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Enhancing the Right to be Present

PRESENT

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D3.4 Recommendation List

Partner: VICESSE

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Executive summary

The following report, *D3.4 Recommendation List*, contains all measures which have been identified to be the most successful and effective and that could be applied in all countries regarding the implementation of Directive 2016/343. The purpose of this Deliverable is to reach out to decision and policy makers, while providing them with an expert opinion and workable solutions on how the legislation should be amended in order to achieve unification and high effectiveness of legal remedies. Following the PRESENT seminars, partners were tasked with drafting a report of the national seminars, summarising all relevant outcomes from the discussions. On the basis of the national seminar reports, the WP-Leader (VICESSE) has compiled the following recommendation list which will be presented by all partners during the national roundtables.

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I. Introduction

PRESENT*, Enhancing the Right to be Present*, is an EU-funded research project with partners from Austria (VICESSE), Bulgaria (LIF), Romania (CRPE), Slovakia (CUB), Cyprus (UCY), and Portugal (IJP). It is dedicated to the fundamental rights of persons suspected or accused of crimes. Having started in 2018 with a runtime of two years, the aim of the project PRESENT is to enhance the right to be present at trial for persons suspected or accused of crimes, as well as to strengthen certain aspects of the presumption of innocence. To this end, the current project is aimed at gathering and transferring comprehensive knowledge on the right to be present; contributing to the implementation and the practical application of Directive 2016/343/EU; enhancing the effectiveness of legal remedies; fostering unification of judicial remedies; as well as strengthening mutual trust among member states.

As part of *WP3, Seminars*, the following report entitled *D3.4 Recommendation List*, contains all measures, which have been identified to be most successful and effective regarding the implementation and application of Directive 2016/343 and that could be applied in all countries participating in the project PRESENT.

The aim of this report is to reach out to decision and policy makers, while providing them with an expert opinion and workable solution on how the legislation should be amended in order to achieve unification and high effectiveness on the legal remedies. The outcomes and findings from the discussions of 13 national seminars (Austria 2, Bulgaria 2, Cyprus 3, Romania 2, Slovakia 2, and Portugal 2) are integrated in this report, which is structed as follows: Chapter II gives an overview of the Methodology. Subsequently, Chapter III provides a Recommendation List that should provide decision and policy makers with an expert opinion and workable solution on how the right of the accused to be present at trial can be applied in practice. Chapter IV provides concrete policy recommendations for national legislators on how the legislation in Austria, Bulgaria, Cyprus, Portugal, Romania, and Slovakia could be amended in order to fully transpose the standards set out in the Directive. Lastly, Chapter V provides a final comparative Conclusion.

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II. Methodology

In the second year of the project PRESENT, 13 national seminars were conducted in 6 partner countries (Austria 2, Bulgaria 2, Romania 2, Cyprus 3, Slovakia 2, and Portugal 2).

The structure for the seminars was developed by VICESSE and presented during the interim work meeting in Bratislava (January 2019). Subsequently, consortium partners discussed the proposed format in the meeting and agreed that the main challenge for conducting the national seminars will be to ensure the participation of expert target groups (judges, prosecutors, lawyers, and academics), as these groups of professionals usually work on a very tight agenda. Therefore, the consortium agreed to proceed with a rather open approach regarding the national seminars, in order to allow that each partner is able to use their own entry points to reach the target groups. Further, partners agreed that the location of seminars should not limited to the city of the permanent establishment of the respective partner's organisations.

Notwithstanding, a unified approach was chosen in order to ensure the comparability between the outcomes of the national seminars. Therefore, three pillars were incorporated in the event guidelines, namely: the presentation of all preliminary findings from the previously conducted research (the PRESENT Paper and the PRESENT Best Practice guidelines); a discussion on legal measures' effectiveness in the national context (challenges, best practices, policy recommendations); and a discussion on the use of ICT based tools for notifying the accused.

More precisely, it was agreed upon that discussions should highlight weaknesses of the transposition of the Directive in national legislation and corresponding to that to identify examples of best practices. In addition, lessons learnt from partner countries in order to improve judges', prosecutors', police officers' and lawyers' knowledge and competences in the field was included. The latter is essential when it comes to the enforcement of a decision, taken in partner countries. Overall, knowledge about the transposition of EU law in other member states that ensure defendant's rights is essential to strengthen mutual trust between member states.

