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REMOTE CRIMINAL PROCEEDINGS IN EU LAW FROM THE PERSPECTIVE OF STRENGTHENING THE RIGHTS OF THE ACCUSED

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ABSTRACT¹

This article analyses remote proceedings as a new form of participation in the criminal process in the context of EU law, with particular reference to the question of whether remote participation could be considered (and established) as part of the defendant's right to be present at their trial. The question of how technological developments may be used to strengthen the rights of the accused is also considered. The author explores the EU legal framework promoting the use of video conferencing tools as innovative technologies, while also considering the perspective that sees them as representing a practical risk to the observance of procedural rights. The requirement that a videoconference hearing must meet the standards established by the European Court of Human Rights is identified. Following this, the question of whether a videoconference hearing can become an instrument that balances the protection of the rights of the accused with progressive e-justice digitalisation processes when adequately regulated in EU law is addressed. The article concludes with proposals relating to the measures that need to be implemented to effectively

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protect the rights of the accused, along with steps that should be taken to amend the relevant legislation.

KEYWORDS

Digitalisation of justice, Remote criminal hearing, EU law, Defence right.

INTRODUCTION

The benefits of European Union (EU) membership for any country extend beyond mere economic stability and freedom of movement. Indeed, the process of joining the EU also entails a commitment to enhancing citizens' access to justice and increasing the efficiency and effectiveness of court proceedings. In this context, the development of digitalisation has been identified as an urgent priority within the EU policy agenda with the aim of improving efficiency within the justice systems of Member States.

The digitalisation of justice gives cause to revisit the concepts through which we understand public powers, including justice. At the same time, traditional models may prove important in understanding digitalisation-related missteps. The EU's Communication on Digitalisation of justice in the European Union,² adopted during the COVID-19 pandemic, has been influential in guiding Member States towards reviewing their legislation – in particular, the legislation of remote criminal proceedings. There have been progressively more significant legislative changes in Member States' criminal procedural law,³ but there have also been legislative developments at the EU level that aim to digitalise cross-border cooperation between EU judicial authorities.

Ten years ago, academic articles debated the future of videoconferencing in criminal proceedings, predicting that developments would intensify despite likely risks to defence rights.⁴ In fact, the pandemic crisis created particularly favourable conditions for the increased use of remote criminal proceedings. However, researchers remain concerned about the practical realities of the risks associated with limiting the effective exercise of the rights of defence and participation in proceedings: "The point is, however, that [...] regulations do not fully realise the objectives set for them, hindering, through the adoption of specific solutions, the proper realisation of certain fundamental procedural principles, first and foremost the right to defence".⁵ While online hearings may serve as tools that enable delays in the criminal justice process to be avoided, the aim of amendments in this sphere is to ensure that the right to a fair trial remains effective and practical, which is essential in order to maintain mutual trust between Member States and public confidence in the EU. It is therefore important to understand the safeguards that are in place, without which there may emerge a growing risk of undermining the right to a fair trial.

² *Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions Digitalisation of justice in the European Union A toolbox of opportunities, COM/2020/710 final*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020DC0710>.

³ Anne Sanders, 'Video-Hearings in Europe before, during and after the COVID-19 Pandemic', *International Journal for Court Administration* 12, 2 (2021): 1–2 // <https://doi.org/10.36745/ijca.379>.

⁴ ³ Michele Simonato, 'Defence rights and the use of information technology in criminal procedure', *Revue internationale de droit pénal* 85, 1–2 (2014): 261–310 // <https://doi.org/10.3917/ridp.851.0261>.

⁵ Radosław Olszewski and Amadeusz Małolepszy, 'Exercise of the Right to Defence in Criminal Proceedings during the COVID-19 Pandemic with Particular Reference to the Relation Between the Accused and the Defence Counsel', *Białystok Legal Studies Białostockie Studia Prawnicze* 27, 2 (2022): 223–236 // <https://doi.org/10.15290/bsp.2022.27.02.13>.

This article provides a systematic analysis and discussion of EU policy trends and developments in EU law in relation to the protection of the rights of the accused in criminal proceedings (both cross-border and domestic) conducted remotely. The article endeavors: 1) to provide an overview of EU policy development in regard to the digitalisation of criminal justice; 2) to assess whether remote participation could be considered (and established) as part of the defendant's right to be present at their trial; 3) to identify universally applicable minimum standards for strengthening procedural rights in remote proceedings (case hearings in the trial phase) based on the case law of the European Court of Human Rights (hereinafter ECtHR) and the EU legal framework; and 4) to discuss whether EU law can set itself the task of establishing minimum standards for the protection of defendants' rights in criminal proceedings conducted remotely, or whether this task should remain the exclusive preserve of national states.

1. EU POLICY DEVELOPMENTS REGARDING THE DIGITALISATION OF THE CRIMINAL JUSTICE SYSTEM

Any legal framework should be the result of a considered and value-based policy. As policy documents, the EU's political strategies are important for legal scholars when assessing the social validity of legal norms, the limits of their application and their relationship with Member States' national laws. One of the strengths of EU politics is the development of adequate and proportionate technical and regulatory solutions which contribute to the well-being of the Union's citizens in pursuit of common values. As legal scholars have observed, "the best way to protect and pursue the Union's values consists of embedding those values in detailed regulatory and technological solutions".⁶ Both the European Council⁷ and the European Parliament⁸ have recognised the digital transformation as having an important role in relaunching and modernising the EU economy. The digitalisation of justice systems is an important objective to pursue as part of a new push for European democracy and aligns with the political priority of a "Europe fit for the digital age".⁹ The directions and means of achieving interoperability between technology and justice systems are identified in Communication COM(2020) 710¹⁰ on the digitalisation of justice systems in the European Union. Although not directly identified, this Communication lays the foundations for the 'digital by default' principle, which is already used when adopting new EU legislation related to criminal justice.¹¹

The digitalisation policy action plan and its various orientations are scheduled for implementation over a four-year period. The most recent e-Justice Strategy was

⁶ Luigi Malferrari, 'Digital Justice at the European Court of Justice after Covid-19: Solving the "Smaller Questions" to Tackle the "Big Questions"': 53, in: Daniel Sarmiento, Helene Ruiz Fabri, Burkhard Hess, eds., *Yearbook on Procedural Law of the Court of Justice of the European Union Third Edition – 2021*, MPILux Research Paper Series No. 2022(5) // <http://dx.doi.org/10.2139/ssrn.4212945>.

⁷ European Council, 'A Roadmap for recovery. Towards a more resilient, sustainable and fair Europe' (2020) // <https://www.consilium.europa.eu/media/43384/roadmap-for-recovery-final-21-04-2020.pdf>.

⁸ '2019–2023 Strategy on e-Justice (2019/C 96/04)', Eur-lex // [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313\(01\)&rid=7](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XG0313(01)&rid=7).

⁹ Candidate for President of the European Commission Ursula von der Leyen, 'A Union that strives for more: My agenda for Europe. Political guidelines for the next European Commission 2019–2024' // https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

¹⁰ *Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the regions Digitalisation of justice in the European Union A toolbox of opportunities, COM/2020/710 final*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52020DC0710>.

