HOUSE OF COMMONS

President of the European Commission
European Commission
Rue de la Loi 200
1049 Brussels
Belgium

By email: SG-NATIONAL-PARLIAMENTS@ec.europa.eu

11 February 2014

Dear Mr President,

EUROPEAN UNION DOCUMENT NO. 17621/13 AND ADDENDA 1 TO 3, A DRAFT DIRECTIVE ON THE STRENGHTENING OF CERTAIN ASPECTS OF THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS.

On 10 February 2014, the House of Commons of the United Kingdom Parliament resolved as follows:

> That this House considers that the Draft Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (European Union Document No. 17621/13 and Addenda 1 to 3) does not comply with the principle of subsidiarity, for the reasons set out in the annex to Chapter One of the Thirty-second Report of the European Scrutiny Committee (HC 83-xxix); and, in accordance with Article 6 of Protocol (No. 2) annexed to the EU Treaties on the application of the principles of subsidiarity and proportionality, instructs the Clerk of the House to forward this reasoned opinion to the Presidents of the European Institutions.

I enclose the relevant extract of the report.

With best wishes,

David Natzler

David Natzler, Clerk Assistant
House of Commons, London, SW1A 0AA

Reasoned Opinion of the House of Commons

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

concerning

a Draft Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings[1]

Treaty framework for appraising compliance with subsidiarity

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

Proposed legislation

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

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

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

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

[1] COM (13) 821

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

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

Subsidiarity

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

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

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

i) Failure to comply with essential procedural requirements

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

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

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

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

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

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

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

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

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

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

[2]Article 5.

[3]See Article 5(3) TEU.

[4] Article 82(2) TFEU.

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

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

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

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

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

> "At its meeting on 21 January, the Justice Committee considered the Commission Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821).
>
> "The Committee noted the Commission's view that action at EU level is needed because there is a lack of mutual trust between judicial authorities of different member states and reluctance amongst these authorities to co-operate with each other. We also noted that the UK Government is not necessarily satisfied with the quality of evidence provided by the Commission to support its decision to act at EU-level and that it intends to seek further clarification during the negotiation process.
>
> "We further considered correspondence from the Scottish Government which also questions the limitations in evidence on which the Commission's conclusions are based and asserts that "the necessity for the EU to act to ensure EU judicial authorities

[5] P.18 of the impact assessment (ADD 1).

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

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

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

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

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

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

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

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

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[6] Page 16 of the explanatory memorandum.

1 The presumption of innocence and EU law

(35642) 17621/13 COM(13) 821 + ADDs 1–3	Draft Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings

Legal base	Article 82(2) TFEU; QMV; co-decision
Document originated	27 November 2013
Deposited in Parliament	11 December 2013
Department	Justice
Basis of consideration	EM of 9 January 2014 and Minister's letter of 20 January 2014
Previous Committee Report	None
Discussion in Council	February
Committee's assessment	Legally and politically important
Committee's decision	Not cleared; recommended for a debate on the floor of the House on the Reasoned Opinion before 12 February; recommended for a debate on the floor of the House on the opt-in before 13 February; further information requested

Commission explanatory memorandum

Background to the proposal

1.1 The Commission's explanatory memorandum states that "the purpose of the whole exercise of the Commission's agenda on procedural rights is to ensure the respect of the right to a fair trial in the European Union".[1] The principle of presumption of innocence, together with its related rights, contributes to ensuring the right to a fair trial. Various rights of suspects or accused persons in criminal proceedings established by EU Directives over the past few years, such as the right to interpretation and translation, the right to information and the right to access to a lawyer are not objectives themselves. They have a wider aim: they are tools to materialise the principle of the right to a fair trial. Presumption of innocence and its related rights contribute to this. Persistent breaches of the presumption of innocence in the Member States, the Commission states, will lead to the objectives of the procedural rights' agenda not being fully achieved.

1.2 The Commission says it has made a thorough examination of the issue in its impact assessment and concluded that a measure on certain aspects of presumption of innocence is needed to strengthen this fundamental right. Article 47 of the Charter stipulates the right to a fair trial. Article 48 guarantees the right to be presumed innocent and has the same meaning and scope as the right guaranteed by Article 6(2) of the ECHR. Article 6(2) of the

1 p.2, para 6.