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Following the above-mentioned format, each partner conducted 2 national seminars (Cyprus 3) until July 2019 with criminal justice professionals including lawyers, judges, prosecutors, and police officers. All participants of the seminars were sent a protocol containing the main discussion points with a request for validation. Subsequently, a seminar report containing the validated outcomes of the expert focus groups discussions (in form of concrete policy recommendations and identified examples of promising practices) was drafted by partners and collected by the WP-leader. Based on these national seminar reports, VICESSE has drafted this deliverable, *D3.4 Recommendation List,* which will be presented by partners during their national roundtables.

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III. Key Findings: Promising Practices

The right of the accused to be present at trial is one of the most important dimensions of the safeguards of defence that are part of the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights. To strengthen this right, *Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings,* lays down minimum standards regarding trials held *in absentia* of the accused. Specifically, the Directive has the purpose to enhance the right to a fair trial in criminal proceedings by determining common minimum rules for certain aspects of the presumption of innocence and the right to be present at trial. All member states were obliged to transpose the Directive into their national legal systems, hence, providing for and assuring the safeguarding of the right to be present before court. Herewith, the Directive aims to strengthen the trust of member states in each other's criminal justice systems and the mutual recognition of decisions in criminal matters.

In the course of the two-year research project, the PRESENT consortium worked closely with judges, prosecutors, lawyers, and police officers as well as other relevant practitioners in order to identify the most successful and effective measures to guarantee the accused's right to be present at trial. One of the central aims of the research activities was to identify measures that might be applied in all countries. These recommendations should provide decision and policy makers with an expert opinion and workable solution on how the right of the accused to be present at trial in the sense of Directive (EU) 2016/343 can be applied in practice.

Due to the distinct legal frameworks and existing administrative systems in place in EU member states, however, every country inevitably produces divergent answers for transposing and implementing EU directives on national level. In the case of Directive (EU) 2016/343, for example, member states that have a nation-wide residence register in place will understand their responsibility to transpose the norms of the Directive in a different way, as compared to other member states that do not have the tradition of such an administrative system. For example, in the Austrian seminars, participants considered the establishment of nationwide residence registers – as existing in Austria – as an essential

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prerequisite for a well-functioning summoning procedure. On the other side, in Bulgaria and Romania, discussions focused more on the possibility of ICT tools for the notification of the accused.

A key aspect for EU policy making is, thus, to include and understand the role of context. It is important that EU policy makers consider the different contextual factors, including different legal and administrative systems, to develop more flexible means to influence policies and practices in the member states.

Whereas certain best practices might not be directly applicable to other member states as they stem from particular national contexts, the identified examples of best practices within the project PRESENT, are characterised by a certain degree of transferability. Furthermore, they might also be found in more than one member state.

1. Austria – A well-developed and functioning administrative system

During both Austrian seminars, participants agreed that a well-developed and functioning national administrative system – including a residency register and a postal system – is one of the most important prerequisites for ensuring the summoning of the accused person. They argued that the more ineffective the residency registration system or the postal system of a country is, the more tasks must be taken over by the police and the judiciary.

For example, if a country only possesses a poorly developed mail delivery system, other authorities like the police have to perform tasks, such as detecting an accused person's residence or whereabouts in order to inform him/her about the accusation as well as to deliver the summons. Therefore, Austrian experts highlighted the importance of a well- functioning administration system with effective mail delivery services on the national level.

2. Austria – Establishing nation-wide residence registers

During the discussion in the Austrian seminars it was highlighted that not all EU member states

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have a nationwide residence register, causing ambiguity regarding mail deliveries, for

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example, in cases with wrong or outdated addresses. Therefore, the establishment of nationwide residence registers – as existing in Austria - was considered to constitute an important prerequisite for a well-functioning notification procedure.

In Austria, the resident registration system is well developed. Every person living in Austria must be registered in the resident register. A change of residency can be conducted in three ways: in person, via mail, or delivered by a person of trust. It is necessary to fill out a residence registration form (in German: *Meldezettel-Formular*), which can either be downloaded online or picked up at the registration authority. Online, however, the form is unfortunately only available in German.