¹¹ *Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation*, Eur-lex // <https://eur-lex.europa.eu/eli/reg/2023/2844>.

finalised in 2023. One of the most significant outcomes of this strategy was the adoption of the new Regulation 2023/2844 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial, and criminal matters. In the course of the debate on the draft Regulation, the European Parliament made it clear that digital transformation constitutes one of the most important measures for enhancing access to justice and the effectiveness, quality and transparency of justice systems.¹² The EU's intention to encourage the use of technological means is also expressed in the Regulation's provision (Recital 33).¹³

The digitalisation of justice is a major technological and regulatory challenge that the EU must face with poise, competence, and strategy. Indeed, digital technologies must be used in a manner that enables the Union's values to be preserved and pursued.¹⁴ To that end, effectiveness and efficiency are important, but they must be reconciled with the pursuit of the Union's values. This is essential for tackling both current and long-term challenges that the EU judicial system faces.¹⁵ In EU policy, the need for digitalisation in the criminal justice area relates to cooperation between justice systems, including electronic evidence, communication channels, data exchange and the use of videoconferencing in criminal proceedings. Upgrading and modernising judicial cooperation and information exchange in criminal cases across the EU is crucial in light of the evolving security threat landscape and the rapid pace of technological development, as acknowledged by the European Council.¹⁶ Moreover the COVID-19 crisis has highlighted the need for a more holistic approach to the modernisation of European justice – one that is resilient to emerging challenges.¹⁷

The fact that the digitalisation of justice remains a strategic objective of EU policy is confirmed by the adoption of the European e-Justice Strategy 2024–2028.¹⁸ This new programming document expresses the political will to develop the digitalisation of justice systems, while at the same time reminding policymakers of the need to carefully assess the impact of initiatives to digitise justice systems on the protection of the rights of every individual. Plans for the digitalisation of justice also cover the area of criminal justice. Thus, particular actions should be taken in the criminal justice context, where the use of remote communication technologies could present serious risks to the fundamental rights of suspects and accused persons – such as with the right to a fair trial, and the right to be present at the trial and the right of defence (paragraph 25 of the Principles). Commenting on the digital by default approach, the 2024–2028 Strategy notes that the new justice system should be designed as a digital service, even though non-digital alternatives need to be maintained in order to ensure effective legal protection and access to justice for those who do not fully participate in technological

¹² 'Position of the European Parliament EP-PE_TC1-COD(2021)0394', (23 November 2023) // https://www.europarl.europa.eu/doceo/document/TC1-COD-2021-0394_LT.pdf.

¹³ *Regulation (EU) 2023/2844*, *supra* note 10.

¹⁴ Luigi Malferrari and Alessandro Spina, 'A Virtual Court in Luxembourg? The Issues of Digital Technologies and Webstreaming for Hearings before the CJEU', *EU Law Live* 35 (2020): 7–15; Philip Sales, 'Algorithms, Artificial Intelligence and the Law', *Judicial Review* 25, 1 (2020): 66 // <https://doi.org/10.1080/10854681.2020.1732737>.

¹⁵ Luigi Malferrari, *supra* note 5, 53.

¹⁶ 'European Council meeting, EUCO 13/18' (18 October 2018) // <https://www.consilium.europa.eu/media/36775/18-euco-final-conclusions-en.pdf>; Deloitte and Directorate-General for Justice and Consumers (European Commission), *Cross-Border Digital Criminal Justice: Final Report* (Luxembourg: Publications Office of the European Union, 2020) // <https://data.europa.eu/doi/10.2838/118529>.

¹⁷ European Commission, 'Roadmap – Ares(2020)4029305' // https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-EU_en.

¹⁸ Council of the European Union, 'European e-Justice Strategy 2024–2028' (17 November 2023) // <https://data.consilium.europa.eu/doc/document/ST-15509-2023-INIT/en/pdf>.

developments (paragraph 33). This policy is justified because, although not everyone has access to it, it is important that technological innovation exists alongside traditional systems. The clarification by the Court of Justice of the European Union (CJEU) that “electronic means” cannot be the only means by which procedures can be accessed, as this can make it impossible for some persons to exercise their rights,¹⁹ remains a relevant principle for EU policy making. The degree of integration of technologies is not the same across different Member States and different groups of society; however, this may not diminish EU citizens’ access to justice. In addition, differences between the national laws of different Member States remain a significant challenge.

Among EU priorities and tools for the digitalisation of justice, one of the major issues that are often discussed concerns oral remote hearings. This issue has been a matter of considerable debate within the national courts of the Member States, as well as within the courts of the EU. As an illustration, confronted with the COVID-19 crisis, the CJEU decided to hold hybrid oral hearings, while the EFTA Court held exclusively remote hearings.²⁰ There are some advantages that ensue from the holding of remote oral hearings. For example, costs and time related to travelling, which can be non-negligible for parties, are removed. On the other hand, the added value of in-person oral hearings is clear: the debate is more direct, richer, more effective and more efficient. Furthermore, in its opinion on justice and information technologies (IT), the Consultative Council of European Judges (CCJE) stressed that the introduction of IT in European courts should not compromise the human and symbolic faces of justice. If justice is perceived by users as being purely technical, without performing its real and fundamental function, then it risks being dehumanised.²¹ In addition, the issue remains that the development of digital solutions should also cater to the needs of citizens suffering from disabilities. Such solutions should not entirely replace traditional channels of communication in order to prevent hampering access to justice for, inter alia, marginalised groups, individuals with low IT skills or those who do not have internet access.²² It is important to think about the impact of technologies on the relevant symbols and rituals and the ensuing implications for the right to a fair trial. Indeed, the modification of the forms of participation that technological innovation may entail is not without risks to fundamental procedural rights.²³

While the EU had previously endorsed videoconferencing in the context of its e-Justice²⁴ initiative prior to the COVID-19 pandemic, its use was largely confined to specific proceedings, such as interviews involving vulnerable witnesses and victims.

¹⁹ *Rosalba Alassini (C-317/08) and Filomena Califano v. Wind SpA (C-318/08) and Lucia Anna Giorgia Iacono v. Telecom Italia SpA (C-319/08) and Multiservice Srl v. Telecom Italia SpA (C-320/08) (Joined Cases C-317/08 to C-320/08)*, CJEU (18 March 2010, Joined Cases C-317/08 to C-320/08).

²⁰ Luigi Malferrari, *supra* note 5, 40.

²¹ *Opinion of the European Economic and Social Committee on Proposal for a regulation of the European Parliament and of the Council on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation (COM(2021) 759 final — 2021/0394 (COD)), and Proposal for a Directive of the European Parliament and of the Council amending Council Directive 2003/8/EC, Council Framework Decisions 2002/465/JHA, 2002/584/JHA, 2003/577/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, 2008/947/JHA, 2009/829/JHA and 2009/948/JHA, and Directive 2014/41/EU of the European Parliament and of the Council, as regards digitalisation of judicial cooperation (COM(2021) 760 final — 2021/0395 (COD))*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022AE0174>.

²² European Commission, ‘Roadmap – Ares(2020)4029305’ // https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12547-Digitalisation-of-justice-in-the-EU_en.

²³ Cécile Chainais, ‘Open Justice and the Principle of Public Access to Hearings in the Age of Information Technology: Theoretical Perspectives and Comparative Law’, *Open Justice* 13 (2019): 68; Robert Magnus, ‘New Media in the Courtroom: Benefits and Challenges’, *Open Justice* 13 (2019): 96.