ECHR stipulates that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The European Court of Human Rights (ECtHR) has clarified the scope of Article 6. The Court has repeatedly held that it applies to the pre-trial stage of criminal proceedings as well as the trial and that suspects or accused persons have the rights under Article 6 of the ECHR at the initial stages of police questioning. The Court has also ruled that these guarantees must apply to witnesses whenever they are, in effect, suspected of a criminal offence.

1.3 The principle of presumption of innocence has been developed over the years. The ECtHR has held that Article 6(2) of the ECHR encompasses three key requirements: the right not to be publicly presented as convicted by public authorities before the final judgment, the fact that the burden of proof is on prosecution and that any reasonable doubts on guilt should benefit the accused and the right of the accused to be informed of the accusation. The ECtHR also recognises the existence of a clear link between the presumption of innocence and other fair trial rights, in the sense that when such rights are breached, the presumption of innocence is inevitably also at stake: the right not to incriminate oneself, the right not to co-operate and the right to silence and the right to liberty (and not to be placed in pre-trial detention).

Compliance with subsidiarity

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

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

Compliance with proportionality

1.6 The Commission argues that the proposal complies with the proportionality principle in that it does not go beyond the minimum required in order to achieve the stated objective at European level and what is necessary for that purpose. The proposal only deals with certain aspects of the presumption of innocence, which are more directly linked to the functioning of mutual recognition instruments and to police and judicial cooperation in criminal matters. Furthermore, it is limited to individuals rather than corporate entities. This is in line with the "step-by-step" approach of EU intervention in the area of procedural rights in criminal matters and the need for proportionate action, the Commission concludes.

The draft Directive

Article 1 — Subject matter

1.7 The objective of the Directive is to lay down minimum rules concerning certain aspects of the right of suspects or accused persons to be presumed innocent until proved guilty by a final judgment. It covers the following rights:

i) the right not to be presented as guilty by public authorities before the final judgment;

ii) the requirement that the burden of proof rests on the prosecution and that any reasonable doubts about guilt should benefit the accused;

iii) the right not to incriminate one-self, the right not to cooperate and the right to remain silent; and

iv) the right to be present at one's trial is also addressed by this Directive.

Article 2 — Scope

1.8 The Directive applies to suspects or accused persons (not companies) in criminal proceedings from the very start of those proceedings, even before the suspects are made aware of the fact that they are suspected of having committed a criminal offence. It applies until the final judgement is delivered.

Article 3 — Presumption of innocence

1.9 This provision lays down the right to the presumption of innocence: Member States shall ensure that suspects or accused persons are presumed innocent until proven guilty according to law.

Article 4 — Public references to guilt before conviction

1.10 Article 4 provides that:

- Member States shall ensure that, before a final conviction, public statements and official decisions from public authorities do not refer to the suspects or accused persons as if they were convicted.
- Member States shall ensure that appropriate measures are taken in the event of a breach of that requirement.

Article 5 — Burden of proof and standard of proof required

1.11 Article 5 provides that:

- 1. Member States shall ensure that the burden of proof in establishing the guilt of suspects or accused persons is on the prosecution. This is without prejudice to any *ex officio* fact finding powers of the trial court.
- 2. Member States shall ensure that any presumption, which shifts the burden of proof to the suspects or accused persons, is of sufficient importance to justify overriding that principle and is rebuttable.
- 3. In order to rebut such a presumption it suffices that the defence adduces enough evidence as to raise a reasonable doubt regarding the suspect or accused person's guilt.
- 4. Member States shall ensure that where the trial court makes an assessment as to the guilt of a suspect or accused person and there is reasonable doubt as to the guilt of that person, the person concerned shall be acquitted.

Article 6 — Right not to incriminate oneself and not to cooperate

1.12 Article 6 provides that:

- 1. Member States shall ensure that suspects or accused persons have the right not to incriminate themselves and not to cooperate in any criminal proceeding.
- 2. The right referred to in paragraph 1 shall not extend to the use in criminal proceedings of material which may be obtained from the suspects or accused persons through the use of lawful compulsory powers but which has an existence independent of the will of the suspects or accused persons.
- 3. Exercise of the right not to incriminate oneself or of the right not to cooperate shall not be used against a suspect or accused person at a later stage of the proceedings and shall not be considered as a corroboration of facts.
- 4. Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.

