

Strengthening aspects of the presumption of innocence and the right to be present at trial in criminal proceedings

Impact Assessment (SWD (2013) 478, SWD (2013) 479 (summary)) for a Commission Proposal for a Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings (COM (2013) 821).

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the above proposal which was transmitted in November 2013.

In the Council Resolution on a Roadmap for strengthening procedural rights, adopted in November 2009¹, the Commission was invited to submit proposals covering a number of specific measures. Three Directives have since been adopted covering the right to interpretation and translation, the right to information, and the right of access to a lawyer and the right to communicate. The proposed measures related to the strengthening of the presumption of innocence are part of a package which includes two other proposals, one on procedural safeguards for children suspected or accused in criminal proceedings and a second on the right to provisional legal aid.

The principle of the presumption of innocence is overarching, representing a fundamental principle of criminal law and a key element to fair trial. The European Court of Human Rights (ECtHR) has clearly set out the three key requirements of this principle: (i) public authorities, including judiciary authorities, must not presume that the accused has committed the offence he is charged with; (ii) the burden of proof is on the prosecution and any doubt must benefit the accused; and (iii) the prosecution must inform the suspect or the accused of the case against him. It is complementary to other procedural rights, such as the right not to incriminate one-self, the right not to co-operate, the right to silence and the right to be released pending trial. The right to information, and the right to be released pending trial are not covered in the IA, as initiatives to protect these rights have already been taken (IA, p. 8).

Article 82 of the TFEU states that the principle of mutual recognition of judgements and judicial decisions should be facilitated by means of minimum rules on procedural rights.

Identification of the issue at stake

The IA argues that there are two general problems that need to be addressed at EU level:

- there is insufficient protection of fundamental rights of suspected and accused persons as a result of inadequate protection of the principle of presumption of innocence, and
- insufficient mutual trust between Member States hampering the smooth functioning of mutual recognition of judgments and judicial decisions and judicial cooperation in criminal matters.

Concerning the first problem, the IA bases its argumentation on the number of cases at the European Court of Human Rights (ECtHR) where there has been a violation of presumption of innocence and points out that

¹ 2009/C295/01

'we are strongly convinced that this is only the "tip of the iceberg" and that violations of presumption of innocence by EU Member States are significantly higher' (IA, p. 14). Annex VI, on financial aspects, points out the difficulty in obtaining data on the extent of the problem. Unfortunately, the Commission does not provide any concrete/quantified data to back up the findings of 'ad hoc conversations with practitioners' which have indicated that for each of the issues, 'the number of breaches per case can be counted in thousands rather than hundreds' (IA, p. 71). The IA also describes the causes of the problem (mainly shortcomings in the national enforcement systems) and the reasons why these shortcomings cannot be compensated by the ECtHR mechanism.

The IA further explains that, since the focus of the European area of justice in criminal matters is both on mutual recognition instruments and on safeguarding procedural rights, and a right to a fair trial plays a vital role in building mutual trust across the EU, the lack of adequate protection of the presumption of innocence results in both insufficient trust and detriment to the mutual recognition of judicial decisions. However, this description is mainly made by way of examples (Annex VII). The Commission's IA Board pointed out that a clearer explanation of the extent to which other relevant legal instruments linked to this proposal may address this problem would have been useful, as well as a better differentiation between circumstances when problems derive from gaps in Member States' legal frameworks or from deficiencies in practical application.

The IA does contain a brief description of how the baseline scenario would evolve should no further action be taken. It argues that essential elements of the principle of presumption of innocence have not been dealt with by other measures and that the positive impact of such other measures would not be sufficient.

Objectives of the legislative proposal

The IA presents a hierarchy of objectives. The *general* objectives of the Commission proposal are to guarantee for EU citizens an effective high-level standard of protection of fundamental procedural rights in criminal procedure and to enhance mutual trust, thus facilitating mutual recognition of judgements and judicial decisions and improving judicial cooperation in the EU. These general objectives are linked with the problems identified and *operational* objectives derive from the specific problems presented in the IA.

Range of the options considered

The Commission examines the potential impact of a limited range of three options, including the option of retention of the status quo.

