

Presumption of Innocence: procedural rights in criminal proceedings

Social Fieldwork Research (FRANET)

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PART A. EXECUTIVE SUMMARY

The right to be presumed innocent in general: There is no constitutive article in the Belgian constitution or Belgian code of criminal procedure (CCP) concerning the protection of the presumption of innocence. However, it is accepted as a general principle of criminal law and additionally, protected on the basis of article 6 § 2 ECHR. Further, the rights specific to the presumption of innocence, i.e. the right to remain silent and the prohibition against self-incrimination, are included in the CCP, in particular with regard to conducting interrogations.

The research found a general high awareness and internalisation of the importance of the presumption of innocence among all the respondents. The respondents among the several actors name particular roles they take in their professional activities to ensure the presumption of innocence. The respondents highlight that the respect for the presumption of innocence has increased due to introduction of the Salduz-rights.

During investigations, the main factor impacting on the presumption of innocence is in the phase of investigation (lawyers, police and prosecution) mention the phase in which the investigation is. Once law enforcement has decided on a given hypothesis of the facts, bias or a tunnel vision occur. The openness to analyse or accept counter narratives may diminish.

During the trial phase, the criminal record of the defendant can impact on the presumption of innocence according to respondents. Whereas this can be taken into account for the severity of the punishment, respondents agree that it may affect the finding on the complicity of the person to the alleged crime. Further, respondents mention that the nationality or ethnicity of a defendant can create a bias or prejudice when the defendant is prosecuted for certain crimes often linked to the given nationality or ethnicity.

Public references to guilt: The role of the media on the presumption of innocence is evaluated overall negative by the respondents, with some respondents even unable or unwilling to mention a single positive impact of the media on the presumption of innocence. Respondents believe that reporting is often erroneous, partly due to speed, and focused on sensationalism. Whereby respondents accept the role of the media in reporting on judgments, there is a general agreement among the respondents that it has a negative impact in the phase on the investigation on the presumption of innocence, but also the possibility to have a serene debate and the effectiveness of the investigation. There is a high level of trust among the respondents that public references do not impact on the judge deciding the case, but a low level of trust as to the impact on the wider public. A public reference is considered as a “stamp” by the respondents. Social media is referred to by many respondents as a particular challenge.

Respondents believe leaks to journalists and negative coverage in the phase of the investigation not to be attributable to one actor within the criminal justice system. Due to the constitutional protection of the freedom of media and freedom of information as well as the protection of journalist sources, reporters can count on a network of sources. However, respondents refer to other actors as to their responsibility of behaviour in the media. It is mentioned that lawyers should not discuss the case in television studios when they are still ongoing. Lawyers find the press communications of the public ministry too detailed which allows for the identification of the suspect and in some instances, too soon, when the facts are still unclear creating unnecessary prejudices against the suspect. Respondents also mention the practice in court to have a public available calendar of cases mentioning the name of the suspect and a reference to the crime for which they are under investigation or prosecuted.

The presentation of suspects and defendant persons: Different restraining orders are used for the transport of defendants and during the audience. The most common are the handcuffing of defendants and the presence of security personnel during the trial. In general, the handcuffs are removed in front of the judge. However, when the defendant moves too much or in high-risk cases the handcuffs will remain. It is mentioned that in such high-risk cases (in particular in terrorist cases) additional security measures can be taken, which are not taken because of the person of the defendant but because of the overall security risk that such cases entail. Lawyers and judges accept that restraining orders can take such measure as to create a certain atmosphere portraying the defendant as dangerous. As to clothing, different practices exist whereby in principle defendants can appear in their own clothing. It is mentioned, however, that in practice due to the organisation of transport from prison or due to a lack of social or family network, detainees often appear in prison clothing.

Respondents claim that in general they have a high level of trust in professional judges to disregard the manner of representation. Judges appear aware of the potential impact of presentation of innocence on the presumption of innocence. In contrast, respondents fear the impact of the representation on media coverage and the general public. The lay-out of courthouses often does not allow for further accommodations to shield a defendant from the public eye. Moreover, respondents note that there are no specific adjustments for vulnerable persons, with the exception of minors appearing before the juvenile court.

Burden of proof: In Belgium, the burden of proof rests on the public prosecution. There are certain examples of a rebuttable reversal of proof on the defendant, mostly in technical economical financial cases e.g. as to the illicit origin of money in cases of alleged money-laundering. Further, the statements of fact in police report also are considered correct unless the contrary can be proven.

As to confessions, all respondents accept that these need to be treated with care and with a critical approach. The introduction of Salduz-guarantees, in particular the assistance of a lawyer, is considered in that respect an improvement as confessions will now in general be made knowingly. Police, prosecutors and judges believe that such confessions are best supported by underlying material evidence, given there might be other reasons to confess or, from their perspective, such confessions may be retracted.

The right to remain silent and not to incriminate oneself: All respondents agree on the importance of the right to remain silent and the prohibition of self-incrimination. The actors mostly signal the importance of these rights in the context of the investigation, more particular with regard to interrogations. The respondents make reference of the good practice in Belgium for informing suspects of the right to remain silent before an interrogation, i.e. a clear letter of rights (translated in many languages), the assistance of a lawyer and repetition of the rights in the beginning of the interrogation. The right to remain silent appears moreover ingrained, as police state they will not probe when a suspect invokes the right to remain silent and prosecutors state not to encourage probing. The prosecution states that this has resulted in a shift in the investigation, whereby now more focus is put on getting material evidence instead of focussing on extracting confessions. Judges accept invoking the right to remain silent as an acceptable strategy in investigations and during a procedure. In principle, the right to remain silent will not be taken into account when deciding on the guilt of a person, but respondents highlight that in the exceptional cases where a defendant has not provided any explanation they have no counter-narrative to balance the story of the prosecution. Moreover, it may result in a more severe sentence.

The prohibition against self-incrimination is accepted as well by the respondents as an important right, but from the interviews it is clear that respondents are less aware of its contours, e.g. with regard to

the obligation to give a password or encryption code. In recent cases, the highest courts in Belgium accepted that the obligation on a suspect to give this information under pressure of a prison sentence or a fine is compatible with the prohibition against self-incrimination.

The right to be present at the trial and to have a new trial: The right to be present and right to have a new trial in case of an in absentia judgement, are included in the Belgian criminal code. Recently, the admissibility criteria to have a retrial were restricted. Judges argue that they will look on the request to have a retrial and the reasons for the absence during the first trial with leniency.

Respondents agree that there are several factors that result in many in absentia trials: the manner in which the summons in court are served, the language and content of the summons in court, the lack of mentioning of the consequences of absence in the summons in court, not sufficient time between the serving of the summons and the trial and summoning defendants who have already been deported.

Finally, there is a different appreciation among respondents as to what effective participation to a trial entails, namely merely being present or represented or the possibility to understand and actively participate during the trial. It is mentioned that the technicality of trials, vulnerability, and the lack of sufficient (qualitative) interpreters and limited time to deal with a case limit the possibility for defendants to effectively participate.

PART B. INTRODUCTION

In total, **12 eligible interviews** were carried out in the timeframe of 3 March 2020 to 22 May 2020. The interviews with one judge (at the home of the interviewee) and one lawyer (at the law firm of the interviewee) were held face to face. From 15 March 2020 onwards, due to the implementation of measures to prevent the spread of Covid-19 in Belgium, the remaining Interviews took place via telephone.

B.1 PREPARATION OF FIELDWORK

In preparation for the fieldwork, an interviewer training session was carried out. In preparation for the training, a fieldwork manual was created. The manual was the main material used during the training sessions focused on the project overview, including the research methodology, the project timeline; the fieldwork, including the target groups, the interview reporting templates, recording of interviews; conducting the fieldwork, preparing the interview, approaching respondents, qualitative interview techniques, obtaining informed consent and respecting the rights of respondents; duties and responsibilities of fieldworkers, role of project team; materials and recording and data protection.

In preparation for the implementation of the fieldwork, a number of key interview materials were professionally translated into Dutch. The following materials were translated:

- Three interview guides for judges, lawyers and police
- Consent form
- Privacy Notice

B.2 IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The efforts for identifying and recruiting participants have been focused on three out of the five judicial areas (defined as areas of jurisdiction of the 5 courts of appeal): Brussels, Antwerp and Ghent.

Respondents were identified and selected according to their experience and engagement with media, but also with a view to ensure gender and geographical balance. It is to be noted that the French speaking judicial areas have not been covered.

The selection of participants was approved by the FRA team before invitations to participate were circulated.

The participants were recruited mainly through existing professional relationships with members of the research team. However, in relation to the police officers, it was necessary to receive authorisation from the Director of the Judicial Police of the relevant department.

It was challenging to recruit judges, some of the judges that were approached in the Brussels area did not respond to our invitations, which means that judges from Antwerp were then invited to participate. Furthermore, in light of the Covid-19 pandemic, there was a delay in conducting interviews with judges and prosecutors since they were making efforts in keeping the courts up and running in light of the measures taken by the Belgian government in the fight against Covid-19. As a result, it was difficult for them to commit to an interview date and time, in a few circumstances the interview dates were postponed/cancelled.

B.3 SAMPLE AND DESCRIPTION OF FIELDWORK

The sample, as outlined in Table 1, consisted of 2 police officers, 3 prosecutors, 3 judges and 4 defence lawyers.