²⁴ *Multi-annual European e-Justice action plan 2009-2013, 2009/C 75/01*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2009:075:FULL&from=SV>.

During the pandemic, the objective was to implement videoconferencing for the majority of court hearings, thereby effectively reducing the health risks associated with in-person attendance. In recent years there has been a growing trend in Europe of exploring the use of remote technologies as a means of supplementing physical presence and digitising the justice system more broadly. The most recent EU Justice Scoreboard (2023) provides an assessment of the quality of judicial systems. One of the key indicators for evaluating the efficacy of the justice system is the extent to which Member States' national legislation permits the use of digital technology, including the use of videoconferencing in criminal proceedings.²⁵

The COVID-19 pandemic has demonstrated the necessity of not only regulatory changes, but also the implementation of appropriate technical preparation to ensure the effective functioning of distance procedures in criminal proceedings: "The technicalities are essential to make sure that the digitalization of justice increases the quality of the administration of justice in compliance with the Union's values".²⁶ The EU has taken a leading role in reconciling transformative technologies with fundamental rights and freedoms and in ensuring protection against potential risks. One of the measures envisaged in the action plan is to improve videoconferencing interoperability – for example, by establishing common requirements, standards or tools for conducting remote hearings.²⁷ The EU calls on Member States to "use more extensively digital tools for judicial proceedings without undermining fundamental principles such as the independence and impartiality of the courts".²⁸ In the context of such a policy, the EU has the task of developing a legal framework in which scientific progress and its applications (technology) are compatible with fundamental human rights and freedoms in the administration of justice, as the right to effective justice is one of the fundamental rights guaranteed in a democratic society.

2. STANDARDS FOR THE PROTECTION OF THE RIGHTS OF THE ACCUSED IN REMOTE PROCEEDINGS UNDER ECTHR JURISPRUDENCE

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the Convention or the ECHR) enshrines the right to a fair trial, which must also be respected in the event of the use of videoconferencing in criminal justice proceedings. Although Article 6(1) of the Convention does not mention this right explicitly, the established case law of the ECtHR on the object and purpose of this Article shows that a person 'charged with a criminal offence' has the right to be present at their trial.²⁹ Indeed, the ECtHR has recognised in a number of cases on the basis of the principles of a fair and just criminal procedure that it is of paramount importance that the accused should appear at their trial and that the duty to guarantee the right

²⁵ Directorate-General for Justice and Consumers (European Commission), *The 2023 EU Justice Scoreboard* (Luxembourg: Publications Office of the European Union, 2023), 33, Figure 41 // <https://data.europa.eu/doi/10.2838/33482>.

²⁶ Huw Roberts, Josh Cows, Federico Casolari, Jessica Morley, Mariarosaria Taddeo and Luciano Floridi, 'Safeguarding European values with digital sovereignty: an analysis of statements and policies', *Internet Policy Review* 10, 3 (2021): 18 // <https://doi.org/10.14763/2021.3.1575>.

²⁷ Council of the European Union, *supra* note 17.

²⁸ European Council and Council of the European Union, 'A digital future for Europe' (last review: 22 May 2024) // <https://www.consilium.europa.eu/en/policies/a-digital-future-for-europe/#e-justice>.

²⁹ *Sejdovic v. Italy*, ECtHR (1 March 2006, no. 56581/00); *Hokkeling v. the Netherlands*, ECtHR (14 February 2017, no. 30749/12).

of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 of the Convention.³⁰

Article 6(3) of the ECHR plays an essential role when determining the substantive content of Article 48(2) of the Charter of Fundamental Rights of the EU (hereinafter the Charter), as confirmed by the Explanations relating to the Charter which assert that the two rules are the same³¹: “Despite its concise formulation, the provision is in fact a [sic] very meaningful since it triggers new perspectives and future developments of European criminal law. Article 48(2) should [...] be read as a specification of the rights of defence for the particular field of criminal proceedings”.³² The protection afforded to the right of defence under Article 48(2) also encompasses those guarantees that are not explicitly provided in Article 6(3) of the ECHR, but which the ECtHR has read into such a provision in its rich case law, in accordance with Article 6 of the Treaty on the European Union. Therefore, when defining the right of defence, the list laid down in Article 6(3) is not exhaustive because on several occasions the ECtHR has read into that scanty provision a much wider set of guarantees by closing loopholes and adopting an evolutive interpretation of the Convention in order to adjust it to the challenges of contemporary criminal justice. The ECtHR, taking into consideration the object and purpose of Article 6 taken as a whole, has acknowledged the right to be present at the trial as a precondition for the effective exercise of the rights laid down in points c), d) and e) of Article 6(3) of the ECHR.³³

The physical presence of the accused in the courtroom is desirable, but not an end in itself³⁴; therefore, the ECtHR does not rule out the possibility of a technological substitution.³⁵ The jurisprudence of the ECtHR establishes the doctrine that remote proceedings are more vulnerable in terms of the use of procedural safeguards, and that this format is considered as a measure that can be applicable in exceptional cases. This means that it is not videoconferencing *per se*, but the conditions of its use that may lead to deviation from the components of a fair trial.³⁶

The use of videoconferencing, analysed through the prism of effective participation in court and the rights to defence,³⁷ has been singled out by the ECtHR as one of the most pressing threats to the principle of immediacy. Article 6 of the Convention, as a whole, guarantees the right of effective participation in criminal proceedings to the accused,³⁸ and the rights to defence are directly linked to this. Effective participation means that issues concerning a breach of Article 6 of the Convention can arise not

³⁰ *Hermi v. Italy*, ECtHR (18 October 2006, no. 18114/02), § 58; *Dijkhuizen v. the Netherlands*, ECtHR (8 June 2021 no. 61591/16), § 59.

³¹ *Explanations relating to the Charter of Fundamental Rights [2007] JO C303/29. Document 32007X1214(01)*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32007X1214%2801%29>.

³² Silvia Allegrezza and Valentina Covolo, eds., *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies* (Milan: Wolters Kluwer, 2018), 26 // <https://hdl.handle.net/10993/38401>

³³ *Colozza v. Italy*, ECtHR (12 February 1985 no. 9024/80), § 27; *F.C.B. v. Italy*, ECtHR (28 August 1991, no. 12151/86), § 29; *Belziuk v. Poland*, ECtHR (25 March 1998, no. 23103/93), § 37; *Sejdovic v. Italy*, ECtHR (1 March 2006, no. 56581/00), § 81.

³⁴ *Vladimir Vitalyevich Golubev v. Russia*, ECtHR (9 November 2006, no. 26260/02).

³⁵ Bruno Min, ‘Balancing the Need for Due Process, Fair Trials and Systemic Efficacy: The Benefits and Challenges of Technological Improvements and Greater Efficiencies for the Criminal Justice System’, *Irish Probation Journal* 19 (2022): 7–23.

³⁶ Piermaria Corso and Francisco Peroni, eds., *Studi in onore di Mario Pisani* (Casa Editrice La Tribuna, 2010).

³⁷ Jeremy McBride, *Human rights and criminal procedure. The case of the European Court of Human Rights* (Council of Europe Publishing, 2009), 262–263, 346–347; *Zagaria v. Italy*, ECtHR (27 November 2007, no. 58195/00); *Marcello Viola v. Italy*, ECtHR (5 October 2006, no. 45106/04).