3. Bulgaria – Detailed requirements for summoning accused persons

The Supreme Court of Cassation of Bulgaria (SCC) is the fourth phase of the criminal procedure at court level and is tasked with the supervision of court decisions that have not yet entered into force. The SCC examines only whether the law is implemented correctly on the basis of facts adopted by the two previous court instances. Several good practices underlined in the case law of the SCC were identified in the course of the PRESENT project.

For example, the SCC clarified that the competent authorities are to execute all necessary actions for the accused person to be duly summoned to court. If necessary, those actions could be applied with the assistance of the law enforcement authorities from other EU member states or international organisations (Interpol, Europol, Frontex, etc.). If there is a need, the summoning actions aimed to bring the accused to court are to be repeated.

Moreover, the SCC highlighted that the accused person should receive the subpoena personally alongside with the accusation indictment and all other relevant documents for the trial. If he/she is absent from his/her address, the subpoena could be received from his/her closest family members or other persons that live with him/her. The list of persons who can receive the documents is exhaustively listed in Article 180 from the Bulgarian Criminal Procedure Code (BCPC).

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The subpoena must contain an explicit description of the consequences for non-appearance at trial. If the accused leaves the country in the course of the criminal procedure, he/she must be summoned again after he/she returns (Case 265/17.06.2015 of Criminal Chamber No 1). Another good practice is related to the situation when the summoning address of the accused person must be confirmed by the persons they live with. Also, they could confirm if the accused is absent from the country or detained in prison (Case 295/27.06.2015 of Criminal Chamber No 1).

4. Austria – Summoning accused persons: "registered personal delivery"

According to the Austrian Code of Criminal Procedure, every court letter that causes a time limit in which an appeal must be submitted, must be sent by "registered personal delivery" (in German: *zu eigenen Handen,* see § 83 (3) Code of the Criminal Procedure). If a letter is sent via this delivery method, the letter can be only received personally by the recipient and by no other person. After having received the delivery, the recipient must sign a receiving confirmation (in German: *Rückschein*), which is noted in an internal system, to which the responsible criminal judge and his or her office has direct access. The signed receiving confirmation is sufficient proof that the accused has received the summons. The idea of the registered personal delivery is, thus, that the recipient receives "direct notice" from the delivery and that there exists a certain proof that – and when – the recipient received a letter.

The delivery of the summons is generally performed by the Austrian Post as delivery service. As this mailing method ensures that the accused person has been personally informed about the charges against him/her, participants identified it as a promising practice.

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5. Austria – Voluntary notification of absence

In Austria, the delivery of summons or other letters of the court is generally performed by the Austrian Post. The Austrian post offers the service of a notification of absence (in German: *Abwesenheitsmitteilung*) as a form of voluntarily notifying authorities when travelling. With this notification, every resident of Austria has the option of having incoming formal letters (in German: *RSa or RSb-Briefe*) returned to authorities and public offices in their absence. This notification can be made in a post office, or online on the webpage of the Austrian Post. While the settled case law does not require residents to make such a notification of absence, this option makes procedures less complicated and cheaper.

6. Bulgaria – Possibility to notify the accused person via email

The Supreme Court of Cassation of Bulgaria (SCC) clarified through case-law, that there exists the opportunity that the accused person to be summoned by email. This matter was further discussed with participants in the seminars, who highlighted that the summoning via email could be preferred when the accused is a foreign citizen. When using email as a notification medium, the accused could not only be reached without any difficulties, but also the accusation could be presented to him/her in a clear and understandable manner. In relation to the email, the summoning could be organised in an e-system for receiving legal documents.

7. Austria – Strict legal requirements for holding trials *in absentia*

From the point of view of the participants in the Austrian seminars, the number of trials *in absentia* in Austria is very low, one of the reasons being the strict legal requirements for holding a trial in the absence of the accused. In Austria a trial *in absentia* may only be held, if 1) the person is accused of having committed a misdemeanour (in German: "Vergehen") and not an offence (in German: "Verbrechen"); 2) the accused was already heard in the case; and if 3) the accused was sent a formal summons which contained all the necessary information. No trials *in absentia* may be held in the case of juveniles or adolescents (see § 427 Code of

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the Criminal Procedure). Further, the indictment cannot be expanded or altered, if the accused was not heard on the matter.