Police officers:

Requested: Regional Director of the Judicial Police was contacted and confirmed willingness to have his officers participate, completed: 2

Judges/prosecutors:

Requested: 9, completed: 6 (3 prosecutors, 3 judges)

Defence lawyers:

Requested: 4, completed: 4

Table 1: Sample professionals

Group	Operational expertise on criminal investigations and trials	Experience with media	Gender
Police officer	Police officer at the Federal Judicial Police	No.	Male
Police officer	Police officer at the Federal Judicial Police	No.	Male
Lawyer	Criminal defence lawyer with over 15 years of experience.	Yes.	Male
Lawyer	Criminal defence lawyer with many years of experience.	Yes.	Female
Lawyer	Criminal defence lawyer with many years of experience.	Yes.	Male
Lawyer	Criminal defence lawyer with many years of experience.	Yes.	Female
Judge	First instance court judge who previously was a member of the prosecution service.	No.	Female
Prosecutor	Prosecutor at the public ministry with a general practice.	No.	Male
Prosecutor	Prosecutor at the public ministry with a general practice.	Yes.	Male
Judge	First instance court judge with many years of experience in handling criminal cases.	Yes.	Female
Prosecutor	Substantial white-collar crime expertise.	No.	Male
Judge	Judge with substantial experience in criminal matters.	No.	Male

The length of the interviews ranged from 30 minutes to 95 minutes, with the majority of interviews lasting approximately 70-80 minutes. The interviews were rarely interrupted. The atmosphere and level of trust was not a problem in any of the interviews. One interviewee appeared to be concerned with giving the “wrong answers” whereas all other respondents were more open when answering.

B.4 DATA ANALYSIS

a. Research set-up as to comparative analysis

The interviews were analysed from the perspective of finding 1) patterns of commonalities among respondents and 2) differences in findings between actors:

The term 'respondents' is used to identify individual interviewees independent from their respective role in the criminal justice system (lawyer, police, public prosecutor or judge). As to respondents, the focus is put on finding commonalities in the responses as this increases the potential of common or shared appreciation and objectivity of the findings. In so far a certain experience is only mentioned by one or two respondents, there might be a risk that this experience is particular to the specific interviewee or his or her context.

The term 'actors' is used to identify respondents belonging to the same professional group (lawyers, prosecutors and judges, or lawyers, police and magistrates – see more below on coding). The data from the interview were also compiled on the basis of the coding also actors to analyse whether there were significant differences in findings between the respect professional groups given that these differences a) may suggest different experiences and b) different appreciation of the same experiences. Hence, a certain appreciation will only be accorded to an "actor" if sufficient respondents of this group have provided a similar answer.

This first step of analysis was executed per theme (sub-divisions of themes in the interviews) and on the basis of a comparison between the respondents and actors per question asked. As such, an overview was construed with the different replies for every question with coding as to the number of respondents and as to the weight of replies per actor.

b. Manner of analysis of interviews: coding

For the analysis of this interview the respondents were coded on the basis of their professional group according to the standards provided by the guidelines, namely lawyers (L), police officers (LEAP), public prosecutors (LEAJ) and judges (J). The subdivision between police and public prosecutors was required because of the dual position of a public prosecutor. On the one hand, the public prosecutor can be coded as law enforcement (LEA) together with police from their respective roles in the criminal law system (lawyers - defending and advising the suspect / defendant) and law enforcement (investigation and prosecution -, and judges – deciding on the substance). On the other hand, a further coding of a public prosecutor (LEAJ) in contrast to police (LEAP), is further required as a public prosecutor is also a part of the magistracy and due to the common experiences and education of judges might, on certain issues, have a different perspective than police that is more aligned with judges.

c. Further theme-analysis on the basis of coded outcomes

Once the replies of the respondents were compiled on the basis of coding and similarities as differences were mapped, a renewed analysis has taken place to look for recurrent themes over the different questions to find common themes. Several themes clearly appeared from this research where there was a high-level of commonality in the answers, either over all the respondents or by certain actors. The themes identified are:

- Trust and distrust;
- Discontent with regard to media;
- Tunnel visions;
- Bias and prejudice;
- Vulnerability;
- In absentia trials;
- Structural deficiencies;

- Improvements.

d. Outliers

The research, observations and conclusions focus on commonality in the replies between the respondents, either to find commonality over all respondents or to be able to scrutinise differences in the replies between the actors. Given the limited sample, researchers should be critical as to single experiences or claims, in particular where numbers are lacking. In that regard, it is felt in this research, but broader in overall research, that it is a pity and obstructs research that there is no longer a yearly statistical publication of data by the justice department.

However, certain replies have been included in the report even though only one or two respondents mentioned the issue. This is only been done if these replies signal not a subjective appreciation but can be brought back to publicly available sources e.g. the mentioning of a judge that defendants will be summoned to court even though they have already been deported. Also, a reply has been mentioned if it provides a new and under-researched perspective on the presumption of innocence, e.g. a lawyer mentioning the importance that lawyers also take the presumption of innocence into account when entering in contact with a client as it may affect the manner in which they defend defendants. In these cases, it is clearly mentioned that only one respondent highlights this element.

B.5 LEGAL FRAMEWORK

a. Presumption of innocence in general (Article 3 of the Directive 2016/343)

There is no constitutive article in the Belgian constitution or Belgian code of criminal procedure (CCP) concerning the protection of the presumption of innocence. The Belgian Court of Cassation stipulated that the presumption of innocence constitutes a general legal principle.¹ However, there are several provisions in the code of criminal procedure mentioning the presumption as a principle to be taken into account:

Article 21bis and 61ter CCP: parties getting access to the criminal code during the investigation phase, can use the information for their defence, however with respect to the presumption of innocence;²

Article 28quinquies and 57 CCP: both the public ministry (LEA) and the lawyer of the parties can give a certain amount of information to the press, as an exception to the general obligation of secrecy during criminal investigation, however, taking into account the presumption of innocence;³

¹ Belgium, Cass. 17 September 2003, AR P.03.1018.F, AC 2003, nr. 438, Cass. 7 April 2004, AR P.04.0260.F, AC 2004, nr. 192; Cass. 16 November 2005, AR P.05.0817.F, AC 2005, nr. 599, Cass. 15 maart 2007, AR P.06.1334.N, AC 2007, nr. 134, Cass. 27 February 2008, AR P.07.1485.F, AC 2008, nr. 134; Cass. 14 January 2009, AR P.08.1860.F, AC 2009, nr. 32. On this, see R. Verstraeten, *Handboek Strafvordering*, 2005, nr. 1562, nr. 732 and M-A Beernaert, H. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, 2014, 25.

² Belgium, Article 21bis, Chapter IIIbis, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 31 January 2013, Entered into force 12 February 2013; Article 61ter, Chapter VI, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 12 March 1998, Entered into force 2 October 1998 [last accessed 10 March 2020].

³ Belgium, Article 28 quinquies Chapter IIIbis, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 10 July 1967; Article 57, Chapter VI, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 12 March 1998, Entered into force 2 October 1998 [last accessed 10 March 2020].

Article 47bis CCP: a person should be informed of the right to remain silent and non-incrimination when deprived of his or her liberty or when interrogated;

Article 10 of the Basic Law on the prison system and position of detained persons of 12 January 2005 provides that suspects are presumed innocent. Contact and measures in detention should be taken in respect of the presumption of innocence (articles 11 – 13 same act)⁴

Moreover, the court of cassation stipulated the rule that the public ministry is to establish the guilt of the accused and provide for the evidence as a general legal principle.⁵ Likewise, it is accepted as a general legal principle that in case of doubt on the facts, the presumption should work in favour of the accused.⁶

Whereas the Directive on the assistance of a lawyer had a profound impact on the Belgian criminal code, the implementation of the Directive on the presumption of innocence did not result in the introduction of new provisions or amendments to the current. That is not to say that the Directive remains without impact. In the first place, when introducing new legislation, the legislator will control and if needed alter the draft legislation to render it compatible with the presumption of innocence. E.g. with the implementation of the Directive on the assistance of lawyer, the legislator checked the compatibility of the new provisions with the Directive on the presumption of innocence, namely with regard to Article 8, 6 ° on the possibility for the member states to provide written procedures with regard to “minor facts” in consequence of which the person concerned cannot be questioned.⁷ The Directive is also a point of reference for the Council of State, department legislation, when controlling and advising on the legality of draft legislation. E.g. during the discussion on the introduction of the European Investigation Order, reference was made to the Directive for the use of terminology to revert to a person who is suspected of having committed a crime.⁸

Also, in the case law, the courts in general will revert to article 6 ECHR when discussing the presumption of innocence, but in recent times the first references were made to the Directive on the presumption of innocence. E.g. the court of appeal of Ghent relied on the Directive for its analysis on the compatibility of a decryption order (i.e. a disclosure order for a suspect to inform the investigating judge of the encryption code of a smart device) with the prohibition of self-incrimination.⁹ The Court of Cassation also made a reference to the Directive on the same issue (see further C.3).¹⁰

⁴ Belgium, Basic Law on the prison system and position of detained persons of 12 January 2005 ([Basiswet gevangeniswezen, rechtspositie van gedetineerden, 12 januari 2005/ Loi de principes concernant l'administration pénitentiaire ainsi que le statut juridique des détenus, 12 janvier 2005](#)) Publication in Belgian Official Gazette 1 February 2005 [last accessed 10 March 2020].

⁵ Belgium, Cass. 11 December 1984, Ar 9015, Arr. Cass. 1984-85 and Cass. 22 april 2008, AR P.08.0087.N, Arr.Cass. 2008, iss 4, 999.

⁶ The secrecy is included in article art. 28quinquies § 1 lid 2, Chapter 4, book 1 Code of Criminal Procedure, ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 10 July 1967. The Court of Cassation also held that this constitutes a general legal principle, see e.g. Court of Cassation 8 December 1999, AR P.99.0887.F, AC 1999, nr. 669.

⁷ Belgium, Draft of 13 September 2016 concerning certain rights of persons who are interrogated ([Wetsontwerp betreffende bepaalde rechten van personen die worden verhoord / projet de loi relatif à certains des personnes soumises à un interrogatoire](#)), Parl.St. 54-2030/001

⁸ Belgium, Draft of 27 April 2017 concerning the European Investigation Order in criminal matters ([Wetsontwerp betreffende het Europees onderzoeksbevel in strafzaken / Projet de loi relatif à la décision d'enquête européenne en matière pénale](#)), Parl. St; 54 - 3437/001.