Article 7 — Right to remain silent

1.13 Article 7 provides that:

- 1. Member States shall ensure that suspects or accused persons have the right to remain silent when questioned, by the police or other law enforcement or judicial authorities, in relation to the offence that they are suspected or accused of having committed.
- 2. Member States shall promptly inform the suspect or accused persons of their right to remain silent, and explain the content of this right and the consequences of renouncing or invoking it.
- 3. Exercise of the right to remain silent shall not be used against a suspect or accused person at a later stage in the proceedings and shall not be considered as a corroboration of facts.
- 4. Any evidence obtained in breach of this Article shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings.

Article 8 and Article 9 — Right to be present at one's trial

1.14 Article 8 stipulates the right established by the ECtHR of an accused to be present at the trial and also establishes limited exceptions to this right, in line with the Charter, the ECHR and EU law. Provided that the conditions laid down in Article 8 are respected, nothing prevents Member States making use of "simplified procedures" for the most common minor offences. Article 9 establishes that the remedy of a re-trial (as established by the ECtHR) is necessary in cases where the right to be present at trial has not been observed.

Article 10 — Remedies

1.15 Article 10 ensures 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.

Article 11 — Data collection

1.16 Article 11 requires Member States to send to the Commission data showing how the rights in this Directive have been implemented. The Commission explains that there is a need for collection of this data.

Article 12 — Non-regression clause

1.17 Article 12 provides that: [n]othing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter of Fundamental Rights of the European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.

1.18 The Commission explains that the purpose of this Article is to ensure that setting common minimum standards in accordance with this Directive does not have the effect of

lowering standards in certain Member States and that the standards set in the Charter and in the ECHR are maintained. Since the Directive provides for minimum rules, in line with Article 82 TFEU, Member States remain free to set standards higher than those agreed in this Directive.

The Government's view

1.19 The Secretary of State for Justice (Chris Grayling) sent an Explanatory Memorandum setting out the Government's views on the proposal on 9 January, over ten days after it was due to be deposited. Not only was the EM late: its contents fell well below the standards the Government has set itself for the drafting of EMs.

Fundamental rights analysis

1.20 The Minister says the draft Directive is designed to enhance the rights of suspects or accused persons in relation to the presumption of innocence and the right to be present at one's criminal trial. The main fundamental right engaged by these proposals is Article 6 ECHR (right to a fair trial). Article 6 ECHR provides that in the determination of any criminal charge, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. Article 6(2) specifically provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Articles 47 and 48 of the Charter of Fundamental Rights contain corresponding principles about the right to a fair trial, the presumption of innocence and right of defence. In the view of the Government, the substantive provisions of the draft Directive in chapter 2 (right to the presumption of innocence) and chapter 3 (right to be present at one's trial) would respect these rights.

Subsidiarity

1.21 The Minister's assessment of compliance with subsidiarity is as follows:

> "The Commission's assessment is that the proposal complies with the principle of subsidiarity as it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed and a consequent reluctance of EU judicial authorities to cooperate with each other. It says that the European Court of Human Rights (ECtHR) alone does not ensure full protection of the presumption of innocence. It suggests, therefore, that EU level action is necessary to address these variations and, by inference, only the EU can act. In that respect and insofar as that analysis is correct then the subsidiarity principle would be fulfilled.
>
> "The European Commission's Impact Assessment, which accompanies this proposal, also acknowledges, however, that there is limited statistical quantifiable evidence of insufficient mutual trust which may raise a question about the necessity of the proposal. The Government will consider this matter further and seek clarification of the Commission's justification during the forthcoming negotiations."

Policy implications

1.22 Article 2 is wider than the corresponding scope provisions for other measures arising out of the Roadmap for strengthening procedural rights. For example, Article 1(2) of the Directive on the right to interpretation and translation in criminal proceedings[2] provides that the right in that Directive applies "to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence". The Government will be considering the implications of this wider approach in the context of the specific rights conferred by this draft Directive.

1.23 Article 3 would appear to reflect the provision in Article 6(2) of the ECHR. The Government will be considering further whether this provision is designed to have an identical meaning to the meaning in Article 6(2).

1.24 The broad principle of Article 5 is reflected in UK laws though there are limited circumstances where the evidential burden is reversed (for example those set out in the Criminal Procedure (Scotland) Act 1995), and the impact of this provision on those exceptions will be considered further.

