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THE RIGHT OF THE SUSPECT OR ACCUSED TO BE PRESENT AT THE JUDICIAL PROCEEDINGS CONDUCTED AGAINST THEM

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Abstract: *Among the procedural guarantees that fall under the right to a fair trial is the guarantee of the suspect's and accused's right to be present at their own trial. This right applies at all stages of criminal proceedings, from the moment a person is suspected or accused of committing a crime or an alleged crime, until the decision establishing that the respective person committed the crime in question becomes final. A recent ruling by the Court of Justice of the European Union (CJEU, July 4, 2024) highlights the need to understand the complex nature of the phrase 'to be present at one's own criminal trial,' considering the various ways in which a person can be deemed present during judicial proceedings. Therefore, an analysis regarding the manner of participation of the suspect or accused, whether through actual physical presence in the courtroom, representation, assistance by a lawyer, or presence via remote communication means, must be conducted and considered.*

Keywords: *fair trial; presence; judicial proceedings; accused; representation*

1. Preliminary Considerations

In 2016, the European Parliament, through Directive No. 343 of March 9th, concerning the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, introduced some clarifications regarding the presence of the suspect or accused in criminal proceedings, stipulating in Article 8 that Member States have the obligation to ensure that the right to be present at the trial is respected. A decision on the guilt or innocence of the suspect or accused may be taken in absentia, provided that either the suspect or accused was informed in time about the trial and the consequences of non-appearance, or the suspect or accused who was informed about the trial is represented by a mandated lawyer, who was appointed either by the suspect or accused, or by the state. Such a decision is enforceable against the suspect or accused.

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The same Directive recognizes the possibility for Member States to legislate for trials in absentia under the condition that the suspect or accused cannot be located, despite reasonable efforts to do so, and the judgment rendered is enforceable against that person. Under these circumstances, Member States shall ensure that, when the suspects or accused persons are informed of the judgment and, in particular, when they are apprehended, they are informed of the possibility of appealing the judgment and of the right to a retrial or other remedy.

Therefore, if the suspect or accused was not informed in time about the trial and the consequences of non-appearance or was not represented either by a lawyer appointed by them or by a court-appointed lawyer, even if they knew about the existence of a trial concerning them, they have the right to a retrial or other remedy that allows for a full review of the case, including the examination of new evidence, and which could lead to the annulment of the original judgment. In this regard, Member States shall ensure that the persons concerned, who are suspected and accused, have the right to be present, to participate effectively, in accordance with the procedures provided for by national law, and to exercise their right to defense.

It is noteworthy that the second situation where the absence of the suspect or accused can lead to an enforceable judgment against them is when a mandated lawyer, appointed either by the suspect or accused or by the state, has represented them in court. The question arises in this context whether we are talking about a new case of mandatory legal aid, considering that the European normative act does not specify, but it can be deduced from the provisions of Article 9 of the Directive that the initiation of a new criminal proceeding or an appeal can only take place under the conditions where, according to the second case, the suspect or accused, although aware of the existence of the trial, was nevertheless absent, and their absence was not supplemented by the presence of a defense counsel, regardless of how this representative became the party's representative (special mandate or ex officio appointment). For complete coverage against an accusation of violating the principle of equality of arms, we consider that the absence of the suspect or accused from the criminal trial, even in the event of apparent evasion or apparent lack of interest on their part in participating in the judicial proceedings, implies a state obligation to appoint a defense counsel ex officio in the absence of a chosen one.

2. The Interpretation of Article 8(1) of the Directive (EU) 2016/343

In recent judicial practice[1], the Court of Justice of the European Union has been called upon to rule on the interpretation of Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings, given