⁹ Belgium, Court of appeal of Ghent 14 May 2019, nr. 2019/NT/20, Tijdschrift Strafrecht 2019, iss. 6, 359.

¹⁰ Belgium, Cass. 4 February 2020, nr. P.19.1086.N., Journal des Tribunaux 2020, iss. 6807, 202.

b. Public references to guilt (Article 4 of the Directive 2016/343)

As mentioned above, article 28quinquies and 57 CCP provides for public information during the criminal investigation by the public ministry and the lawyers of the parties in so far as limited to what is necessary and with respect for the presumption of innocence.¹¹ Article 23 of the Dutch Code of the Council of Journalism provides that journalists are to take particular care in a judicial context of the private life of the persons mentioned. In the guideline of this article, the Code highlights that the journalist is to take as much as possible account of the innocence of the suspect.¹²

The press has no legal, but only a deontological obligation to respect the presumption of innocence.¹³ In the same way, the press cannot be held accountable or is not criminally responsible in case of leaks or publications that might violate the presumption of innocence, in contrast to e.g. defamation.

That does not mean that there are no legal boundaries. First, the courts can oblige media, potentially under a penalty payment, not to publish or broadcast certain information that might violate the private life of presumption of innocence of parties. The Court of Cassation highlighted that press should cover the news in an impartial and reserved manner if a criminal investigation is still ongoing and no one has yet formally been indicted.¹⁴

Second, in Belgium a close connection exists between the secrecy of the criminal investigation¹⁵ and the presumption of innocence. In the first place this principle of the secrecy has a criminal purpose, namely to allow an effective investigation without the parties or third parties being able to manipulate evidence. Second, it protects the presumption of innocence and private life of the suspect, in that it prevents the public to form an idea before all elements have been examined. The Belgian council of state therefore held that the secrecy of the criminal investigation is of general interest.¹⁶

This principle has an internal angle (vis-à-vis the parties in the investigation) and an external angle (vis-à-vis the public). In so far elements of the criminal file are leaked before the end of the investigation, often it will be mentioned as a breach of the presumption of innocence as the public will already have formed an idea of the guilt of the suspect before he or she is able to defend themselves. This is in particular sensitive in those cases with jury trials (Court of Assize). Even though only parties to the investigation or collaborators to the investigation (e.g. IT experts aiding digital investigation on behalf of the public ministry) are in principle criminally liable for the violation of the secrecy of the criminal investigation and the abuse of access to the criminal file, in exceptional and recent cases the public ministry has tried to hold journalists equally accountable as accomplice to the perpetrator.¹⁷ In

¹¹ Belgium, Article 28 quinquies Chapter IIIbis, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 10 July 1967; Article 57, Chapter VI, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 12 March 1998, Entered into force 2 October 1998 [last accessed 10 March 2020].

¹² Belgium, Code of the Council of Journalism ([Code van de Raad voor de Journalistiek](#)) [last accessed 10 March 2020].

¹³ See e.g. President tribunal Brussels, 18 July 2017, Juristenkrant 2017, iss 353, 9. On this: D. Voorhoof, "De media, de verdachte en het vermoeden van onschuld", Auteurs & Media 2012, iss 1, 7 – 12.

¹⁴ Belgium, Court of cassation 27 June 2004, AR C.12.0119.F, Arr.Cass. 2014, afl. 6-7-8, 1667.

¹⁵ Belgium, Court of Cassation 28 April 1999, AR P.99.0438.F, AC 1999, nr. 248.

¹⁶ Belgium, Council of State 10 January 1992, JLMB 1992, 1049.

¹⁷ Belgium, De Morgen, When the silent journalist suddenly becomes an accomplice ([Als de zwijgzame journalist plots medeplichtig wordt](#)), 25 November 2016 [last accessed 10 March 2020].

general, such investigations against journalists will not be continued due to a strong protection of the secrecy of sources of journalists by the Act of 7 April 2005.¹⁸

c. Presentation of suspects and accused persons (Article 5 of the Directive 2016/343)

There are no specific legal rules governing the physical presentation of suspects and accused before the courts. However, implicitly there are certain standards that are enforced before the court.

First, article 37 Act on the police (5 August 1992) provides that police may, but is not obliged to handcuff a detained suspect or accused during his or her transfer, collection or surveillance.¹⁹ As such, it is a standard that the handcuffs are removed when the detained or suspect is present before the judge. However, practices differ as in many cases the handcuffs will only be removed when the suspect is already before the judge, whereas in other courts they will be removed before the accused is present before the judge.²⁰

Second, the suspect or accused is in principle allowed to wear his or her own clothes before the court. Even in prison there is a right to wear their own clothes, unless there are reasons of security or hygiene to refuse the clothing (art. 43 Basic Law on the prison system and position of detained persons of 12 January 2005).²¹

In this respect, a public discussion on the representation of a suspect as guilty emerged due to the Act of Act of 25 April 2014²² that allowed the hearings of the pre-trial court (council in chambers) to take place in prison when deciding on the continuation or release of a detained suspect. It was argued that such hearings in prison could breach the presumption of innocence as the suspect is not presented as any non-detained suspect, but already with the burden of criminality due to the surrounding (e.g. by the Flemish Order for lawyers). However, the constitutional court sanctioned the Act as constitutional holding that it provides that such hearings are only allowed for in exceptional cases, namely in so far security requires such hearing (Constitutional Court, 14 April 2016). As yet, such hearings have not yet taken place due to the fact that there are still no separate hearing rooms in the detention facilities.

As to press coverage, there are no legal binding rules. However, there are some inherent guarantees. First, all hearings before pre-trial courts both as to the investigation as to the detention of a suspect

¹⁸ Belgium, Act of 7 April 2005 ([Loi protection des sources journalistes / Wet bronnengeheim](#)), concerning the protection of journalistic services, Official Gazette 27 April 2005, 19522. Entered into force 7 May 2005 [last accessed 10 March 2020].

¹⁹ Belgium, Law on the police ([Loi sur la fonction de police/ Wet op het politieambt](#)) Publication in Belgian Official Gazette 22 December 1992, Entered into force 1 January 1993 [last accessed 10 March 2020].

²⁰ Belgium, There is no general rule here, and often this will simply follow from practicalities e.g. is there a secured waiting room before the court (handcuffs can be removed there), or is it an older court whereby there are general issues with security whereby police officers may decide to remove the handcuffs only when arriving in the court room itself. This decision is taken by the police accompanying the detained person. Exceptionally, there might be more strict rules for specific procedures with a high security risk, e.g. terrorist cases, where the president of the court might decide on alternative regulations.

²¹ Belgium, Basic Law on the prison system and position of detained persons of 12 January 2005 ([Basiswet gevangeniswezen, rechtspositie van gedetineerden, 12 januari 2005/ Loi de principes concernant l'administration pénitentiaire ainsi que le statut juridique des détenus, 12 janvier 2005](#)) Publication in Belgian Official Gazette 1 February 2005 [last accessed 10 March 2020].

²² Belgium, Act on Miscellaneous Provisions relating to justice, 25 April 2014 ([Loi portant des dispositions diverses en matière de Justice/ Wet houdende diverse bepalingen betreffende Justitie](#)) Publication in Belgian Official Gazette 14 May 2015 [last accessed 10 March 2020].

are behind closed doors, protecting both the secrecy of the investigation as to protect the presumption of innocence.

Second, articles 28quinquies and 57 CCP highlight that the public ministry and lawyer of the parties cannot communicate on the case more than is strictly required for the public interest / interest of the parties. The article provides explicitly that they should as far as possible prevent naming the suspect.

Third, the deontological codes concerning the representation of a suspect or accused in the media provides that journalists should only use personal information or an identifiable image of a person in so far as necessary (article 22 Code on Journalism). Moreover, a journalist should take account of the unknown outcome of a criminal procedure and therefore, inform with care for the presumption of innocence (article 23 Code on Journalism).

As to remedies, first, any person, thus including a suspect or accused, can in the first place rely on his or her right for rectification (Act on the right to rectification of 23 June 1961).²³ This Act provides the right to ask any print press or broadcasting agent to publish or broadcast a rectification in so far as the person could be identified, directly or indirectly, on the basis of this publication, program or any other broadcast. As such, the suspect or accused can react against erroneous and defaming press coverage.

Second, pre-emptively the person concerned can ask the civil court in summary proceedings to prevent the publishing or broadcasting of certain information that might irreparably harm his or her private life and the presumption of innocence. The court can decide to render such decision accompanied with penalty payments.

Third, the court of indictment can remove all evidence during the pre-trial phase that has been gathered in violation of the presumption of innocence on the basis of article 235bis, § 6 CCP, e.g. by acts of the investigating judge or police.

Fourth, the person can claim before the court that his or her right to presumption of innocence is irreparably infringed in the consequence of which the criminal procedure is inadmissible and thus, discontinued. It is up for the court to decide on the correct remedy.²⁴ The Court of Cassation held that the fact that the presumption of innocence was not respected in the public opinion due to media coverage, does not mean that the trial, even a jury trial, cannot be conducted in a fair manner and in respect of the presumption.²⁵

d. Burden of proof (Article 6 of the Directive 2016/343)

The burden of proof rests on the public ministry. In case of doubt on the facts of the case, the accused needs to be acquitted, so-called *in dubio pro reo* - principle (Court of Cassation 8 December 1999, Court of Cassation 6 October 2004). The judge has a free appreciation of all evidence brought before his or her court, with the exception of police reports and reports of the administration of tax and customs that are considered factually correct until evidence of the contrary enjoying a presumption of truth with regard to factual claims only.