³⁸ *Murtazaliyeva v. Russia*, ECtHR (18 December 2018, no. 36658/05), § 91.

only as a result of poor acoustics in the courtroom or difficulties in hearing,³⁹ but also because of the inability of the accused to communicate directly and immediately with their defence counsel or the lack of access to confidential counselling.⁴⁰ However, the ECtHR recognises the possibility of compensatory guarantees, which it most often identifies with the cognitive weight of evidence (assessing the weight and relevance of the evidence in terms of how decisive it is).⁴¹ The ECtHR also considers that an important element of fair criminal proceedings is the possibility of the accused to be confronted with witnesses in the presence of the judge who ultimately decides the case.⁴² This means that the accused must have the opportunity to gather the same information as the court, to observe the witness in person, to uncover inconsistencies and hesitations when they testify, to form an opinion about their credibility, and to request that their witness be questioned in the same circumstances as the prosecution witness.⁴³

Guided by the principle of fairness, the ECtHR set the direction in this regard by stating that recourse to remote proceedings “in any given case must serve a legitimate aim”, and that “the arrangements for the giving of evidence must be compatible with the requirements of respect for due process, as laid down in Article 6 of the Convention”.⁴⁴ Although the format of videoconferencing can be considered as an appropriate measure to reduce delays caused by the transport of the accused, thereby simplifying and speeding up the criminal proceedings, the mere promptness of proceedings as a justification for the use of videoconferencing under any circumstances is not compatible with the standards of Article 6 of the Convention.

In developing its case law on ensuring the presence of a defence counsel when proceedings are organised by videoconferencing, the ECtHR draws strict limits for the formal representation of the accused. According to the Court’s jurisprudence, the appointment of a defence counsel does not in itself guarantee the effectiveness of the aid that they can provide to the accused, which is why it emphasises the need to ensure adequate facilities and time for consultations with the defence counsel.⁴⁵ In this context, another requirement identified in the cases heard by the ECtHR is also relevant: the right of an accused to communicate with their lawyer without any risk of being monitored by a third party, which is regarded as one of the fundamental requirements for a fair trial under Article 6 of the Convention.⁴⁶ According to the case law of the ECtHR, the interests of justice require that, in order to ensure a fair hearing, an applicant who appears before the court by videoconference must be represented by a lawyer, in particular when a representative of the public prosecutor is present.⁴⁷ The ECtHR has reiterated a number of times that the exercise of the right to legal aid is of particular

³⁹ *Stanford v. the United Kingdom*, ECtHR (23 February 1994, no. 16757/90), §§ 26, 29.

⁴⁰ *Marcello Viola v. Italy*, ECtHR (5 October 2006, no. 45106/04), §§ 63–67; *Asciutto v. Italy*, ECtHR (27 November 2007, no. 35795/02), §§ 62–73; *Sakhnovskiy v. Russia*, ECtHR (2 November 2010, no. 21272/03), § 98.

⁴¹ *Dan v. the Republic of Moldova* (no. 2), ECtHR (10 November 2020, no. 57575/14), § 53; *Schatschawili v. Germany* [GC], ECtHR (15 December 2015, no. 9154/10), § 107.

⁴² *P.K. v. Finland* (dec.), ECtHR (9 July 2002, no. 37442/97).

⁴³ *Matytsina v. Russia*, ECtHR (27 March 2014, no. 58428/10), § 153; Cristiana Valentini, ‘Contraddittorio, immediatezza, oralità nella giurisprudenza della Corte E.D.U.’, *Archivio penale* 2 (2016): 1–33 // <https://archiviopenale.it/File/DownloadArticolo?codice=61806407-a77c-4c8b-babd-145829de7f87&idarticolo=15071>.

⁴⁴ *Marcello Viola v. Italy*, ECtHR (5 October 2006, no. 45106/04), § 67; *Asciutto v. Italy*, ECtHR (27 November 2007, no. 35795/02), §§ 62–73; *Zagaria v. Italy*, ECtHR (27 November 2007, no. 58195/00).

⁴⁵ *Sakhnovskiy v. Russia*, ECtHR (2 November 2010, no. 21272/03).

⁴⁶ *Sakhnovskiy v. Russia*, ECtHR (2 November 2010, no. 21272/03), §§ 97, 102, 104; *Zagaria v. Italy*, ECtHR (27 November 2007, no. 58195/00); *Medvedev v. Russia*, ECtHR (3 October 2017, no. 10932/06), § 30.

⁴⁷ *Shulepov v. Russia*, ECtHR (26 June 2008, no. 15435/03), §§ 34–36; *Slashchev v. Russia*, ECtHR (30 April 2012 no. 24996/05); *Grigoryevskikh v. Russia*, ECtHR (9 April 2009, no. 22/03).

importance when the applicant communicates with the courtroom by video link. Moreover, the court imposes an obligation on courts hearing cases by videoconference to verify the reasons for the absence of the defendant's counsel,⁴⁸ and warns that failure to comply with this obligation may lead to a decision on a violation of Article 6(1) and (3)(c) of the Convention.

Obstacles to the confidentiality of contact between the accused and their defence counsel can undermine the European standards of a fair criminal trial developed by the ECtHR⁴⁹ with regard to the right of defence. In one of its judgments,⁵⁰ the ECtHR held that an accused's contact with their defence counsel must be unrestricted, as this is the only condition for the proper functioning of the defence relationship. In the same case, the ECtHR also held that a violation of Article 6 of the Convention was observed due to the design of a meeting room in which a suspect remanded in custody met with their counsel. In addition, the ECtHR remains sceptical about some of the ways in which contact between the accused and their defence counsel is ensured during a videoconference trial, pointing out that contact via equipment which is provided and operated by the state may generate doubts as to the confidentiality of contact with legal counsel.⁵¹

Thus, the case law not only emphasises the right of an accused to communicate with a lawyer, but also highlights that unilateral decisions made by authorities concerning the remote participation of an accused in a hearing should be restricted if the individual situation of the accused has not been taken into account.⁵² The case law of the ECtHR is developed not only with regard to the assessment of the objectives pursued, but also with respect to the compliance of the specific conditions pertaining to the implementation of remote proceedings with the requirements set forth in Article 6 of the Convention.

In sum, although the ECtHR may view remote proceedings as a means for creating preconditions for the restriction of procedural rights, the jurisprudence of the ECtHR does not preclude the further development of the use of technology in criminal proceedings.

3. THE MAZE OF EU LAW IN THE CONTEXT OF THE REGULATION OF REMOTE CRIMINAL PROCEEDINGS

3.1. Regulatory aspects of the protection of the rights of the accused

As the ECHR provides only general rules and the ECtHR's interpretation of procedural rights through its case law is very casuistic, there is also a lack of an enforcement mechanism through which Contracting States may be compelled to modify their deficient laws.⁵³ Thus, the protection of the rights of accused and suspected persons in criminal proceedings in the EU guaranteed under the ECHR is not sufficient. In order to reinforce mutual confidence within the EU, it is essential that EU standards for the protection of procedural rights, in tandem with those of the ECHR, exist and are correctly

⁴⁸ *Grigoryevskikh v. Russia*, ECtHR (9 April 2009, no. 22/03), § 92.