Option 1 – Status quo, no further action at EU level.

Option 2 Soft law (non-legislative action). This would include guidance and training in good practices.

Option 3 - Legislative measures. A directive would set minimum rules on the principle of presumption of innocence. The directive could either codify ECtHR principles and remedies to any breach of these principles (Option 3A), or impose higher standards of protection than those of the ECtHR *acquis* (Option 3B).

The Commission's preferred option is a combination of elements from options 2, 3A and 3B. It is logically explained and it shows very well how each of the four aspects of the presumption of innocence dealt with by this proposal is covered by certain policy options (IA, p. 46-49).

The options are presented in a balanced, neutral way. The Commission chooses to select elements of the options which could accomplish the objectives and seem to be proportional to them. Choosing the right option seems rather difficult because, as the IA points out well, the 28 Member States have very different judicial systems. Some Member States could even argue that for certain aspects of some of the proposed legislative measures (e.g. non-admissibility to the court of evidence obtained in breach of the right to remain

silent), 'internal consistency of their judicial systems could be at stake' (IA, p.42), an argument that is challenged by the Commission.

Scope of the Impact Assessment

Each policy option is evaluated based on several criteria: effectiveness in achieving the policy objective, social impact and fundamental rights, impact on the legal system of Member States and financial and economic impact. A table (IA, page 50) presents the costs of the preferred option for each Member State individually. Annex VI is dedicated to detailed calculations used to assess the financial costs of each policy option, but mentions that sometime 'only anecdotal evidence is available' (IA, p. 71). In addition, the fundamental rights of the victims of crime might perhaps have merited some consideration, particularly when presenting Option 3B.

Numerous assumptions are made throughout the IA, most of which are not explained at all. For example, concerning the burden of proof for the status quo, the reversal of the burden of proof in some Member States is assumed to lead to a reduction in the cost of prosecution which can be calculated as being equivalent to the cost of the introduction of Option 3B. In addition, three scenarios in which it is assumed that 1 in 10,000, 50,000 and 100,000 cases will lead to a retrial are used, but these figures are not properly explained and appear to be rather arbitrarily chosen. Furthermore, the figures representing the cost per case seem to be surprising in some cases: in the Czech Republic, for example, it seems to be much higher than the cost in France, which is assumed to be almost equal to the cost in Romania. (IA, p.81-82).

Subsidiarity / proportionality

There is a significant variation in the legislation of the Member States on the right to be presumed innocent and on all its aspects. The IA considers that the objective of this proposal to promote mutual trust cannot be sufficiently achieved by Member States, therefore action taken at EU level is necessary in order to establish consistent common mutual standards applicable throughout the EU.

The proposal is based on Art. 82(2) TFEU, which states that minimum rules concerning the rights of individuals in criminal procedure may be adopted by means of directives, to facilitate mutual recognition of judgements and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension.

The Charter of Fundamental Rights of the European Union contains the European general right to be presumed innocent. However, the Charter can only be invoked in an individual case when related to the application of EU law by a Member State. In addition, the ECtHR alone cannot provide appropriate protection. Furthermore, some aspects of the presumption of innocence have not been largely considered by the ECtHR and its redress procedure is not satisfactory as it intervenes only *ex post* after exhaustion of all internal remedies, and suffers from large backlog of cases.

The Commission states that its preferred option has been chosen in such a way as not to go beyond the minimum required in order to achieve the objective at EU level. Other measures considered, aimed at achieving the objectives, were discarded during the IA process for reasons of proportionality. The proposal deals only with certain aspects of the presumption of innocence and is limited to natural persons.

One Reasoned Opinion was submitted by the UK House of Commons.

Budgetary or public finance implications

The IA informs about the implications of every option for each of the Member States' public finances (Annex VI). The Explanatory Memorandum of the proposal indicates that there are no implications for the EU budget.