²³ Belgium, Law on the right to rectification 23 June 1961 ([Loi relative au droit de réponse/ Wet betreffende het recht tot antwoord](#)) Publication in Belgian Official Gazette 8 July 1961, entry into force 18 July 1961 [last accessed 10 March 2020].

²⁴ Belgium, Cass. 13 May 2015, P.13.1755, Arr.Cass. 2015, afl. 5, 1213.

²⁵ Belgium, Cass. 15 December 2004, P041189F, Pas. 2004, nr. 612.

In certain cases, in particular in specific areas of criminal law (e.g. tax and customs or traffic law), the burden of proof is altered as to certain factual elements and legal presumptions. This is considered acceptable in highly complex, technical and administrative areas of criminal law.

Article 326 CCP obliges the president of the Court of Assize to inform the members of the jury that they can only come to a judgment of guilt if they find the accused on the basis of the legitimate evidence that was subject to adversarial pleadings guilty 'beyond every reasonable doubt'.²⁶ The level of certainty as to the guilty verdict is not mentioned explicitly in the CCP with regard to the proceedings before the other courts, but it is accepted that the 'beyond every reasonable doubt' is the general standard of proof.²⁷

There remains doubt as to the effectiveness of the beyond reasonable-doubt criterion and the *in dubio pro reo*-principle regarding highly mediated jury trials. As such, a discussion is ongoing in Belgium to depart from the jury trials in Assize procedures and replace these with professional judges.²⁸

e. Right to remain silent and not to incriminate oneself (Article 7 of the Directive 2016/343)

The protection of the right to remain silent and prohibition of self-incrimination is entrenched in article 47bis CCP concerning the interrogation in criminal whereby the suspect is informed of his or her right to remain silent and the prohibition of self-incrimination.²⁹ This article further provides that these rights are to be respected. Further, assistance of a lawyer is provided for every suspect to ensure the respect for these rights.³⁰ The public ministry provided in a Letter of Rights including these rights in no less than 46 languages.³¹

The guidelines of the public ministry on these rights consider a 'light' and a 'full' version of the right to remain silent depending on the category of the interrogated person (COL 8/2011 version 29 November 2017³² and addendum COL 11/2018 version 6 Augustus 2018). If the person is interrogated as a witness and/or victim, the authorities have to inform the person that he or she is not obliged to incriminate oneself (right to remain silent 'light'). However, if the person interrogated is a suspect, the

²⁶ Belgium, Article 326, Chapter VIII, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 11 January 2010, Entered into 21 January 2010 [last accessed 10 March 2020].

²⁷ Belgium, Cass. 8 oktober 2010, P.10.1046.F, Arr.Cass. 2010, afl. 12, 2914.

²⁸ Belgium, See e.g. Anne Vanrenterghem, "Assisen, assisen light of assisen zero? 5 vragen en antwoorden over de assisenhervorming" (25 april 2018), available at: <https://www.vrt.be/vrtnws/nl/2018/03/23/assisenhervorming/> [last accessed 31 March 2020] or "Openbaar ministerie dringt aan op afschaffing van het hof van assisen", (20 June 2019), available at: https://www.gva.be/cnt/dmf20190620_04470528/openbaar-ministerie-dringt-aan-op-afschaffing-van-hof-van-assisen [last accessed 31 March 2020].

²⁹ Belgium, Article 47bis, Chapter IV, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 24 November 2016, Entered into force 27 November 2016 [last accessed 10 March 2020].

³⁰ Belgium, Article 47 § 2, Chapter IV, Book 9, Code of Criminal Procedure only provides for assisting interrogations on crimes punishable with a prison sentence.

³¹ There are three versions: one for persons who are not detained, one for persons being detained and on for persons when being detained following an EAW. Available at: https://justitie.belgium.be/nl/themas_en_dossiers/documenten/documenten_downloaden/verklaring_van_rechten [last accessed 31 March 2020].

³² Belgium. Public Minister, Circular on the organisation of the assistance of a lawyer from the first hearing in Belgian criminal proceedings ([Circulaire relative à l'organisation de l'assistance d'un avocat à partir de la première audition dans le cadre de la procédure pénale Belge](#)); available for download at: <https://www.ommp.be/fr/savoir-plus/circulaires> [last accessed 10 March 2020].

authorities will have to inform the suspect in addition that he or she has the choice, after declaring his or her identity, to make a statement, answer the questions asked or remain silent (right to remain silent 'heavy')..

In addition, the adage of *actori incumbit probatio* i.e. fact that the public ministry needs to establish guilt and evidence), implies that the guilt of the accused cannot merely be grounded on his or her passive behaviour and that the accused did not bring forward evidence *à décharge*.³³

Currently, an intense discussion is ongoing on decryption orders. Academics and courts disagreed on the fact whether the investigating judge can force a suspect to give this code to open a digital device or decrypt digital devices or networks in view of the right to silence and the prohibition of self-incrimination taking into account the ECHR Saunders-jurisprudence and EU directive. In view of article 88quater § 1 CCP the investigating judge can oblige any person, including suspects and defendants, to provide such information, including the suspect or accused, under the penalty of fines and a prison sentence, whereas the obligation to ask a person to cooperate actively in opening or conducting a digital system under article 88quater § 2 CCP exempts suspects and accused. It was questioned whether article 88quater §1 CCP does not violate the right to silence and prohibition of self-incrimination.³⁴

In recent cases the Court of Cassation and followed by the Constitutional Court argued that this article does not violate the prohibition of self-incrimination as a code does not constitute incriminating evidence in itself and has an existence independent from the will in that it exists once created by the user or owner.³⁵ The question is outstanding, whether a request to open the device via iris scan or fingerprint falls within the scope of article 88quater § 1 or § 2 CCP and therefore, whether the prohibition of self-incrimination applies. Moreover, neither court tested the decryption code on its compatibility of the right to silence.

In so far, the prohibition of self-incrimination or the right to silence is violated, the pre-trial court or court will remove the evidence. Further, the Supreme Court adheres to the theory of the fruit of the poisonous tree and as such, all evidence directly following from the contested evidence will have to be removed as well.

These rights are considered qualitative rights and thus, are not unlimited (See Court of Cassation 4 February 2020). As such, these rights may be limited in exceptional cases in so far as proportionate.

f. Rights to be present at the trial and to a new trial (Articles 8 & 9 of the Directive 2016/343)

Article 153 and 185 § 1 CCP provides that the accused and / or his or her lawyer presents the defence for the court, implying the presence of the accused as principle.³⁶ The accused is not obliged to be present. However, in certain cases the court can order the presence of the accused (article 185 § 2

³³ Belgium, Cass. 14 February 2010, P.10.0407, Arr.Cass. 2010, afl. 3, 895.

³⁴ Belgium, Article 88quater §1 - § 2, Chapter VI, Book I, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 3 February 2001, Entered into force 13 February 2001 [last accessed 10 March 2020].

³⁵ Belgium, Court of Cassation 4 February 2020, P.19.1086.N/6, Juristenkrant 2002, afl 403, 1 - 7 and Constitutional Court 20 February 2020, nr. 28/2020, www.const-court.be.

³⁶ Belgium, Article 153, Chapter I, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 29 November 1808, entered into force 9 December 1808; Article 185§ 1 - § 2 Chapter II, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 12 February 2003, entered into force 7 April 2003 [last accessed 10 March 2020].

CCP). Articles 145 and 182 CCP include strict rules on the notification of the accused of the day and place of the hearing and the incriminations held against him or her.³⁷ Articles 146 and 184 CCP hold that there should be at least ten days between the notification and the hearing, in order for the accused to allow him or her to organise the defence and be present (3 days if the accused is detained).³⁸ Those accused that do not understand the official language (French, German or Dutch) can request a translation into another language. If the accused is not present the judge is to control whether the notification has been conducted in a manner compatible with the timeframe.

The main challenge of the Belgian procedure is in the still fully paper-based notification of the day and time of the hearing. There is no possibility to notify during the procedure the preference to be informed by email or other means. Therefore, often vulnerable people are not notified due to their precarious housing situation and simply the quality or absence of a postal box. In addition, there is no possibility to request in advance that all communication would be provided in another language. As such, they will receive the notification only in the official language and will then have to request a translation. In such case, they will often seek a pro bono counsel for assistance to understand the summons and have the consequences explained. Often, once this counsel is appointed and there is a meeting with the counsel, the date of the hearing has already passed.

Articles 171 and 187 CCP provide for the right to a new trial when judged *in absentia*. Rather than a principled statement of the right, these provisions detail the procedure to act against a trial *in absentia*.³⁹

Articles 171 and 187 CCP provide for the legal remedy in cases of *in absentia* trials. Once the opposition against the trial *in absentia* is filed, the court will conduct a two-step test to decide whether the case needs to be redone. First, the court will examine whether there was in fact a trial *in absentia*. Therefore, the court checks (1) whether the opposition has been filed within the provided time period (15 days after the day on which they became aware of the notification of the judgment), (2) whether the person, his or her lawyer was in fact absent during the trial and (3) whether the accused did not file an appeal against the first decision. In the latter case, the appeal will take priority. Second, the court will consider whether the opposition is acceptable and check (1) whether the accused had knowledge of the hearing in the first case and has a legitimate reason why he or she was not present, or in case of *force majeure* (2) whether the accused is in person or via his or her lawyer actually present in the re-trial, following the adage *pourvoi sur pourvoi ne vaut pas*). If the accused passes the test, the judge will provide for a fresh trial.

In 2016 the legislator restricted the access to this remedy by providing that the absentee was to establish that he or she did not receive the notification or that there was a case of *force majeure sensu*

³⁷ Belgium, Article 145, Chapter I, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 11 July 1994, entered into force 1 January 1995; Article 182 Chapter II, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 29 November 1808, entered into force 9 December 1808 [last accessed 10 March 2020].

³⁸ Belgium, Article 146, Chapter I, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 27 February 1956; Article 184 Chapter II, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 27 February 1956 [last accessed 10 March 2020].

