are these problems related to differences in approach in other jurisdictions?

(c) Could EU proposals add value in this area? If so, in what way?

³² Adopted by the Committee of Ministers on 11 July 2002.

³³ *Allenet de Ribemont v. France*, see footnote 16, para. 36