⁴⁹ *Ibrahim and others v. Great Britain*, ECtHR (13 August 2016, nos. 50541/08, 50571/08, 50573/08 and 40351/09); *Salduz v. Turcji*, ECtHR (27 November 2008, no. 36391/02); *Plonka v. Poland*, ECtHR (31 March 2009, no. 20310/02); *Beuze v. Belgium*, ECtHR (9 November 2018, no. 71409/10).

⁵⁰ *Modarca v. Moldova*, ECtHR (10 May 2007, no. 14437/05).

⁵¹ Radosław Olszewski and Amadeusz Małolepszy, *supra* note 4.

⁵² *Medvedev v. Russia*, ECtHR (3 October 2017, no. 10932/06), § 30.

⁵³ Cornelia Riehle and Allison Clozel, '10 years after the roadmap: procedural rights in criminal proceedings in the EU today', *ERA Forum* 20 (2020): 321–325 // <https://doi.org/10.1007/s12027-019-00579-5>.

implemented and applied in Member States.⁵⁴ The issue of procedural rights in criminal proceedings as a matter of EU law is a relatively new one, with the limits of its applicability being the subject of constant debate.⁵⁵ It seems probable that the establishment of common EU standards for the protection of the rights of the accused in remote proceedings may be the object of similar discussion.

The EU has devised a structured programme of legislative initiatives with the objective of protecting the rights of the accused. Firstly, at the EU level, soft measures have been implemented to address the issue of strengthening procedural rights (e.g., the 2009 Roadmap⁵⁶). Additionally, various directives on the protection of the rights of the accused have been adopted in accordance with Article 82 of the Treaty on the Functioning of the European Union (TFEU).⁵⁷ The EU has thus made it its competence to establish minimum rules to harmonise the rights of individuals in criminal proceedings:

It is important to recognise the autonomous EU-dimension of the rights of the defence. It is a context that facilitates more effective recognition of rights than in the legal order of the ECHR. This is especially so, because the preliminary reference procedure offers a possibility to prevent violations from taking place. Whereas the ECHR supervisory mechanism focuses on compensation after the fact, the Union legal order can do more. This is a unique dimension to the Union legal order, which empowers human rights protection.⁵⁸

The transposition of the ECHR standards on effective remedies should be considered and used as a natural and desirable step in the area of the integration of criminal law in the EU,⁵⁹ as all EU Member States are members of the Council of Europe. This is why the genesis and content of the directives cannot be considered separately from the standards of human rights protection established by the ECtHR.⁶⁰ Directives are a "new tool through which respect for individual citizens' defence rights may be moderately improved, if effective use can be made of them".⁶¹ The directives play a fundamental role: they extend the applicability of their provisions to both suspects and the accused, thereby confirming the importance of the substantial notion of the charge developed in the ECtHR case law. It is not permissible to interpret the provisions of the directives in a way that would result in a reduction in the level of protection afforded to fundamental rights. This would entail limiting or derogating from the rights and procedural

⁵⁴ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2009) // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009G1204%2801%29>.

⁵⁵ Gwen Jansen, 'The need for a new roadmap of procedural safeguards: a lawyer's perspective', *ERA Forum* 22 (2021): 279–294 // <https://doi.org/10.1007/s12027-021-00667-5>.

⁵⁶ Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ C 295, 4.12.2009) // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009G1204%2801%29>.

⁵⁷ Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012), Article 82 // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008E082>.

⁵⁸ Andre Klip, 'Violation of Defence Rights' Directives', *European Journal of Crime, Criminal Law and Criminal Justice* 26, 4 (2018): 271–281.

⁵⁹ Pawel Wilinski and Karolina Kiejnisch-Kruk, 'Right to Effective Legal Remedy in Criminal Proceedings in the EU. Implementation and Need for Standards', *Review of European and Comparative Law (RECoL)* 54 (2023): 147–168 // <https://doi.org/10.31743/recl.16244>.

⁶⁰ Valsamis Mitsilegas, 'The European Union and the rights of individuals in criminal proceedings': 115, in: Darryl K. Brown, Jenia Iontcheva Turner and Bettina Weisser, eds., *The Oxford Handbook of Criminal Process* (Oxford: Oxford University Press, 2019) // <https://doi.org/10.1093/oxfordhb/9780190659837.013.8>; Julia Dora Batta, 'Officiality and the Right of Defence in the Case Law of the ECHR', *Revista Facultatii de Drept Oradea* 1 (2021): 86–90.

⁶¹ Alex Tinsley, 'Protecting Criminal Defense Rights through EU Law: Opportunities and Challenges', *New Journal of European Criminal Law* 4 (2013): 480 // <https://doi.org/10.1177/203228441300400405>.

safeguards guaranteed by the ECHR, the Charter, or the law of any Member State that ensures a higher level of protection.⁶²

The Roadmap outlines six areas where action should be taken at the EU level to strengthen the rights of suspects and accused persons. Following this, the Council endorsed the Roadmap, and the European Council made it part of the Stockholm Programme.⁶³ In the intervening years, agreements have been reached on six directives⁶⁴ outlining the rights to the following: interpretation and translation, information, access to a lawyer, legal aid, the presumption of innocence, and procedural safeguards for children suspected or accused in criminal proceedings. The Roadmap directives, in edifying standards derived from ECtHR case law as clear provisions of law which can be directly invoked in the national courts, facilitate reliance on and the application of those standards.⁶⁵ The directives create an EU system for the protection of defence rights, the defining feature of which is, theoretically, that it helps individual litigants uphold their rights during national criminal proceedings, shifting responsibility upstream from the ECtHR.

In recent years, there has been a debate regarding the need for the creation of a new Roadmap.⁶⁶ To this end the ECBA introduced "Agenda 2020: A new Roadmap on minimum standards of certain procedural safe guards"⁶⁷ (Roadmap 2020). This document expresses concern that, apart from the right to be present in trials (Directive 2016/343/EU), the entire trial phase suffers from a lack of protection for defendants due to national differences without any legally binding and functional concrete minimum standards.⁶⁸

⁶² Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward, eds., *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), 1524.

⁶³ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering an area of freedom, security and justice for Europe's citizens – Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, Eur-lex (20 April 2010) – Not published in the Official Journal // <https://eur-lex.europa.eu/EN/legal-content/summary/action-plan-on-the-stockholm-programme.html>.

⁶⁴ *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010L0064>.

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Eur-lex // <https://eur-lex.europa.eu/eli/dir/2012/13/oj>.

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

Directive 2016/1919/EU of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919>.

Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016L0343>.

Directive 2016/800/EU of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Eur-lex // <https://eur-lex.europa.eu/eli/dir/2016/800/oj>.

⁶⁵ Alex Tinsley, *supra* note 60, 480.

⁶⁶ Gwen Jansen, *supra* note 54.

⁶⁷ ECBA, "ECBA Initiative 2017/2018 "Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards" // https://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf.

⁶⁸ The areas in which these rules are violated include: continuous and confidential access to a lawyer (seating order), access to complete files (information), right to defence statement, right to confrontation with witnesses, right to directly ask questions to witnesses (cross examination), right to request evidence, recording of trials and right to access to recordings.

3.2. The interaction in content of the directives between the protection of defendants' rights and remote proceedings

To provide a sufficient degree of trust in the criminal justice systems of other Member States, the EU aims to establish common minimum rules on the protection of the procedural rights of suspects and accused persons. Although there is a positive appraisal of the progress that has been made to date, it is imperative not to lose sight of the fact that technological intervention in legal processes implies risks to fundamental human rights. The main risks of remote criminal proceedings relate to ensuring the right to be present in the proceedings and the right of defence.

Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at a trial in criminal proceedings are most relevant for the topic of this paper. As mentioned above, the content of the directives has been influenced by the standards of rights protection developed by the ECtHR. The EU responded to the ECtHR's *Salduz* judgment⁶⁹ in 2013 by issuing a Directive on the right of access to a lawyer.⁷⁰ Concerning subparagraph (a) of Article 3(3) of the Directive, the ECtHR left no doubt regarding its view that an effective defence presupposes the possibility of confidential communication between the lawyer and their client.⁷¹ Article 4 of the Directive reinforces the protection of confidentiality between the suspect and their lawyer, albeit with certain reservations.⁷² Directive 2013/48/EU follows three general aims: "(a) to harmonise national procedural standards on the right to legal assistance in order to generate trust among the EU Member States, (b) to overcome the shortcomings of the protection of this right in the ECHR, and (c) to further develop and strengthen the existing standards of protection for the right to access to a lawyer as set out by the ECHR and the EU Charter".⁷³ Despite the existence of ECtHR case law which suggests the necessity of establishing specific standards of protection for rights in order to guarantee the effective participation of the defence counsel in remote proceedings, the Directive does not include any specific rules which would reinforce the rights of the accused.

In 2016, the EU issued a directive⁷⁴ which reflects, by and large, the case law of the ECtHR, and thus compels EU Member State to comply with the rules developed by the ECtHR. The subject matter and purpose of Directive 2016/343/EU are to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial. The provision on the presumption of innocence under Article 2 of Directive 2016/343/EU foresees that "the rights therein are applicable at all stages of criminal

⁶⁹ *Salduz v. Turkey*, ECtHR (27 November 2008, no. 36391/02).

⁷⁰ Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

⁷¹ *Brennan v. UK*, ECtHR (16 Oct 2001, no. 39846/98), § 58; *Castravet v. Moldova*, ECtHR (13 June 2007, no. 23393/05), §§ 49–50; John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence* (Cambridge University Press, 2012), 291–292.

⁷² Directive 2013/48/EU of 22 October 2013, Article 4; Ilias Anagnostopoulos, 'The Right of Access to a Lawyer in Europe: A Long Road Ahead?', *European Criminal Law Review* 4, 1 (2014): 15 // <https://doi.org/10.5235/219174414811783333>.

⁷³ Silvia Allegrezza and Valentina Covolo, *supra* note 31, 67.

⁷⁴ Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0343>.

proceedings – from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence”⁷⁵. Finally, according to Directive 2016/343/EU, “the rights provided are guaranteed until the decision on the final determination of whether the person has committed the criminal offence concerned has become definitive”.⁷⁶

Even if Directive 2016/343/EU enshrines the person’s right to be present at their trial,⁷⁷ the current Directive has no provision for the defendant’s right to take part in the proceedings remotely, nor does it include specific guidelines or regulations for ensuring that procedural rights are protected during remote proceedings. Directive 2016/343/EU does not establish the right of accused persons or suspects to choose between physical presence or videoconference, nor is such a choice prohibited *expressis verbis*. The Directive focuses on strengthening the protection of the rights of the accused by further defining the grounds and procedures for trials in absentia. Two situations are specified in the Directive, defining under which circumstances a trial can be held in the absence of the defendant.⁷⁸ The regulation set out in the Directive does not provide an *expressis verbis* answer to the question of whether participation by videoconference is an integral part of the right of the accused to participate in the trial, nor whether the accused may request remote participation in their trial on the basis of the human rights doctrine and the rights guaranteed by EU law.

Thus, although the abovementioned directives, which set out the standards for the protection of the rights of the accused as established by the ECHR, are significant as they lay down rules for national enforcement authorities and will also form the basis of a potential European criminal procedure in the future, there unfortunately remains a clear lack of regulation of the protection of the rights of the accused in the case of remote criminal proceedings. Despite the adoption of European Commission for the Efficiency of Justice (CEPEJ) guidelines⁷⁹ on videoconferencing in judicial proceedings, which set out principles that states and courts should follow to ensure that the use of videoconferencing for remote hearings is in line with the right to a fair trial as enshrined in Article 6 of the ECHR, there is no straightforward answer as to what measures need to be taken to effectively protect procedural rights.

3.3. The limits of the application of the EIO Directive

There are considerable differences in the approaches and legal frameworks of EU Member States regarding the legitimisation of remote criminal proceedings in national legislation. Even if remote participation is legalised at the national level, procedural actions (e.g. questioning) involving an accused person who is in the jurisdiction of another Member State should be carried out in accordance with the mutual assistance agreements in force in the EU legal framework – in particular, the Convention on Mutual

⁷⁵ *Ibid.*, Article 2.

⁷⁶ *Ibid.*, Article 2.

⁷⁷ *Ibid.*, Article 8.

⁷⁸ Divna Ilikj Dimoski and Boban Misoski, ‘Reflection on the EU Directive on the Strengthening of Certain Aspects of the Presumption of Innocence and of the Right to Be Present at the Trial in Criminal Proceedings’, *Iustinianus Primus Law Review* 11, Special Issue (2020): 1–10.

⁷⁹ European Commission for the Efficiency of Justice (CEPEJ), ‘Guidelines on videoconferencing in judicial proceedings’, document adopted by the CEPEJ at its 36th plenary meeting (16 and 17 June 2021) // <https://rm.coe.int/cepej-2021-4-guidelines-videoconference-en/1680a2c2f4>.

Assistance in Criminal Matters between Member States (2000)⁸⁰ and the EIO Directive⁸¹. Article 21 of the EIO Directive, in terms of the modes and guarantees to be granted to participants, reflects the content of Article 10 of the 2000 Convention on Mutual Assistance.⁸² The procedures set out in the agreements must be applied by courts when the accused or other participants in the proceedings are in the detention facilities of foreign States, when they are in the control of the authorities of foreign States, or when their rights are otherwise restrained. However, as there is free movement in the EU, a person can simply be in another State. Where an accused person is in another State and has to be heard by a court hearing their case or where they simply need to participate in the proceedings remotely, national courts have several options: (a) on the basis of the national legislation allowing remote proceedings, they may question the person remotely, considering that the place from which they connect is equivalent to the courtroom; (b) they may disregard the location of the accused and, under the national regulation allowing remote participation in proceedings, question the accused remotely, without considering whether the person is within or outside the same State; or, (c) if it appears that the accused is in another State, they may apply for legal assistance and question the accused in accordance with the procedure laid down in the EIO Directive (Article 24),⁸³ which covers all stages of criminal proceedings, including the trial phase. The latter, however, is not an easy solution in terms of either time or resources.⁸⁴ Some national implementing legislation allows the questioning of a suspect or accused person by videoconference only if they consent (with 'refuses' indicating mandatory grounds for non-recognition), while other national implementing legislation is less strict in its wording (with 'may refuse' indicating optional grounds for non-recognition).

Videoconference hearings in the trial phase are not used by those Member States whose domestic law requires the actual presence of the accused at trial. These countries may, however, execute such EIOs issued by the Member States where videoconferences are allowed, provided that the rights of the accused are guaranteed and where doing so by videoconferencing is not contrary to the fundamental principles of law of the executing Member State (Article 24(2)(b) of the EIO Directive).⁸⁵ An accused person is protected by the rights granted by both legal systems (see Article 24(5)(e) of the EIO Directive).