³⁹ Belgium, Article 171 Chapter I, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 19 February 2016, entered into force 1 March 2016; Article 187 Chapter II, Book II, Code of Criminal Procedure ([Code d'instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 19 February 2016, entered into force 1 March 2016 [last accessed 10 March 2020].

strictu (Act 5 February 2016, so-called Potpourri II law).⁴⁰ Moreover, the law changed in that a trial would no longer be considered to be conducted *in absentia* if the accused or his or her lawyer was present during one of the hearings, even though they were not present during every hearing. This was due to the critique that often the remedy was abused by lawyers who would simply appear during the pleadings of the public ministry and afterwards disappear in order to prepare the defence with the knowledge of the public ministry's approach or simply to win time in view of the statutory period of limitation.

The constitutional court, however, judged that these provisions should be interpreted as providing that the absentee should only provide for a reason why he or she was not present and that it is up to the public ministry to show that this is incorrect.⁴¹ Moreover, the constitutional court highlighted in a second judgment that the legislator cannot restrict the possibility to file appeal against a judgment in re-trial finding the objection inadmissible in a manner that bars the accused from having the court of appeal to test the first judge's assessment of the legitimate reasons in an overly restricted interpretation.⁴²

PART C. THE PRESUMPTION OF INNOCENCE IN BELGIAN PRACTICE

C.1 The right to be presumed innocent in general

Neither the Belgian code of criminal procedure nor the Belgian constitution provides of an explicit protection of the presumption of innocence. The Belgian Court of Cassation, however, stipulated that the presumption of innocence constitutes a general legal principle.⁴³ In practice, article 6 § 2 ECHR remains the guiding provision for the interpretation and application of the presumption of innocence in Belgian legal practice. As such, there is a recurrent reference to the case law of the European Court of Human Rights when discussing the presumption of innocence.

Whereas there is no general provision protecting the presumption of innocence, it is mentioned – implicit or explicit - in several provisions of the code of criminal procedure (see section B.5.):

- Article 21bis and 61ter CCP: access to the criminal file during the investigation phase is possible, however with respect to the presumption of innocence;
- Article 28quinquies and 57 CCP: both the public ministry (LEA) and the lawyer of the parties can give a certain amount of information to the press, as an exception to the general obligation of secrecy during criminal investigation, however, taking into account the presumption of innocence;
- Article 47bis CCP: a person should be informed of the right to remain silent and non-incrimination when deprived of his or her liberty or when interrogated;

⁴⁰ Belgium, Act of 5 February 2016 amending the criminal law and criminal procedure and laying down miscellaneous justice provisions ([Loi du 5 février 2016 modifiant le droit pénal et la procédure pénale et portant des dispositions diverses en matière de justice/Wet tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie](#)) Publication in Belgian Official Gazette 19 February 2016, entered into force 29 February 2016 [last accessed 10 March 2020].

⁴¹ Belgium, Constitutional Court 21 December 2017, nr. 148/2017.

⁴² Belgium, Constitutional Court 17 May 2018, nr. 56/2018.

⁴³ Belgium, Cass. 17 September 2003, AR P.03.1018.F, AC 2003, nr. 438, Cass. 7 April 2004, AR P.04.0260.F, AC 2004, nr. 192; Cass. 16 November 2005, AR P.05.0817.F, AC 2005, nr. 599, Cass. 15 maart 2007, AR P.06.1334.N, AC 2007, nr. 134, Cass. 27 February 2008, AR P.07.1485.F, AC 2008, nr. 134; Cass. 14 January 2009, AR P.08.1860.F, AC 2009, nr. 32. On this, see R. Verstraeten, *Handboek Strafvordering*, 2005, nr. 1562, nr. 732 and M-A Beernaert, H. Bosly and D. Vandermeersch, *Droit de la procédure pénale*, 2014, 25.

- Article 10 of the Basic Law on the prison system and position of detained persons of 12 January 2005 provides that suspects are presumed innocent. Contact and measures in detention should be taken in respect of the presumption of innocence (articles 11 – 13 same act).
- a. How are the different professions implementing the presumption of innocence?

All respondents highlight the importance of the presumption of innocence but accept that its implementation is not always self-evident. Lawyers and law enforcement (police and prosecutors) put the focus on the investigation phase as the crucial moment to safeguard the presumption of innocence. This does not come as a surprise since the Belgian legal system is an inquisitorial system whereby the vast majority of evidence collection and analysis is conducted at this stage. As such, the quality of evidence gathering - including the respect for the presumption of innocence - in this phase, will have a high impact on the defence of the suspect. Judges are mostly concerned with the trial phase, however accepting that the procedure during the investigation phase can have a considerable impact on the presumption of innocence.

As to their different roles safeguarding the presumption of innocence, *lawyers accept three roles*. First, lawyers play an important role to safeguard the presumption of innocence during the investigation phase. As the Belgian Criminal Code provides explicitly in article 47bis CCP, lawyers are to control during an interrogation the respect for the right of the suspect to be heard and not to accuse himself (prohibition against self-incrimination), the freedom of choice to make a statement, answer the questions asked or remain silent (right to remain silent), the manner in which the person questioned is treated during the questioning, in particular whether or not there is manifestly unauthorized pressure or coercion, and on the notification of the rights of the defence, including the right to remain silent and the prohibition against self-incrimination. Even though the lawyers are all well aware of the understanding of the presumption of innocence and its importance as their role in protecting this right, a lawyer argued that too many lawyers are not aware or not diligent in that respect. S/He believes that the presumption of innocence should be given more attention by the Bar association and by attorneys.

Second, lawyers are to ensure the presumption of innocence during the trial phase by bringing the discussion before court back to the facts of the case. It is mentioned that the public ministry often makes references to facts other than those for which the person is being prosecuted and, as a consequence, were not investigated. The prosecution may even revert to previous investigations that were discontinued to paint a negative picture of the defendant. In such cases, lawyers will indicate that these facts are not a part of the ongoing case and cannot be taken in consideration in view of the presumption of innocence.

Third, lawyers are to put into practice the presumption of innocence themselves when entering in contact with clients. A lawyer highlights that, in their profession, lawyers should also respect this presumption vis-à-vis suspects and be wary of bias, namely when entering into contact with clients and managing the case. In the first contacts, the client should be given the benefit of the doubt. This may change over time, e.g. by studying the criminal file or further contacts with the client. A lawyer mentions the importance of this approach as s/he finds it much more difficult to convince a judge if the lawyer is not convinced himself/herself of the case.

As to the role of police and prosecutors, police take the presumption of innocence into account in the manner of conducting or reporting the outcome of investigation measures whereas the prosecutors put the onus on which measures they order or the decision whether or not to bring someone before the court, which is only possible if there are sufficient indications of guilt. It is clear that law enforcement accepts that it is often believed that law enforcement does not (sufficiently) attach

importance to the presumption of innocence, as a prosecutor states that they apply the presumption in their work *“contrary to what people think”*. One prosecutor argued that doubt (in favour of suspects) plays a role for prosecutors *“like it does for the court”*.

Prosecutors indicate that the presumption of innocence clearly affects their decisions. First, because of the presumption of innocence, prosecutors will try to limit the impact of the investigation on the suspect, including on the respect of their fundamental rights (prosecutor, Belgium). E.g. a prosecutor may consider to first opt for measures that have limited impact on a person’s privacy. In this perspective, the prosecutor will look for less intrusive investigatory measures than a house search given the high impact on the respect for privacy. Second, during the investigation prosecutors will try to keep an open mind and in doubt ask for additional investigation. A prosecutor highlights that such open mind is possible if the focus remains on finding the truth and not on finding evidence against a given suspect. Third, because of the presumption of innocence, prosecutors will require a high standard of evidence before they bring a case before a court. Even though they are internally convinced of the guilt of a suspect, they will refrain from referring the case if the evidence does not meet the threshold.

Judges distinguish three roles for them when putting the presumption of innocence into practice. First, all judges argue that the presumption of innocence is in particular relevant when hearing the evidence. A judge should start with a blank piece of paper when listening to the different opinions of the parties (judge, Belgium) and not make an assessment before the case is heard. The fact that a suspect remains silent should not cloud the opinion of a judge on the innocence of an accused, a judge argues. Second, the presumption has an impact on the level of certainty of guilt for a conviction. If there are doubts, this implies according to a judge a decision of non-guilt in favour of the defendant. The same judge remarks that the presumption also plays a role as to the impact of a criminal record. If new offences have been committed and a person is already executing a sentence or on conditional release, judges should make sure first to establish whether the defendant has committed these new offences and should not rely on the defendant’s criminal record to find proof of guilt.

b. Potential factors that have an effect on guaranteeing the presumption of innocence

First, time and the chronology of an investigation is considered an important factor for the presumption of innocence. Whereas at the start of the interrogation the position on presumed guilt is open to all actors, the respondents indicate that this changes at the investigation proceeds and more evidence is already gathered. Three out of four lawyers speak of certain *“tunnel vision”*⁴⁴ of investigators which is harder to counter over time. Lawyers find that law enforcement often decides on a given hypothesis at a stage where the investigation has not been finalised and consequently, will proceed any further investigation on the basis of this hypothesis. Lawyers find it very difficult to change this hypothesis, which often leads to bias or a *“tunnel vision”* once law enforcement officials have taken this stance. E.g. it is mentioned that during an interrogation only questions that fit the hypothesis are posed. This is particularly true for investigations which are already ongoing for a while as the enforcement officials have already taken position. A lawyer states in this regard:

“[O]ften there sadly appears to exist a certain tunnel vision, particularly in investigations which are already ongoing for a while, to get the law enforcement officials out of that tunnel”.