1.25 Article 6 would alter the position in English and Scottish law and changes to some laws may be required to reflect this provision, such as section 55(13A) of the Police and Criminal Evidence Act 1984 as it provides that in certain circumstances and with appropriate safeguards some inferences can be drawn from non-cooperation. For example, where consent to a search for drugs is refused without good cause, the court or jury in determining whether that person is guilty of an offence may draw such inferences from the refusal as appear proper. Laws of this nature are compliant with the ECHR and there is ECtHR case law to support this. The proposed rules around the admissibility of evidence in Article 6(4) may also suggest changes would be needed to UK laws.

1.26 Similarly, Article 7 would establish a right for the suspect or accused to remain silent throughout any criminal proceedings and the exercise of that right is not to be used against the suspect or accused person. It provides that any evidence obtained in breach of this provision would be inadmissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings. Again, English law provides that in certain circumstances and with appropriate safeguards inferences can be drawn from silence. These laws are compliant with ECHR: they have been tested and upheld in the ECtHR. The rules around the admissibility of evidence may also suggest changes were needed to UK laws.

1.27 The general principle in Article 8 that the accused should be present is already established in UK law. There are exceptions to this principle in England and Wales, but only where, in magistrates' courts, the accused has explicitly or impliedly waived the right to be present. In the Crown Court in England and Wales, the circumstances in which the trial will continue in the defendant's absence are comparatively rare. The Government will consider further whether Article 8 would require any additional safeguards to the safeguards which presently exist in UK law.

2 Directive 2010/64/EU.

1.28 The provision in Article 9 establishes that the suspect/accused would be given a new trial if they were absent from an earlier trial and the conditions that allow a judgment to be reached in their absence, as established under Article 8, are not met.

1.29 Article 10 establishes that effective remedies for any failure to observe the provisions of this proposal must be in place and in general the aim of those remedies would be to ensure that any such failure returned the suspect or accused person to the same position in which they would have found themselves had the breach not occurred. What precisely this means will need to be considered during the negotiations, the Minister says.

1.30 The final provisions concern the reporting of data on the implementation of the Directive and the transposition and implementation processes. The requirement to collect and submit data to the European Commission periodically may require a new data collection process, which may incur costs, and it is unclear to what purpose these data are sought, which the Government intends to clarify.

The opt-in decision

1.31 The Minister says that the Government will consider these matters and any further implications identified in reaching a decision on whether to opt into the proposal and approach that decision within the terms set out in the Coalition Agreement. That decision will be informed also by any views expressed by Parliament, and will also consider broader issues such as whether the proposal is necessary and proportionate and the implications of the consequent extension of the European Court's jurisdiction into this area.

Financial impact

1.32 The Directive, if adopted as currently drafted, could give rise to a number of financial implications. Mostly, though possibly not exclusively, any implications would fall on the public sector in particular, police and law enforcement authorities which would need to comply with specific obligations. The Government is examining the implications of these requirements further to determine how significant they would be in light of existing practices and UK law.

Timetable

1.33 The Minister expects negotiations of this proposal to begin early in 2014.

Our letter of 15 January 2014

1.34 We wrote to the Minister to express our concerns over both the delay in deposit and the very poor quality of the EMs for all three legislative components of the procedural rights package, which are reported in this week's Report.

Opt-in code of practice

1.35 It appeared to us that the Government had not had regard to its own opt-in code of practice when drafting the Ems. We wrote:

"In relation to paragraph 2 [of the code of practice]: the EMs were due to be deposited on 28 December but were deposited on 9 January. Such delay is unacceptable on any proposal, but particularly so for significant proposals such as these which are subject to the opt-in and Reasoned Opinion timetables. We are of course aware that the Christmas leave may cause slight slippage in the deposit of EMs, but we note that it was your Department that initially suggested a deposit date of 28 December. You may wish to be aware that we are still awaiting the deposit of the EM for the Communication 17645/13, which contains the Commission's overall policy on the procedural rights package. I ask you to provide a full explanation for these delays.

"In relation to paragraph 3: the EMs did not contain these dates nor were they subsequently provided; our officials had to chase them.