National courts in Member States that have introduced remote participation, however, face ambiguity in criminal proceedings: on the one hand, the national law allows remote participation; on the other hand, there is an obligation to apply the Directive, which lays down clear rules as to what should be done in order to question a person in another country. The solution to this problem in the case of persons held in detention

⁸⁰ *Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union - Council Declaration on Article 10(9) - Declaration by the United Kingdom on Article 20*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A42000A0712%2801%29>.

⁸¹ *Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters (Current consolidated version: 13/03/2022)*, Eur-lex // <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0041>.

⁸² Alessandra Grio, 'The defendant's rights in the hearing by videoconference': 119–126, in: Stefano Ruggeri, ed., *Transnational Evidence and Multicultural Inquiries in Europe* (Springer, Cham, 2014) // https://doi.org/10.1007/978-3-319-02570-4_10.

⁸³ *Directive 2014/41/EU*, *supra* note 80.

⁸⁴ Gediminas Bučiūnas, 'Europos tyrimo orderio išdavimo problematika', *Teisės apžvalga* 18, 2 (2018): 210–222 // <http://dx.doi.org/10.7220/2029-4239.18.14>.

⁸⁵ Eurojust, *Bendras Eurojusto ir Europos teisminio tinklo pranešimas dėl Europos tyrimo orderio praktinio taikymo* (June 2019) // https://www.eurojust.europa.eu/sites/default/files/Publications/Reports/2019-06-Joint_Note_EJ-EJN_practical_application_EIO_LT.pdf

is predetermined by the fact of limited access to the person. However, the following question remains open: in situations when a national court remotely questions a person who enjoys free movement and is located within the jurisdiction of another State, rather than doing so in accordance with the EIO or the Convention on Mutual Assistance between the Member States, can such participation can be considered lawful? This practical situation shows that the legitimisation of remote participation in proceedings in national law seems to have created a mechanism for disregarding the jurisdictional limits of the State and avoiding the application of the rules of the EIO Directive.

3.4. New EU regulation on digitalisation in cross border cases

The evolution of EU law indicates that, in cross-border cases, the use of technology to conduct proceedings remotely is not the aspect being politically⁸⁶ advanced; rather, it is the standard for the protection of the accused that is being shaped by specific regulation. Regulation 2023/2844⁸⁷ aims to improve the efficiency and effectiveness of judicial procedures and to facilitate access to justice by digitalising existing communication channels, including establishing rules on the use of videoconferencing. The Regulation is the first type of legislation in the EU on the harmonisation of digitalisation processes, including the use of videoconferencing. The adoption of the Regulation has been welcomed:

The 'Digital Justice' Regulation is an important step in the structuring of cross-border digital justice in the Union and paves the way for a (new) European 'digital judicial culture.' In that respect, the Regulation leaves the Member States room for manoeuvre by allowing them to extend its scope to purely domestic judicial procedures – i.e. outside the EU competence based on Articles 81 and 82 TFEU. This is of great significance since digitalisation blurs the boundaries between internal and international proceedings.⁸⁸

Moreover, "it is expected that the new Digitalisation Regulation will add to already existing legal framework as an 'umbrella regulation,' given that it covers a wide range of issues in various steps of legal proceedings in civil, commercial and criminal matters".⁸⁹

The Regulation defines the scope of application in a manner that is distinct from proceedings for the purpose of gathering evidence or for the purpose of a trial that could lead to a decision on the guilt or innocence of the suspect or accused person. Furthermore, it is explicitly stated that the procedural rights enshrined in the Charter and in Procedural Rights Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, 2016/343/EU, 2016/800/EU and 2016/1919/EU are not affected. The Regulation specifically distinguishes the areas of application for cross-border actions according to an exhaustive list of legal acts. Two of these legal acts, Framework Decisions 2008/947/JHA⁹⁰ and

⁸⁶ Deloitte and Directorate-General for Justice and Consumers (European Commission), *Cross-Border Digital Criminal Justice: Final Report* (Luxembourg: Publications Office of the European Union, 2020) // <https://data.europa.eu/doi/10.2838/118529>.

⁸⁷ *Regulation (EU) 2023/2844*, *supra* note 10.

⁸⁸ Marion Ho-Dac, 'Digitalisation of Justice Systems in the European Union: Towards a European Judicial Area 2.0' (The EAPIL blog, 24 February 2024) // <https://eapil.org/2024/02/06/digitalisation-of-justice-systems-in-the-european-union-towards-a-european-judicial-area-2-0/>

⁸⁹ *Ibid.*

⁹⁰ *Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions*, Eur-lex // http://data.europa.eu/eli/dec_framw/2008/947/oj.

2009/829/JHA⁹¹, already legalised the use of videoconferencing before the adoption of the new Regulation, but neither defined the requirements for its use nor set standards for the protection of the right to fair trial.

One of the most significant developments in regulation is the introduction of a clear and comprehensive definition of videoconferencing. This definition prioritises the protection of fundamental criminal procedure principles such as immediacy and orality: "Videoconferencing means audio-visual transmission technology that allows two-way and simultaneous communication of image and sound, thereby enabling visual, audio and oral interaction" (Article 2(6)). Furthermore, the Regulation (Recital 33) sets out technical requirements for identification and communication: the technology used must enable the authority to identify the person, and must meet the visual, audio and verbal requirements for communication. Finally, the Regulation requires that the technology used must ensure data protection. The Regulation prohibits the use of technology that lacks at least one of these capabilities, such as telephone communication.

The Regulation provides a detailed account of the legal safeguards in place, and does not make the use of videoconferencing compulsory, but merely optional (Recital 31). Consent is an essential requirement for the use of videoconferencing, and deviations from consent may be permitted only in exceptional circumstances (Article 6(2)(b)). The Regulation refers to such cases as serious threats to public security or public health that must be tangible ("which is shown to be genuine and present or foreseeable"). According to Article 6(2)(b) of the Regulation, it is required that consent be both unambiguous and voluntary. The emphasis on obtaining consent confirms that videoconferencing is acknowledged to pose potential threats to a person's procedural rights and, as such, cannot be used coercively or without the person's explicit consent.

The provisions of the Regulation on legal safeguards also include ensuring access to legal assistance. The Regulation establishes a separate right to consult a lawyer before giving consent to participate by videoconference, and also provides that the confidentiality of communications between lawyers and participants of the procedure shall be ensured both immediately before and during the hearing (Recital 46). Member States must ensure that the persons concerned have access to the necessary infrastructure to use videoconferencing or other distance communication technology, and that communication with lawyers is confidential both before and during the videoconferencing hearing, or when using other distance communication technology.⁹²

In summary, even if the Regulation defines the limits of its direct impact for procedural rights enshrined in the Charter and in the procedural rights directives, it is the first of its kind in the EU to identify potential risks associated with remote participation in the criminal process and to establish minimum measures for cross-border cases to avoid risks to procedural rights caused by technology.

3.5. The desire for clarity in future CJEU case law

A review of EU legislation reveals that the regulation of remote criminal proceedings is a matter of some uncertainty with respect to the procedural rights guaranteed by EU law. On the one hand, there is a strong policy in favour of digitalisation; on the other

⁹¹ Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, Eur-lex // http://data.europa.eu/eli/dec_framw/2009/829/oj.