⁴⁴ A *“tunnel vision”* is often used in criminal literature or pleaded by lawyers and should be understood as ‘a general way of thinking based on the ground of incomplete and uncertain information’ whereby one thesis is preferred, without being open to other information, even if with that additional information it would become clear that the thesis chosen is a ‘dead end’. See L. De Groot-Van Leeuwen, *“Toegang tot de rechter: een elegie”* in L. De Groot-Van Leeuwen, *Voor recht, rechtvaardigheid en Camus. Liber Amicorum Bernard Hubeau*, Brugge, Die Keure, 2018, 147.

“Jammer genoeg is dat al vaak, zeker in onderzoeken die al een tijd bezig zijn, met al een zekere tunnelvisie die ze zijn ingeslagen zeer moeilijk om hen uit die tunnelvisie te krijgen.” (Lawyer, Belgium)

This approach can compromise the presumption of innocence, in particular where this would result in no longer investigating or loyally analysing evidence in favour of the suspect. Due to the increasing technicality of evidence (e.g. e-evidence or biometrical evidence) or in view of the fundamental rights of third parties (e.g. bank account data of a third person) the suspect must rely on an official authority to gather the data. In so far that this would be flatly denied as it does not help to support the provided hypothesis this risks seriously infringe the rights of defence and is contrary to the presumption of innocence. The current CCP stipulates that an investigation needs to be conducted loyally. It might be improved by making an explicit reference to the respect for the presumption of innocence.

Police officers acknowledge that over time the position as to the presumption might change and they would be less open to counterarguments. A police officer noted in this respect that he noticed a tunnel vision in ongoing investigations with colleagues and to a lesser extent with himself. He states that: *“one needs to learn to think in terms of maybe and to keep thinking in those terms”/ “Je moet leren denken in termen van misschien en altijd blijven denken in termen van misschien.”* (Police officer, Belgium). It is mentioned that more belief will be attached to a statement of a suspect when this is supported by tangible evidence than when there is no such evidence. Obviously, this might be problematic in those cases where non-involvement requires a negative evidence or in cases where the evidence is based purely on declarations and statements without tangible evidence. Police officers indicate that in case of doubt or inconclusiveness they will always focus on more evidence, e.g. when a suspect denies involvement in drug trafficking when found in his or her possession, they will consider telephone investigation to support or refute the statements.

Second, experience is also mentioned as a factor. A judge states that previous experience as a lawyer had an impact as to assessing and recognising bias or presumptions not justified on the basis of the criminal file. The judge found that those colleagues with no such previous experience and who enter the justice system directly (e.g. through internships with the public ministry) rely more easily on elements that could undermine the presumption of innocence. In the same, a police officer notices that experience and training helps to see both sides.

c. The role of prejudices and stigma

Respondents recurrently mention that a previous criminal record or the execution of a sentence for another offence results in a prejudice or stigma often being taken into account. Whereas it is allowed and not contrary to the presumption of innocence that judges take this into consideration as an objective criterion when deciding on the punishment, a lawyer noticed that judges all too often also take note of this when deciding whether a new offence has been committed. Judges acknowledge this to be the case, in particular when having to decide on individual criminal liability in multi-actor offences. A judge stated that in case of such offences, e.g. burglaries by gangs, where a person connected to the crime denies the allegations, the fact that this person has committed similar offences in the past may impact on the internal conviction of a judge when coming to a guilty verdict.

As for other factors, nationality and/or ethnicity are also mentioned as a relevant factor, in particular in combination with certain crimes to which this nationality or ethnic group is easily connected in media, the public opinion or based on previous cases. Lawyer raise this point, although they add that they have no numbers on this. One of the judges accepts that in cases where there is a combination with a certain ethnic minority and a crime that is often connected with this minority, there might exist

bias. Most respondents, however, do not raise nationality, ethnicity, or other factors as a defining element.

As to remedies for the potential of bias or indirect prejudices, two remedies are mentioned. First, it is argued that awareness of bias is pivotal for the effect of such bias. As such, voicing the presence of such factors in a case during the investigation or trial phase by lawyers or other actors can have an impact as to alert the other actors of potential ingrained prejudices and bias. Second, respondents make a reference to experience and training. It is mentioned that first training as a lawyer before entering the magistracy has an impact as in that case the judge or public prosecutor will have seen the other side and experience how bias occurs in criminal files and the impact it has on the rights of the defence. In Belgium, candidates can enter the magistracy via an entry exam after one year of experience in a legal position after which they will follow an internship within the public prosecution, or they can enter the magistracy after an exam without a following internship after several consecutive years of legal experience. Further research would be needed to substantiate these claims.

d. Discussion of findings

All respondents are well aware of the importance of the presumption of innocence, and as important, aware that this is not self-evident. They all accept that they have a role to play in protecting the presumption of innocence and have clearly considered the impact on their work. As such, they accept as well that bias may occur and that one should be alert. One of the judges argues that one needs to remain “cautious” to maintain the presumption of innocence when certain contextual elements, such as a criminal record, might cloud the evidence before them. Lawyers see it as their role to highlight during the investigation or during the trial certain elements or bias existing or that might potentially affect the presumption of innocence. By mentioning the potential of bias or prejudice, they hope to alert the law enforcement officials or judge to the potential undetected impact on the internal conviction.

Interestingly, the findings reveal that the presumption of innocence is not only considered a right of the defence that lawyers should guard vis-à-vis law enforcement or judges, but a principle that applies to lawyers as well. When they first hear a client or review the case, it is also important that they take a neutral position as to the potential guilt of their client. If not, they risk not providing for an effective assistance of the client. This internal regulation of lawyers on the presumption of innocence and impact on the quality or effectiveness of the defence is under-researched and not mentioned in the respective national deontological codes for lawyers nor in the European code. This could be construed as an element of the principle of loyalty to a client.⁴⁵

All respondents put significant focus on the stage of investigation as the essential phase affecting the presumption of innocence and the guarantees for the defence, due to the inquisitorial nature of the Belgian criminal system. The vast part of evidence gathering is done in the pre-trial phase (so-called phase of pre-investigation) by police under supervision of the public prosecutor or an investigating judge. During the trial phase (so-called phase of investigation of the substance) the judge will rely heavily on the evidence gathered during the investigation and included in the criminal trial. As the European Court of Human Rights well argued in the *Salduz*-case, the investigation sets the framework for the trial phase.⁴⁶ As such, it is evident that in this phase the respondents acknowledge the need to

⁴⁵ [CCBE, Charter of core principles of the European legal profession, p. 10.](#)

⁴⁶ The ECtHR noted: “*In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial*”. See ECtHR 27 November 2008, *Salduz v. Turkey*, § 54.

be wary of potential bias vis-à-vis the suspect. In that respect, a public prosecutor considers his/her role as to the protection of the presumption of innocence the same as it is for a judge.

Several respondents argue that the attachment to the presumption of innocence, however, changes during the investigation. Respondents agree that during the investigation the investigators will decide on a hypothesis and further conduct the research on this basis. Several respondents highlight the danger of such approach as this might lead to a “tunnel vision” whereby all elements contrary to this hypothesis are disregarded and investigation based on an alternative hypothesis is dismissed.

The respondents in general accept that there is no general bias towards certain groups of suspects. Some lawyers highlight they witnessed bias on the ground of ethnicity or nationality in combination with specific crimes with which this ethnicity or nationality is often affiliated, but argue that these are their own experiences and they do not have data on this. There is consensus, however, that previous convictions, in particular for the same offence, is too often invoked or taken into account when deciding on the guilt of a person for a new offence.

C.2 Public references to guilt

The main principle of Belgian criminal investigations is the secrecy of the investigation. The dissemination of information from the investigation constitutes a crime for all actors working within or aiding the criminal justice system, including lawyers. However, the Belgian criminal code allows for certain actors in the criminal justice system to communicate on ongoing cases. Article 28quinquies CCP⁴⁷ provides that the public prosecutor may provide the press with information if the public interest so requires. Lawyers as well are allowed to communicate with the media on the basis of the same article in so far as the interest of the client requires it. The public ministry and lawyers should observe in their communication the presumption of innocence, the rights of defence of the suspect, the victim and third parties, the private life, and the dignity of persons. In addition, lawyers need to respect the rules of the profession. As far as possible, the identity of the persons in the file will not be released.

The press is not bound by the secrecy of the criminal investigation and considered a third party to the criminal investigation. As such, they cannot be sanctioned when they publish information provided to them via leaks in violation of the secrecy of the criminal file. Moreover, the protection of journalist sources was reinforced by the Act of 7 April 2005.⁴⁸ However, the press is bound by a professional code⁴⁹ that highlights the importance of the presumption of innocence. In practice, there might be a tension between on the one hand the presumption of innocence and on the other hand the freedom of press and right to information. Article 25 of the Constitution provides that the press is free, and censorship is not authorised. In that respect, it was accepted by Belgian courts that although the presumption of innocence constitutes a fundamental rule of criminal law, it nevertheless cannot lead to a restriction of the freedom of the press as it constitutes one of the basic principles of democracy.⁵⁰

Once a case enters the trial phase the hearings will be held publicly, and the secrecy of the investigation no longer applies. As such, information can in principle be provided to the press. The criminal code (CP) provides for a prohibition to publish or disseminate information on the basis of which the identity of victims of certain crimes can be identified. These all concern vulnerable victims.

⁴⁷ Article 57 CCP in case of a judicial investigation.

⁴⁸ Belgium, Act of 7 April 2005 ([Loi protection des sources journalistes / Wet bronnengeheim](#)), concerning the protection of journalistic services, Official Gazette 27 April 2005, 19522. Entered into force 7 May 2005 [last accessed 10 March 2020].

⁴⁹ For Dutch-speaking journalist: [Code van de Raad voor Jouranlistiek](#), while for the French or German-speaking journalists: [Code de déontologie journalistique](#).

⁵⁰ Belgium, Court of appeal of Liège 30 Juin 1997, [J.L.M.B.](#) 1998, p. 9-17.