[1] JUDGMENT OF THE COURT (First Chamber) 4 July 2024, 'Preliminary Ruling - Judicial Cooperation in Criminal Matters - Directive (EU) 2016/343 - Right to be present at the trial - Possibility for an accused person to participate in the hearings of their trial by videoconference

certain doubts regarding its application in the context of a state of emergency or an extraordinary epidemic situation, as well as for a defined period following the end thereof[1], when public court hearings were held remotely, provided that the parties and participants in the proceedings participated directly and virtually. In the context mentioned, a defendant, located in a country other than the place where the criminal proceedings are taking place, requested to participate in the trial via online means. Domestic law allows for hearings by videoconference or telephone conference in situations where the defendant is abroad and this does not hinder the discovery of the objective truth. At the same time, the defendant's lawyer, physically present in the courtroom, indicated that their client was familiar with all the case documents, and it was evident from the request for a preliminary ruling that any new document could be electronically transmitted to the defendant for timely examination during the hearing, and that consultations between the defendant and their lawyer could be arranged confidentially through a separate connection. Given that the exceptional situation allowing remote court hearings had ended, the question arose whether the permission granted to the defendant to participate in the hearings via videoconference, under circumstances where none of the legally permitted cases applied, would constitute a violation of Directive 2016/343, particularly Article 8(1) thereof[2].

Therefore, through the formulated question, the referring court essentially requested a clarification on whether Article 8(1) of Directive 2016/343 should be interpreted as prohibiting a defendant from participating, at their express request, in their trial hearings via videoconference.

In the resolution procedure, the Court must ensure that the interpretation it gives to the provisions concerning the right of suspects and accused persons to be present at the trial ensures a level of protection that does not infringe upon that guaranteed by Article 6 of the ECHR, as interpreted by the European Court of Human Rights[3].

Therefore, the CJEU has held that it follows from the case law of the European Court of Human Rights that the appearance of an accused person is of paramount importance for the interests of a fair trial, and the obligation to guarantee this person's right to be present in the courtroom is, in this regard, one of the essential elements of Article 6 of the ECHR[4].

[1] The situation in question involves a judicial procedure taking place in the territory of Bulgaria.

[2] The question posed was formulated as follows: 'Is the defendant's right to be present at the trial, in accordance with Article 8(1) in conjunction with recitals (33) and (44) of Directive [2016/343], violated when, at their express request, they participate in the court hearings via an online connection, if their defense is ensured by a duly authorized lawyer who is present in the courtroom, and the connection allows them to follow the proceedings, to point out and become acquainted with the evidence, if they can be heard without technical impediments, and if effective and confidential communication with their lawyer is ensured?

[3] Judgment of 8 December 2022, HYA and others (Impossibility of hearing prosecution witnesses), C-348/21, EU:C:2022:965, paragraph 40.

[4] Judgment of 8 December 2022, HYA and others (Impossibility of hearing prosecution witnesses), C-348/21, EU:C:2022:965, paragraph 41.

The Court ruled that, pursuant to the right enshrined in Article 8(1) of Directive 2016/343, an accused person must be able to appear in person at hearings held within the proceedings concerning them, without this Directive imposing an obligation on Member States to establish a requirement for any person suspected or accused of an offense to be present at the trial[1].

Consequently, the Court (First Chamber) has ruled that Article 8(1) of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings *must be interpreted as not prohibiting a defendant from participating, at their express request, in their trial hearings by videoconference, provided that the right to a fair trial is guaranteed.*

3. Conclusions

Taking a holistic view of European and national regulations regarding a component of the right to a fair trial in criminal matters, namely the presence of the suspect or accused during criminal proceedings, it can be observed that the issue becomes increasingly complex as social realities and technology, as a new element to be considered in social dynamics, change. Human needs adapt to easier ways of meeting them, a fact that also reflects in the judicial field.

Therefore, in the new light of social realities and interpretations given to the norms, the presence of the suspect or accused during criminal proceedings is evaluated in terms of the diligence demonstrated by the state in ensuring the following actions:

- information regarding the right to participate;
- information regarding the date and place of the proceedings;
- ensuring the possibility of participation (by communicating the acts, by setting reasonable deadlines, by ordering the necessary measures to facilitate participation - as is the case with arrested or detained persons);
- the possibility of ex officio representation in the case of absence (justified or not);
- ensuring the resumption of the proceedings for a trial in absentia or the exercise of an appeal that would allow for the introduction of new evidence or lead to a diametrically opposed decision.

A radiography of how the right to a fair trial is respected must lead to the conclusion that the state, through its laws and enforcement bodies, is making every effort to guarantee and ensure this right.

[1] Judgment of 15 September 2022, *HN (Trial of an accused person removed from the territory)*, C-420/20, EU:C:2022:679, paragraph 53.

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