"In relation to paragraph 4: the EMs fall far short of providing a sufficient indication of the Government's views as to whether or not it would opt in and the factors likely to influence the Government's decision. For example, the EM on the draft Directive on legal aid does not even put the proposal in the context of the national proposals to reduce the legal aid budget. For example, in relation to the draft Directive on procedural safeguards for children, the EM merely refers back to the very general opt-in factors mentioned in the Coalition Agreement without concentrating on factors specific to the draft Directive. Although a good attempt is made to assess what changes to UK law may be required in order to implement the Directive in the event of participation, there is no overall analysis on the impact on the UK legal system (in other words, is UK law broadly compliant with the proposals or is the change envisaged substantial?) nor on how this factor might be weighted with respect to others. I ask that you provide this information required by this paragraph for all three proposals. The Committee would find it an unsatisfactory answer were you to say that what was provided in the EMs was the fullest extent of the information the Government could disclose.

"In relation to paragraph 5: there is no mention of offering a debate in Government time in the EM. I ask you to explain why this information is lacking, particularly in view of the Government's WMS on opt-in decisions of 5 September last year. And in relation to the WMS, I ask you to explain the grounds on which the draft Directive on the presumption of innocence was not included, and whether, on reflection, the Government is willing to offer an opt-in debate on this in Government time."

Subsidiarity

1.36 On the quality of the subsidiarity assessments we wrote as follows:

"You will be aware of the FCO Guidance on the Application of the Principle of Subsidiarity. I have copied this letter to the Minister for Europe, with whom the Committee has already had correspondence on the quality of subsidiarity assessment in EMs, and who has overall responsibility for ensuring Departments follow the FCO guidance. Paragraph 13 of the guidance exhorts Departments to ensure that Explanatory Memoranda "include a *robust* assessment of subsidiarity to assist Parliament in its exercise of its powers to deliver a reasoned opinion within the eight-

week window. This is particularly important where the Government has concerns about subsidiarity in relation to a proposal.

"This paragraph accurately reflects the difficulty which our Committee has in drafting a Reasoned Opinion within the eight weeks available to it. If, therefore, the Government has subsidiarity concerns, a thorough analysis of its reasoning, with reference to the Commission's explanatory memorandum and impact assessment, can be very helpful in enabling the Committee to make its own assessment in the short timeframe available.

"However:

- "in the EM on the draft Directive on legal aid you say that you agree that common defence rights can facilitate judicial cooperation, but conclude that 'the Government will consider this issue further and seek clarification of the Commission's justification during the forthcoming negotiations';
- "in the EM on the draft Directive on the presumption of innocence, you rehearse the Commission's justification, of which we are aware, and then say: 'In that respect, and in so far as the analysis is correct, then the subsidiarity principle would be fulfilled. The Government will consider this matter further and seek clarification of the Commission's justification during the forthcoming negotiations'; and
- "in the EM on the draft Directive on procedural safeguards you accept that common standards may be justified if Member States are not capable of providing for them, but then, as above, defer the Government's consideration of this.

"We realise that subsidiarity assessments evolve, but that does not exempt the Government from providing a thorough initial analysis in its EM, for the reasons set out in the FCO guidance. The three EMs make no attempt to analyse in any detail the Commission's explanatory memorandum or impact assessment for subsidiarity compliance. The Committee is also puzzled by the Government's 'cart before the horse' approach to the assessment, in which it concedes that EU-level action in the form of minimum standards rules seems to be justified, whilst deferring the assessment of whether any legislative action is necessary in the first place. I ask therefore that you provide further subsidiarity analyses for all three proposals by next Monday."

The Minister's letter of 20 January 2014

1.37 The Minister writes as follows:

"Let me start by apologising to the Committee for late submission and an explanation for this has been provided below. I also note your concern that the EMs were in content below the standards we would hope to meet in discharging our responsibilities for Parliamentary scrutiny. I hope that the information and the explanations I provide below goes some way towards providing the information you need.

"You asked for an explanation of the delay in providing these EMs. I understand that the combination of the complexity of the exercise, occasioned by the fact that the EMs covered a number of linked proposals, coupled with the need to consult other Departments and the Devolved Administrations, and the proximity of the Christmas holiday period, led to the delay.

"You asked about an Explanatory Memorandum on the Communication from the Commission which accompanied its individual proposals. Notwithstanding that this was essentially a covering note to the proposals themselves, one has now been prepared and is in the process of being deposited.