8. Austria – The judges' discretion as an important prerequisite for a fair trial

If all legal requirements are met in Austria, it is ultimately the judge who decides if a judgment will be taken in the absence of the accused person. As an unlawful judgment in absentia may lead to the nullity of the verdict, Austrian judges tend to uphold the legal requirements particularly well. The discretion of the judge is therefore an essential prerequisite for the protection of the right to be present at trial and can be regarded as good practice, if exercised with due diligence. Against this background, the awareness of judges for the (procedural) rights of the accused, was considered to be a crucial factor for the protection of the right to be present during the discussion in the Austrian seminars.

9. Austria – Cancelation and resumption of the criminal proceedings

The Austrian law provides for the possibility to pause (in German: "Abbruch") the proceedings and to resume them as soon as the accused was located.

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IV. Policy Recommendations for Austria, Bulgaria, Cyprus, Portugal, Romania and Slovakia

One of the central aims of the PRESENT project is to provide decision and policy makers with an expert opinion and workable solution on how the legislation should be amended in order to achieve unification and high effectiveness on the legal remedies. The following chapter includes policy recommendations for Austria, Bulgaria, Cyprus, Portugal, Romania and Slovakia on how to adopt the previously identified examples of promising practices.

1. Austria

In Austria, the research results show that regulations concerning the right of the accused to be present at trial were already quite developed before the implementation of Directive 2016/343. In fact, all the minimum standards set out in the Directive regarding the right to be present at trial (Chapter 3 of the Directive) and the presumption of innocence (Chapter 2 of the Directive) already existed before the transposition process. As a result, the Austrian seminars were mainly aimed at collecting promising practices. As all minimum standards set out in the Directive are met, no policy recommendations could be identified.

It should be mentioned at this point that while the possibility of a demonstration of the accused by the police was mentioned as best practice example by participants, it was not included in the recommendation list above. The reason for the latter is that this measure is not ensuring the right of the accused to be present but constitutes an act of force to compel the accused persons' duty to be present at trial. In such cases, police officers appear unannounced (usually between 04:00 – 06:00 am) at the accused persons' residence. According to the participating police officers this approach enhances the probability to encounter the accused person at his/her home/residence. While this practice might serve as an example to ensure the presence of the accused persons at trial, it does not enhance his/her right to be present and is, hence, not included in the recommendation list.

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2. Bulgaria

In Bulgaria, there are several policy recommendations that could be introduced to the national legislation, so that the right of the accused person to be present at his/her trial is guaranteed. There are already certain cases where these practices are implemented with different results. First, the legislation should consider the opportunity for the accused person to be summoned via email or phone. The summoning by email could be preferred when the accused is a foreign citizen because not only, he/she could be reached without any difficulties, but also the accusation could be presented to him/her in a clear and understandable manner. In relation to the email, the summoning could be organised in an e- system for receiving legal documents compliant with the respective rules on electronic trust services.

Another policy recommendation for the improvement of the functioning of the national regulations related to criminal proceedings conduct is the prospect of using video conferences with the defendant if he/she is absent from the country or cannot be present at his/her trial for some other reason.

Other policy recommendations are related to the improvement of the criminal procedure itself. First of all, when the sentence is brought to execution, there is a need to regulate an explicit obligation for the executing public body to inform the sentenced person of the right to retrial.

Moreover, from a legislative point of view, another policy recommendation that was formulated during the PRESENT seminars in Bulgaria, pertains the introduction of the legal concept of "suspect" into the national legislation. As the pertinent Bulgarian legislation provides for the rights of the accused, this hinders the exercise of the rights enshrined by Directive 2016/343 at the very early stage of the criminal procedure, before a person is formally accused. The lack of this role in the criminal procedure is also troublesome from judicial cooperation in criminal matters point of view – in the scope of on-going proceedings pursuant the procedure of a European Arrest Warrant or European Investigation Order.