Quality of data, research and analysis

The IA lists the external studies, carried out from 2004 to 2013, on which it is based. It is also based on knowledge of the legal system of each Member State. It appears to be reasonable and to be based on sound analysis. The methodology used is explained, detailed data is presented for almost all Member States, but the assumptions made could have been more clearly presented. Specific data concerning the extent of the problem is scarce. Furthermore, the Commission recognises that 'there is limited statistical quantifiable evidence on insufficient mutual trust between the Member States' (IA, p. 18) and, somewhat surprisingly, that 'Member States currently do not collect data on the number of proceedings in which insufficient protection of presumption of innocence is complained about or has led to judicial decisions being appealed and upheld or reversed by a higher court'. It also states that 'the precise scope of the human rights problems concerning presumption of innocence is unknown' (IA, p. 27).

Stakeholder consultation

Stakeholders were consulted on several occasions. Some Member States replied to the consultation related to the Commission's Green Paper on the presumption of innocence. Apparently independent experts and practitioners took the opportunity to point out 'an erosion of the principle of the presumption of innocence and to underline, in particular as regards investigations against non-national or non-residents, that a principle of the "presumption of guilt" seems to be more and more tolerated in national systems' (IA, p. 10). The Commission was in contact with stakeholders and benefitted from consultations on other initiatives attached to the package. A meeting of the Expert Group on EU Criminal Policy took place in January 2013 and another one with Representatives of Ministers of Justice was held in February 2013. In addition, an on-line survey took place in the framework of the study carried out for the preparation of the IA and more than 100 responses were received, the findings of which are included in Annex III of the IA. Finally, numerous studies and publications related to the field were issued. The IA states that 'given these different consultations, a formal open public consultation did not take place' (IA, p. 11). It does not explicitly state which Member States are opposed to the proposed directive.

Monitoring and evaluation

The IA points out that this legislative instrument (Directive) 'ensures the effective transposition and implementation', if necessary with the help of the ECJ. As there is a lack of empirical reliable data, Member States should be encouraged to gather relevant data and indicators are presented. The Commission proposal provides for a reporting requirement for Member States but does not refer to any obligations for the Commission in this area, or to any suggestion of reports to be submitted to Parliament and Council

Commission Impact Assessment Board

The IA Board issued a negative opinion on a draft of the IA on 6 June 2013. A revised draft report was subsequently submitted on which the Board issued a positive opinion on 31 July 2013. It nevertheless still called for further improvements in a number of respects, notably with regard to the need for action in relation to mutual trust; further strengthening of the baseline scenario; a clearer explanation for the rationale for action concerning some aspects of the presumption of innocence principle; better assessing the effectiveness of the options by clearly presenting the differences they will make regarding mutual recognition; better explanation of the assumptions used. Concerning evaluation, changes were made to set out the main indicators on which success will be measured in line with the objectives.

Coherence between the Commission's legislative proposal and IA

The legislative proposal of the Commission seems to follow the recommendations expressed in the IA in that all the aspects covered by the preferred combination of options selected as a result of the impact assessment appear to be reflected in the legislative text.

Conclusions

The Impact Assessment provides a clear presentation of the reasons that action is deemed necessary, the options considered and the implications of the measures proposed. This initial appraisal nevertheless identifies a number of issues which might merit further attention. These include in particular the absence of data available concerning the extent of the problem being addressed, and the consequent reliance on anecdotal evidence. This raises questions, notably with regard to benchmarking. Although the Impact Assessment sets out potential indicators for monitoring the attainment of the policy objectives, the fact that the precise scope of the problem is unknown means that the extent to which the success of any new measure in the field can be measured with any accuracy must presumably also be limited. The proposed requirements for data collection and reporting by Member States, which was an area of weakness identified by the Impact Assessment itself with regard to the current situation, are therefore likely to be of particular importance.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) of the European Parliament, analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at: www.europarl.europa.eu/committees/en/studies.html

To contact the Ex-Ante Impact Assessment Unit, please e-mail: impa-secretariat@ep.europa.eu

ISBN 978-92-823-5405-6 | DOI 10.2861/5327 | CAT QA-04-14-155-EN-N



Manuscript completed in March 2014. Brussels © European Union, 2014.

The opinions expressed in this document are the sole responsibility of the author(s) and do not represent an official position of the European Parliament. Reproduction and translation of this document for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.