"You commented that the EMs provided did not include the relevant dates of publication and for Parliamentary scrutiny of the proposals. I can confirm that they are as follows. The proposals were published in English by the Commission on 11 December. I understand that the last language version of the proposals were published on 19 December, which means that the date by which the Committees should express their opinions on the Government's opt-in decision is 13 February. The deadline by which the UK must notify the Council if it has decided to opt in to the proposals is 19 March 2014, for all three proposed Directives.

"In your letter you queried why there was no mention of the proposal on presumption of innocence in the Government's Written Ministerial Statement of 5 September 2013. At that stage we did not know whether the proposal would be a legislative one to which the opt-in would apply, or whether any such proposal would be forthcoming from the Commission in 2013. I will write to you separately on this issue.

"You asked about the factors which will be considered when the Government considers whether or not to opt in to these proposals. The broad terms on which they will be considered are established within the Coalition agreement. The key criteria applicable to these proposals will be the potential impact on protecting civil liberties and the integrity of the criminal justice system. We will also be considering the implications of extending ECJ jurisdiction to these areas, the associated costs and the practical implications. All of these topics require financial and policy analysis which is currently under way.

"We will also look carefully at the evidence that measures of this kind are necessary and proportionate. In those respects, our initial thinking is as follows.

"On the proposal for a Directive on the Presumption of Innocence, the Commission contends that it has identified variations in the legislation amongst Member States which have led, it asserts, to ECHR rights not being fully observed, and a consequent reluctance among EU judicial authorities to co-operate with each other. It suggests, therefore, that EU level action is necessary to address these variations and implies that only the EU can act.

"However, as noted in the relevant EM, the Commission also observes in its Impact Assessment, which accompanies the proposal, that there is "limited statistical quantifiable evidence of insufficient mutual trust" which may raise a question about

the necessity for the proposal. We are not aware of any such evidence. All Member States are already party to the ECHR, which requires that those suspected of a criminal offence should be presumed innocent until proven guilty (Art 6(2)). By the Commission's own account, evidence of reluctance to co-operate, occasioned by differing views taken of the presumption of innocence, is difficult to come by. Accordingly, we will want to probe carefully the necessity for the European Union to act in order to ensure EU judicial authorities co-operate with each other.

"On the proposed Directive on legal aid, we are similarly not aware of any evidence to suggest that the right to legal aid enshrined in the ECHR is not being observed in any Member State. Accordingly, we will interrogate further during the forthcoming technical level negotiations whether there is a robust case for a minimum standards-based regime in this respect.

"On the proposed Directive on child defendants, the Commission asserts in its accompanying material that there is a need for EU-wide action to protect the rights of children involved in criminal proceedings. Whilst the protection of children is clearly a high priority for UK and other Member States, we are not aware of any evidence that current arrangements are an obstacle to mutual trust and recognition. The very detailed provisions of the proposal also raise questions about its proportionality. Again, we would plan to explore this further as negotiations progress.

"We will, naturally, update the Committee as our thinking develops.

"You have also asked, in particular, for an overall analysis of the impact on the UK legal system in addition to the detailed analysis (to be weighted against the other opt-in factors we have identified). Our initial view of the position is as follows:

- "In relation to the proposal for a Directive on the presumption of innocence, the Government considers that the proposal reflects principles which are already part of the law of the UK (the presumption of innocence, burden and standard of proof, rights to remain silent and against self-incrimination and restrictions on trials in absentia). However, there is detail set out concerning those principles which would require changes to UK law. Some of these changes are of significance. In particular, as the EM identifies, the UK law permits in some circumstances inferences to be drawn from non-cooperation with a criminal investigation.

- "On the proposed Directive on Child Defendants, whilst I consider that the UK has appropriate safeguards for child defendants and meets the general aims of the directive, the directive (as detailed in the EM) in part goes beyond the current law and practice. To that extent, clearly the proposal would involve a review of the Police and Criminal Evidence Act 1984 (PACE, in relation to England and Wales) and other legislative provisions and practice.

- "In relation to the proposal for a Directive on provisional legal aid, as set out in the EM, our decision as to opt-in will be guided by the factors set out above, with a particular focus in this context on the likely financial implications of doing so. Our initial analysis is that current UK practice already delivers the main provisions

required by the draft Directive. However, there are areas in which change would be required, with associated financial implications. Any additional financial burdens will need to be scrutinised closely in light of the Government's continuing efforts to bear down on the cost of legal aid.