Article 378bis and 382quinquies CP sanctions any publication and dissemination by any medium of texts, drawings, photographs, any images or audio recordings that may reveal the identity of the victim of a sex crime, except with the written permission of the victim or with permission, for the purpose of the criminal investigation or the judicial investigation, of the public prosecutor or of the magistrate in charge of the investigation. Further article 433bis CP prohibits the publication and dissemination of the report of the debates before the juvenile court, before the investigating judge and before the court of appeal with jurisdiction to hear appeals against their decisions. Only the reasoning and operative part of a judgment that was pronounced publicly by the juvenile court can be reported on and this without any reference to the identification of the minor. Finally, article 433novies/1 CP prohibits to reveal the identity of a victim of human trafficking.

Several reality television programs are being broadcasted on television where cameras can film in court, but also behind the scenes:

- The tribunal (“De Rechtbank”): a production of Woestijnvis, running since 2011 and filming during a trial, including criminal trials. Interrogations of suspects by the investigating judge in ongoing investigations are broadcasted as well. In criminal cases the fact of the suspect is blurred and the voice distorted. The production team can only film upon agreement of all parties.
- The recherche (“De Recherche”): a production of Woestijnvis, running since 2014, whereby local teams of investigative police are being followed while they conduct ongoing criminal investigations.
- Investigating judges: (“Onderzoekersrechters”): a production of Borgerhoff & Lamberigts, running since 2020, whereby the daily actions of investigating judges are being followed, including interrogations and discussions with federal police investigating the cases.
- The public ministry (“Het parket”): a production of Het Nieuwhuis, running since 2020, following the daily practice of public prosecutors, including their pleadings in court, but also the preparation of cases and live calls with police agents.
- Alloo by the road traffic police (“Alloo bij de wegpolie”): a production of XINIX, running since 2014, whereby a journalist follows the road police during their shifts, including showing interventions and breath tests of drivers.
- A lead foot (“Zware voet”): a production of VTM, running between 2002 - 2005, following road traffic police when they stop drivers speeding. In the latter program, the face of the person was not blurred resulting in a finding of the violation of privacy.

Whereas the first human interest programs on criminal justice (in particular “The Tribunal”) were agreed upon by the magistracy in order to provide a more transparent and trustworthy image of courts and judges, today several of these programs are running whereby one can question if the balance between public control and the right to information on the one hand and the presumption of innocence on the other is still acceptable. This is in particular problematic where suspects are being filmed during investigations who are not assisted by a lawyer and might not be informed as to the potential impact of such broadcasting. The same is true for the broadcasting of conversations between law enforcement actors in investigations that are still ongoing or pending before the court. Police courts already acquitted on several accounts the defendant because of a violation of the secrecy of investigations and right to privacy.⁵¹ The Court of Cassation agreed.⁵² As such, a judge argues that s/he does not mind television broadcasting cases, but only if they have been completed and not during an

⁵¹ Belgium, Police Court Antwerp 18 December 2002, *Nieuw Juridisch Weekblad* 2003, 97 and Police Court Ypers 29 November 2004, *Auteurs & Media* 2005, 87.

⁵² Belgium, [Court of Cassation 8 November 2005, P051106N](#). See F. Schuermans, “Realty-televisie, politie en strafvordering: een onmogelijke combinatie?”, *RABG* 2006, 928.

investigation or proceedings. Two judges mention - in almost identical wording - that they believe cases should first be conducted in the court and not in television studios.

As to remedies, it appears that they are in general not often used or effective. In the first place, extensive media coverage could be relied upon in the criminal proceedings to find the presumption of innocence infringed or that the judge or jury can no longer be impartial. In practice, two judges argue, this will not lead to an acquittal, but might have an impact on the severity of the punishment. The Court of Cassation held that extensive media coverage resulting in the infringement of the presumption of innocence vis-à-vis the general public or public opinion does not amount to a violation of article 6 § 2 ECHR.⁵³ The defendant will have to show that the judge deciding the case is no longer impartial or has taken an approach or position contrary to the presumption of innocence. Further, there is the possibility to ask for a rectification in the media (right to answer), start libel and slander proceedings or seek an injunction for a publication or dissemination of coverage on ongoing investigations. Whereas these remedies are mentioned by the respondents from the perspective of the presumption of innocence, they are also open for law enforcement if they believe media coverage could harm the investigation. In a recent case, the public ministry asked the civil judge to stop the broadcasting of a documentary on a murder of a young woman in 1996 promising new hints. The public ministry argued that was still in investigation and the disclosure of new elements could harm the investigation. The civil judge, however, refused to provide the public ministry the injunction finding the freedom of press to outbalance the arguments of the public ministry, stating:

*“[It] is not surprising to conduct a journalistic investigation in this case. In principle, criminal investigations and litigation must be able to deal with this circumstance”.*⁵⁴

a. How do the different professions liaise with the media?

There is much press attention in Belgium for criminal cases and in general certain journalists will constantly monitor whether interesting cases will be considered. Lawyers in criminal matters are frequently in direct contact with the media. As to the police, public prosecution and magistrates there is no direct contact with the media in a specific case. In contrast, the contacts with the media are organised via spokespersons. For the police, the communication will be made by the federal services of the judicial police who have a trained team on media and press. Police operational in investigations will, in general, always communicate with the leading prosecutor or higher ranked officer before communicating to the press, and this only occurs when there is an urgent public interest, e.g. when they need the help of the general public in a case. For the public ministry and for the courts, a prosecutor or judge respectively is appointed a public spokesperson. This spokesperson is provided with training. The spokesperson of the prosecution will be responsible for the communication until a judgment is handed down by the pre-trial court. In general, there will be no further communication until the judgment on the substance is pronounced. The communication on a judgment will be the responsibility of the press magistrate of the court concerned, in addition to being the point of contact for more practical issues on press communications such as whether and when press can film or photograph in court. Judges, who are not press magistrates, try to keep away from press as much as possible and have little contact with the press.

Also other public authorities may communicate on ongoing criminal investigations (e.g. Child Focus in case of children). Often this is coordinated with the public ministry and or police and does not have a negative impact. However, mayors of cities or villages, or other politicians often communicate as well,

⁵³ Belgium, [Court of Cassation of 15 December 2004, P.04.1189.F](#). On this see: J. Engelbert, « Imposer à la presse le respect de la présomption d’innocence est incompatible avec la liberté d’expression », *Auteurs & Media* 2009, iss1-2, 65.

⁵⁴ Belgium, [Court of first instance of Brussels 7 February 2019](#).

among others for political reasons. Police and prosecutors find that such statements might be detrimental to ongoing investigations (e.g. because certain elements become known to the public, including to the suspects) and are in general not appreciated.

As to the contacts with the press, lawyers state to communicate only if it is in the interest of their client and guided by the professional deontology. In particular during the stage of investigation and procedures before a pre-trial court, the interviewed lawyers indicate that they refrain from communicating with the press. The public spokesperson for the public ministry and for the courts are bound by internal guidelines that include the respect for the presumption of innocence, in particular when communicating in ongoing investigations or procedures. For this reason, public spokespersons will remain close to the facts and limit the information provided that can identify a suspect. Public prosecutors mention the evolution of these guidelines whereby they no longer make reference to initials of a person in their communication, but now only refer to the age, gender and area of residence. Moreover, they will avoid communicating on suspected or accused minors. A judge states that s/he will stick close to the judgment when communicating the contents to the media as spokesperson, but e.g. not go into detail why a sentence was stricter. The press magistrate can provide a judgment to journalists in an anonymous version (see further C.2.b).

Even though all lawyers, two prosecutors and two judges mention to limit communication with the press taking into account the presumption of innocence, they do not find other professional groups to apply the same prudence. Two lawyers argue that often the public ministry communicates to the press in great detail which enables the identification of the suspect or communicates at a time during which the facts are still very unclear. One lawyer makes a reference to a case where the federal prosecution communicated on a case while the suspect, the lawyer's client, was still being interrogated. The communication later turned out to be erroneous. Prosecutors state that they take particular care when communicating to the press because they want to avoid that defendant would raise the argument of 'trial by media' in court. A prosecutor mentions in this respect:

"[I]t is a difficult balancing exercise, as the public is entitled to information about criminal offences. I do think that nowadays too much information is disclosed by the media, also insinuations. It does not help the investigation and we should not facilitate the rights of the defence too much" / "Moeilijke evenwichtsoefening, burgers hebben recht op informatie over criminele feiten. Ik vind wel dat men tegenwoordig te ver gaat wat men meegeeft in de media, te veel details, insinuaties. Het komt onderzoek niet ten goede en we moeten het niet te gemakkelijk maken vanuit de rechten van verdediging." (Prosecutor, Belgium)

A judge, further, argued that the manner in which certain lawyers communicate with the press in ongoing cases is also bothersome in view of the presumption of innocence.

In addition to the official communication by lawyers, law enforcement and the courts, the respondents mention that leaks during ongoing investigation occur regularly. Lawyers complain that the media will regularly publish information on ongoing investigations, even before the lawyer in question has received the information. A lawyer recalled that a tabloid newspaper reported on certain investigative acts while s/he was still not aware. All of the prosecutors and judges equally state that they do not appreciate it if information on an ongoing case is leaked to the media. A judge mentions a case where a witness already provided his/her views on the case in the media before s/he appeared in court. Whilst the judge stated that this does not impact on his/her own judgement of the case, s/he does concede that this may influence the judiciary more broadly.

A police officer mentions that in case of leaks in the media, it often happens that a memo or communication is distributed among the police to remind them of the importance of the secrecy of

investigations. According to a lawyer leaks are not attributable to one source within law enforcement. Journalists have many sources to find information. A lawyer noticed that there are, however, structural elements that enable leaks and reporting on cases that are still in the stage of investigation, in particular the public calendar on pre-trial cases. The calendar of the audiences of the pre-trial court makes a reference to the name of the suspect in combination with a number of the nomenclature of the public prosecution on the basis of which one can identify the crime for which the person is prosecuted. In contrast, holding cases behind closed door is not considered sufficiently effective as often leaks, e.g. by the victims to the press afterwards, will result in media coverage.