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Finally, the participants in the Bulgarian seminars shared a recommendation that could be easily implemented: better interaction and communication between the different actors involved in the investigation of the crime and defending the accused. This could improve the way that the accused person is informed of his/her indictment and how he/she could be summoned for his/her trial.

3. Cyprus

Discussions from the national seminars in Cyprus involved the criminal justice system and the Directive's transposition. From a formal point of view, the addition of new articles in the very beginning of the Criminal Procedure Law (a Code that goes back to the 1950s or earlier and has seen little change in its general provisions), sounds pathbreaking and created some interest – and a small degree of concern – by practitioners. But the legislative amendments
– which concern aspects of the presumption of innocence – did not bring in any change as to the criminal process. A certain degree of pride was expressed insofar, as Cyprus has integrated the European Court of Human Rights standards in this area and was therefore up- to-date even prior to the Directive's transposition. The educative value of putting these principles into legislative form was nonetheless underlined by the speakers – especially as the number of members of the legal profession has recently exploded, but also as the society has become markedly more complex and criminality has also increased, leading to new challenges for everyone involved in the administration of justice. This was also pointed out by non-lawyer participants, such as prison and police officials.

One area where the Cyprus legislation is introducing novelties concerns public statements by public officials. In this area as well, the legal system is supposed to be following the high standards set under the European Convention on Human Rights. However, this has not always been the case, so the legislative provision was, in the opinion of the participants, clearly needed. The actual legislative provision includes a detailed list of who constitutes a public official for purposes of the provision. Such an exhaustive list presents the obvious advantage of clarity as to who may make what statement. At the same time, the list was criticized for over-inclusiveness, on the one hand (as it could be construed to include even academics who have

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been asked to write a report for the government or the courts) and

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being incomplete, on the other (the legislative branch of government has taken itself out completely): it is understandable that parliamentarians must be protected in the exercise of their duties and against malicious or unfounded complaints, but there may nonetheless be instances where the damage done to an accused or suspected person is both unnecessary and of such a scale as to constitute a violation of the accused person's rights. This is a point that will solicit further discussions in the next round of these events.

Cyprus opted not to adopt a legislative provision regarding the right to be present. The argument presented by the Supreme Court in lobbying parliament to drop the original bill's proposal (a verbatim transposition of the Directive's Article) was that judges, who, at present, in exercising their discretion show high regard for the right to be present and demand the accused person's presence especially in offences may actually feel more compelled to allow trials in absentia, if faced with a legislative provision. With no judges present in either seminar, some frank opinions were expressed but on the whole the opinion of participating legal practitioners was the system operates satisfactorily even without a legislative provision and that such a provision might have indeed side effects leading some judges to take a less liberal attitude towards absent accused persons.

Whereas, traditionally, there has been no real problem with trials in absentia, the reverse problem exists on occasion, where after repeated failed efforts to summon the accused, charges are withdrawn. That means in effect that in some instances, certain crimes go unpunished. Such a feeling may over time lead to a change in position in favour of allowing trials in absentia under procedural guarantees such as the ones in the Directive 2016/343.

4. Portugal

In Portugal, procedural reinforcement was suggested as policy recommendation regarding a number of aspects, including the judicialization of the identity and residence registration (IRR) collection process and the creation of a centralized IRR register as well as evidence of the reliability of the data provided by the defendant. Furthermore, the definition of a reasonable and renewable duration, indexed to the duration of the investigation, for the IRR

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was suggested as well as requiring reasonable diligence in proving the whereabouts of the defaulting defendant when there is evidence in the case file that he/she was not aware of the judgment.

Finally, the Portuguese Criminal Procedure Code (PCPC) also requires some amendments in order to provide for the possibility of retrial for those cases where, despite the reinforcement of the notification guarantees, it will be proved after the decision that the trial was not actually made of the defendant. The form of this retrial may consist, by way of example, of the possibility of an appeal or a retrial, suggesting the return to the solution of the previous
§ 380a of the PCPC, in the wording of Law 59/98., August 25th.

5. Romania

In Romania, several policy recommendations have been gathered from criminal justice professionals who have participated in the seminars, such as improving the methods and instruments used by the Romanian Post (public company) in handling the subpoena/summon system and in ensuring that the accused person has received the document in time, thus ensuring their right to be present in court. Accordingly, the use of alternative post/mail companies (private companies) along the Romanian Post was suggested, in order to ensure a more safely and efficient handling of the subpoenas/summons.