"You asked about subsidiarity, and in particular asked me to expand on the analysis of this provided in the EMs. As your letter acknowledges, assessment of matters such as subsidiarity is an evolutionary process.

"The Government notes that the Commission's underlying motivation in bringing forward these proposals as part of the Roadmap on criminal procedural rights is that minimum standards throughout the EU are required in order to support mutual trust — particularly having in mind that courts extraditing suspects under the European Arrest Warrant will benefit from the assurance that the defendant will receive a fair trial anywhere in Europe. That aim, if we were to accept it, clearly cannot be achieved by Member States acting alone and must be done at EU level. To that extent they would comply with the principle of subsidiarity.

"As I hope I have made clear, that is not to say that the Government accepts that these measures are necessary or proportionate, but those considerations are distinct from the principle of subsidiarity."

Our analysis

1.38 It is difficult to overstate the significance of the Commission's proposal. It brings the law of the presumption of innocence, as laid down by the European Convention of Human Rights (ECHR) and in the constitutional or national laws of Member States, into the realm of EU law, which has supremacy over national law, for *all* criminal offences. In so doing it sets out certain rights which go further than the interpretation of similar rights in the ECHR by the European Court of Human Rights, and so creates separate standards of procedural safeguard under EU and ECHR law. A domestic consequence of this is that UK laws on drawing adverse inferences from a failure to cooperate or from maintaining the right to silence, which are compliant with the ECHR, would be in conflict with EU law, and so subject to Commission infringement proceedings and severe financial penalty if not amended.

1.39 For the EU to act in this field, it has to demonstrate that legislation is necessary to overcome obstacles "to facilitate mutual recognition"[3] of decisions in criminal matters. The Commission's impact assessment points to various failures on behalf of ten or so Member States to comply with ECHR standards on the presumption of innocence, but does not show through measurable evidence how these have caused an obstacle to cross-border cooperation on a sufficient scale to justify EU action. In the impact assessment the Commission relies primarily on anecdotal evidence from NGOs and defence lawyers, who are not placed to say how the failure to respect the presumption of innocence in a particular Member State is affecting mutual recognition across the EU. Indeed, it recognises that there is "limited statistical quantifiable evidence on insufficient mutual trust

3 Article 82(2) TFEU.

between the Member States".[4] Similarly, Annex VII of the impact assessment lists examples of cases which "can" hinder judicial cooperation, but not which have done so. For these reasons we do not think that EU action in this field is justified in accordance with Article 82(2) TFEU; nor that it has discharged the burden upon it in Article 5(3) TEU and Article 5 of Protocol No. 2 to demonstrate through "qualitative, and, wherever possible, quantitative indicators" that the proposal is necessary at an EU level.

Conclusion

1.40 **We repeat again our disappointment at the poor quality of the Government's EMs on the three proposals forming the Commission's procedural rights package, particularly in the light of the time taken to draft and deposit them. We note that the Minister fails to explain why the information contained in his letter was not contained in the EMs, despite the amount of consultation which appears to have taken place, and ask him to provide that explanation. We also ask him to confirm that future EMs which he or other Ministers in his Department sign contain the information which we listed in our letter of 15 January.**

1.41 **We note that the Minister has still failed to provide a sufficient subsidiarity assessment for any of the three proposals. On this proposal, we ask him to explain why he thinks that the lack of quantifiable evidence of necessity for action, to which his letter alludes, does not have a bearing on the proposal's compliance with subsidiarity.**

1.42 **In light of the subsidiarity concerns we set out above, we recommend the House adopts the draft Reasoned Opinion annexed to this chapter, after debate on the floor of the House, to be sent to the Presidents of the EU institutions by 12 February.**

1.43 **There will be considerable Parliamentary interest in this proposal. We therefore asked in our letter of 15 January that the Government offer an opt-in debate on this proposal on the floor of the House in Government time, and recommend as a conclusion to this Report that it does so. Not to do so would we think be in breach of the Minister for Europe's undertakings in the Written Ministerial Statement of 20 January 2011 (found at appendix C to the Government's code of practice on opt-ins): "in circumstances where there is particularly strong Parliamentary interest in the Government's decision on whether or not to opt in to such a measure, the Government expresses its willingness to set aside Government time for a debate in both Houses on the basis of a motion on the Government's recommended approach on the opt-in."**

1.44 **In the meantime the proposal remains under scrutiny.**

4 p.18 of the impact assessment (ADD 1).