⁹² Anna Pinggen and Thomas Wahl, 'New Legal Framework on Digitalisation of Judicial Cooperation', *Eurcim* 4 (2023) // <https://eucrim.eu/news/new-legal-framework-on-digitalisation-of-judicial-cooperation/>.

hand, there is fragmentation and ambiguity in the regulation. This is evidenced by the fact that on 4 July 2024, the CJEU delivered in case *FP and Others* C-760/22,⁹³ its long-awaited first preliminary ruling to deal specifically with the assessment of distance proceedings.

The background of the case is as follows: the court of appeal referred the criminal case back to the court of first instance in 2021. As the defendant lived in the UK, he had requested to participate remotely; his defence lawyer was physically present in the courtroom and did not object. The court allowed remote participation because at the time the Temporary Pandemic Act was in force, which allowed for remote proceedings. In addition, the court took measures such as ensuring a connection where simultaneous communication was possible, allowing remote participation to be opted out of at any time, and allowing confidential communication with the defence counsel. By June 2022, the defendant had participated several times in person and several times remotely, and had requested that the proceedings be continued remotely. However, the court questioned whether he could continue the proceedings in this way. In this case, the accused expressed a preference to continue the proceedings online, even though the Criminal Procedure Act does not explicitly provide for nor prohibit this form of participation as a right.

As a result of this, the court sought to test the compatibility of remote proceedings with EU legal standards by asking the following question: Can online presence be qualified as 'presence' within the scope of the right to be present as interpreted in Directive 2016/343/EU? The Advocate General's opinion⁹⁴ serves to further enhance the intrigue provided by this case and expands on the issue. In their submission, the AG argued that Article 8(1) of Directive 2016/343 should be interpreted as exempting the use of videoconferencing in criminal proceedings from its scope, which would then be for the individual Member States to regulate. Two potential a priori approaches to the matter may be identified: firstly, to confirmation the functioning of EU law, and secondly, to leave regulation exclusively to the Member States.

CJEU has determined that the Directive 2016/343 does not extend to the regulation of remote participation. In its interpretation of the Directive's 2016/343 substance and objectives in the context of the question at issue, the Court reasoned that the purpose of the Directive 2016/343 is to establish minimum common rules on certain aspects of the presumption of innocence in criminal proceedings and the right of suspects and accused persons to be present at trial. It is not intended to harmonise in detail the criminal procedure in the context of the trial of such persons⁹⁵. Although the Court of Justice stated that the regulation of videoconferencing falls outside the scope of the Directive 2016/343, it nevertheless made it clear that the general right to participate in proceedings, as enshrined in the Directive, is compatible with remote participation⁹⁶.

Moreover, the judgment suggests that if Member States enable the accused person to exercise the right to be present at his or her trial remotely, the rules they lay

⁹³ '*FP and Others (Procès par visioconférence)*, CJEU (Case C-760/22). Case information', InfoCuria // [https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-760%252F22&-for=&jge=&dates=&language=en&pro=&cit=none%252CCJ%252CCR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&qp=&td=%3BALL&avg=&lgrc=en&lg=&page=1&cid=2996172](https://curia.europa.eu/juris/liste.jsf?nat=or&mat=or&pcs=Oor&jur=C%2CT%2CF&num=C-760%252F22&-for=&jge=&dates=&language=en&pro=&cit=none%252CCJ%252CCR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&qp=&td=%3BALL&avg=&lgrc=en&lg=&page=1&cid=2996172).

⁹⁴ 'Opinion of Advocate General Medina, delivered on 18 April 2024, Case C 760/22', InfoCuria // <https://curia.europa.eu/juris/document.jsf?text=&docid=284899&pageIndex=0&doclang=EN&-mode=lst&dir=&occ=first&part=1&cid=269395>.

⁹⁵ '*FP and Others (Procès par visioconférence)*, CJEU (Case C-760/22), supra note 92, para. 27.

⁹⁶ '*FP and Others (Procès par visioconférence)*, CJEU (Case C-760/22), supra note 92, para. 33.

down may not undermine the objective pursued by Directive 2016/343, which is to enhance the right to a fair trial in criminal proceedings⁹⁷. This means that remote participation has been assessed as a possible additional mean of ensuring participation in court. The use of such a means must be consistent with the aim of extending the rights provided for in the Directive, ensuring a higher level of protection⁹⁸. In its ruling, the CJEU established that national states possess the prerogative to determine the regulation of remote criminal proceedings. However, the rules established by these states must comply with the standards set forth in the Charter and the ECHR, which guarantee a fair trial, the presumption of innocence, and the right to a defence.

CONCLUSIONS

As can be observed from the evolution of EU law, the standards for the protection of rights in criminal proceedings using videoconferencing have been established in only cross-border cases to date, thus recognising the scope of EU law. Standards for the protection of the rights of the accused in remote proceedings (in domestic cases) exist in a grey area, as after the judgment of CJEU this does not fall within the scope of EU law as regulated by the Directive 2016/343.

The adoption of the Regulation 2023/2844 makes it possible to discuss minimum EU legal safeguards and guidelines on the protection of the right to a fair trial in criminal proceedings conducted remotely. Moreover, in terms of the protection of the rights of the accused, it is important that clear requirements for videoconferencing have been established, limiting the use of any technology that does not ensure the ability to both see and hear.

In light of recent developments in the EU's policy to facilitate the digitalisation of criminal justice, the regulation of general requirements for the use of videoconferencing during the trial phase of criminal proceedings by directives establishing uniform minimum standards that safeguard the right to a fair trial and foster mutual trust within the EU would complement the EU legal framework, and would strengthen the possibilities for ensuring the proper, practical implementation of the standards developed by the ECtHR for the protection of the rights of the accused in criminal justice.

Within the limits of EU competence, certain decisions to encourage the digitalisation of justice at the national level as a prerequisite for the digitalisation of justice in a pan-European context could be suggested. The main questions that should be regulated are the right to consult a lawyer, the protection of confidentiality, consent, and exceptions to consent. The following requirements, arising from the ECtHR case law and new EU legislation in cross-border cases, stand out as possible standards for the protection of the rights of the accused in remote proceedings:

- Remote participation should be established as an alternative form of participation that is applicable with the consent of the accused and their defence counsel, except in emergency circumstances.
- The presence of a defence counsel when the accused participates in the case hearing remotely should be made necessary.

⁹⁷ *FP and Others (Procès par visioconférence)*, CJEU (Case C-760/22), *supra* note 92, para. 30.

⁹⁸ Inga Žukovaitė, 'Op-Ed: A preliminary ruling on the possibility for an accused person to participate in hearings via video conference: FP and Others (C-760/22)', *EULaw live* September 23, 2024 // <https://eulaw-live.com/op-ed-a-preliminary-ruling-on-the-possibility-for-an-accused-person-to-participate-in-hearings-via-videoconference-fp-and-others-c-760-22/>.

- The importance and significance of ensuring unrestricted contact between the accused and their defence counsel should be emphasised.
- All participants of the hearing, especially the judge, should be able to visually identify each other and not only hear, but also see everybody present at the hearing. Therefore, only technology that meets such requirements should be eligible for use.
- The use of technology must not impede access to the case-file material presented at the hearing; therefore, there should be a procedure for the defence to exercise this right in such a case.

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