Moreover, training for the Romanian post staff aimed at increasing their capacity to ensure that the subpoenas/summons are handed out according to the national legislations, by following each step thoroughly constitutes a suggested policy recommendation. On the level of the police, it is recommended to provide additional staff training for police in order to enable police officers to better identify the location of persons when a warrant of arrest is issued, and, to this end improving the methods and instruments used by police officers in finding the location of a certain person when a warrant of arrest is issued.

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Finally, introducing into the national legislation the option of summoning a person through social media platforms, in cases when the accused person cannot be found through any other method was suggested.

6. Slovakia

In Slovakia, the most important policy recommendation concerns the Directive itself. Due to the fact that the right to be present is recognised as a fundamental human right in all relevant acts of international law either of the United Nations, the Council of Europe or the European Union, it is recommended that due to this fact, the protection of such an important right may not be adequately ensured through the legal instrument of an EU directive.

In view of this fact, several participants of the seminars in Slovakia fully supported the policy recommendation, that this right has to be protected and guaranteed by a much stronger legal instrument. To this end, it is recommended to implement an EU regulation instead of the existing Directive (EU) 2016/343. In addition, on the basis of the discussions at both seminars, it was also recommended that the particular terminology of this existing Directive (EU) 2016/343 would need some more precision regarding key terms such as “suspect”, “accused person”, and “sentenced person”, as the e.g. English and Slovak terminologies determine some differences in their interpretation, which given the importance of the right to present as fundamental human right, could cause unnecessary problems.

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V. Conclusion

From the beginning of the PRESENT project it was clear, that some of the participating countries will be more likely to identify examples of best practices, while others will focus more on discussing how their legislation could be amended. Previous research that was conducted in the scope of the PRESENT project[1] disclosed the inability of a few member states to comply with some of the minimum standards enshrined in the Directive, while the implementation of the Directive was redundant in others.

In Austria, for example, the right to be present at trial was already enshrined in various laws, including constitutional law, before the transposition of the Directive. Also, in Bulgaria the right to be present was already defined and case law gradually introduced stricter rules for summoning the accused. Also, the national legislation in force in Slovakia provides sufficient protection for the right to be present at trial, while challenges still exist.

In Romania, on the other hand, there exists no national consensus regarding the measures that should be taken in order to fully comply with the Directive. Although several steps have been taken to ensure that the accused is appropriately summoned, often the existing notification system is ineffective. Likewise, in Portugal, there exist several challenges in implementing the right of the accused to be present at trial, including the non-existence of a reliable summoning system. In Cyprus, it was decided that the existing common-law regime may be more protective of accused persons than a more formal legislative system. It is due to this cause, that the recommendation list, only lists best practice examples from Austria and Bulgaria.

For example, the regulations and practices in Austria to ensure the right of the accused to be present at trial are quite developed and efficient. As a result, the majority of promising practices identified within this report derive from Austria. Likewise, in Bulgaria, the right of the accused to be present is well established, particularly due to settled case-law and practices. Therefore, research in Bulgaria used case-law as a source for identifying promising practices. While in Slovakia the national legislation provides for sufficient protection for the

[1] See Deliverable 2.3 Evaluation of Legislation Compiled, P 171 ff.

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accused' right to be present at trial, no best practices that can be applied in all other countries could be identified.

In Portugal, on the other hand, given the lack of flexibility of the national legislator and the strong doctrinal conviction that the principle of supremacy of EU law does not apply to constitutional norms, along with the lack of awareness on EU law by all the groups addressed, no identified promising practises were put forth. Similarly, in Romania, there exist several challenges regarding the right to be present at trial. Although, several steps have been set out for ensuring that the suspect or accused receives the summons, often the system proves itself as ineffective and can lead to misinterpretation of the law. Therefore, no best practices could be identified in Romania. Lastly, the Cyprus legislator was of the view that the existing common-law regime that regulates the accused person to be present at trial is more protective of accused persons, indicating at the same time, that this could change over time.

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