As to the quality of reporting, respondents complain of the quality of reporting. They make a distinction between qualitative press on the one hand and press focusing on sensationalism and speedy publications. They highlight that many journalists lack the required background to understand and report correctly on these cases. A lawyer mentions on reports of court hearings:

“It is often full of errors. Quotes are taken from the attorney’s arguments, but they are taken out of context. All serenity is taken away”/ “Het staat heel vaak vol fouten. Uit conclusies worden quotes gehaald die uit de context gehaald. Sereniteit wordt volledig weggehaald.”
(Lawyer, Belgium).

A prosecutors also mentions that they often have to correct information collected by journalists themselves. Therefore, they ever more frequently draft press communications to avoid such wrong information to be published. Whereas respondents are in general critical about the quality of the press, lawyers appreciated investigatory journalists with proper training that take the time to report on a case as a possibility to get a case back on track or allows to provide a different take on the case.

b. Mapping of laws and guidelines

Three sets of rules are to be considered: a) the rules regarding the secrecy of a criminal investigation, b) the rules regarding the deontology of the professionals working in criminal justice and c) the rules regarding journalists and press.

First, there are the rules regarding the secrecy of a criminal investigation, prohibiting in principle any communication on an ongoing investigation. Articles 28quinquies and 57 CCP provide an exception for the public ministry and lawyers of the parties to communicate in so far as necessary for the public interest (public ministry) or interests of the clients (lawyers) and with regard to the presumption of innocence. Once the case is in trial phase, the information is public and the parties could in principle provide their view, albeit with consideration to their respective professional guidelines and the rights of defence. There are, however, limitations as to what can be published in cases either because of their vulnerable position as a minor or because of the vulnerable position due to the type of crime committed (sex crimes and human trafficking) (see C.2 introduction).

Second, there are internal guidelines or lines of deontology for the professionals working in criminal justice when entering into contact with the press. All these actors are held to their professional secrecy and in that sense can only communicate in so far as compliant with the rules of professional secrecy and their respective deontological rules:

- The public prosecution drafts and regularly updates their own guidelines on contacts with the press (Prosecutor, Belgium). This includes rules e.g. about what identification elements will be mentioned, when and how they communicate with the press.
- For police services internal guidelines exist as to contacts with the press. This includes the rule that a police officer does not respond directly to questions of journalists, but

refers to the commanding officer or leadings prosecutor when questions are posed by the media (Both police inspector interviewed, Belgium).

- Lawyers are bound by a deontological code by their respective bars. E.g. the [code of the deontological codex of the Flemish bars](#) provides of an extensive chapter on contacts with the media. Article 156 of this Code obliges lawyers to take account of the presumption of innocence when communicating with the media.
- The magistracy initially concluded a protocol with the media (accredited journalists) that they could obtain a non-anonymous judgment on the condition that they would not reveal the identity of the persons concerned. Currently judgments can be made public if anonymous on the basis of an advice of the former privacy commission (currently personal data authority).⁵⁵ Following the act of 5 May 2019 (entry into force 1 September 2020), all judgments will become available online in an anonymous version.⁵⁶

Within the police, public ministry or magistracy only designated spokespersons will communicate directly with the media. These persons are trained and have to follow the internal guidelines. It is standard practice that the individual prosecutors and judges, even if designated spokesperson, will not communicate on the cases they handle themselves according to a judge.

Third, journalists are in principle not bound by the secrecy of investigation and can rely on the freedom of press as provided in article 25 of the Belgian Constitution. However, they are bound by the internal deontology of the Councils for Journalism for Flemish-speaking or for French and German speaking journalists. This code mentions the respect for the rights of the defence. The respondents in general find that journalists act according to these lines, but that sensationalism is never far away with potential devastating effects on the suspects. A lawyer states that the media seem to respect those guidelines in general, but there are bad examples of people being “trashed” in the press or on blogs, where names are sometimes used or it is not always very difficult to determine who the focus of the article/blog is about.

c. Effects media has on presumption of innocence

Most respondents found media attention both to have positive and negative effects on the presumption of innocence.

aa. Positive effects

Media coverage can have a positive impact in that the press might highlight certain elements that were not considered in the investigation or brushed away. A lawyer refers to a cold case where a former journalist had managed to put the case back on track and was subsequently televised. The impact of the publicity can be double-edged however, as it may on the one hand lead to a conviction before the trial court (specific court that still relies on a jury), however, it may also be used by the defendant’s lawyer on the basis of a violation of the presumption of innocence. Both a lawyer as a judge make a distinction between outlets whereby they see a positive impact of quality journalists in contrast to more sensationalist media often quoting out of context or getting the facts wrong.

⁵⁵ Belgium, Privacy commission, Recommendation n° 3/12 of 8 February 2012 ([aanbeveling met betrekking tot vonnissen- en/of arrestengegevensbanken die vrij of tegen vergoeding toegankelijk zijn voor derden / Recommandation relative aux banques de données de jugements et/ou d'arrêts accessibles à des tiers gratuitement ou contre paiement](#)), (CO-AR-2011-003).

⁵⁶ Belgium, Act of 5 May 2019 concerning the publication of judgments ([Wet tot wijziging van het Wetboek van strafvordering en het Gerechtelijk Wetboek over de bekendmaking van de vonnissen en arresten/ Loi modifiant le Code d'instruction criminelle et le Code judiciaire en ce qui concerne la publication des jugements et des arrêts](#)), Published in the Belgian Official Gazette 16 May 2019.

Further, the media can play a role in controlling the criminal justice system or ensuring that the public will have more confidence in a verdict. A lawyer remarks that making cases public can help to show that the judicial system works and that guilty persons are punished and innocent persons are set free.

Moreover, a judge believes it can rectify previous publicly held ideas on a suspect if the press reports on the acquittal of a suspect. In that respect another judge suggested that it might be better that the media would report only after the handing down of a judgment. Media attention may further bring certain deficiencies of the criminal system to the surface. A judge refers to a case where several defendants were acquitted on a given procedural ground. This received much media coverage and political attention. In follow-up the procedural element was mitigated by the legislator.

Certain respondents state that they cannot name any positive effects, even finding the impact of the media on the presumption of innocence disastrous (Belgian lawyer, prosecutor and police inspector). A lawyer held:

“I don’t think you can still talk about a presumption of innocence when the public prosecutor has communicated in a way which has either due to the way in which the prosecutor has communicated or due to the way the press has communicated about it, not left any reserve” / “Ik denk dat je niet meer van een vermoeden van onschuld kunt spreken als er communicatie van het openbaar ministerie is die eigenlijk weze door de manier waarop het Openbaar Ministerie communiceert, dan wel door de manier waarop de pers het in de media brengt, dat er helemaal geen sprake is van een reserve die wordt ingebouwd.” (Lawyer, Belgium).

Another lawyer found that there was little interest of the press for publishing on an acquittal and sensationalism often overtakes a serene debate. A prosecutor thought that journalists harm the presumption of innocence with their own investigations.

bb. Negative effects

A first negative effect of media is the stigma of being identified in public as a suspect or defendant of a crime. Even if a person is acquitted the stigma remains. A lawyer argued that:

“[I]t is impossible to reverse the very negative reporting in the media, even if in the end the client is acquitted it is difficult to remove any remaining stigma” / “Het is onmogelijk om de zeer negatieve berichtgeving in de media om te keren, zelfs als de klant uiteindelijk wordt vrijgesproken is het moeilijk om het resterende stigma te verwijderen” (Lawyer, Belgium)

The media case on the so-called “Meir-terrorist” presents a clear example (see annex to this report). In this case a driver caused panic by recklessly driving through the main shopping street of Antwerp, which is a pedestrian area. He ignored signals of military forces present to stop and was later found by police sleeping in his car. It was first suspected that this was an attempted terrorist attack, but soon became clear that the driver was intoxicated and panicked. Against the explicit warning of the prosecution services not to communicate, the mayor of Antwerp only hours after the facts informed the media that a suspected terrorist attack had been prevented.⁵⁷ From that moment on the driver was labelled the Meir-terrorist. Even though it became clear afterwards that there was no terrorist

⁵⁷ See a.o. Public ministry advised Antwerp against speaking after the Meir-incident ([Parket raadde Antwerpen af te spreken na het Meir-incident](#)), VRT 29 March 2017; De Wever and police chief gave press conference against advice security services ([De Wever en korpschef gaven persconferentie tegen advies veiligheidsdiensten in](#)), GVA 24 March 2017.

motive, he was still referred to as a terrorist when he finally was brought before court for other offences, including the reckless and intoxicated driving.⁵⁸

Several respondents (a lawyer, a police inspector, two judges and a prosecutor) acknowledge that the mentioning of a suspect in media comes down to a “stamp” that may never get away, even after an acquittal. A judge considered that *“press attention can constitute a second type of punishment, even in case one is innocent”*. A police officer mentions that:

“If someone’s picture has been published in the newspaper or arrested, then he or she is guilty for the average member of the general public” / “Als iemand met foto in krant gestaan heeft of opgepakt, dan is die voor de gemiddelde mens schuldig, ik denk dat ons moeder wel denkt dat die schuldig is.” (Police officer, Belgium)

A second negative effect mentioned by lawyers is that this might have an impact on the position of police and prosecutors during an investigation and prosecution. A lawyer states that if the stance of the public ministry in a case is known early-on, the public ministry will find it more difficult to change its point of view over time. Two prosecutors mention that they would counter this, stating that what is written in the media does not affect them much and they do not appreciate such coverage during the investigation. A judge highlights that if there is much media attention for a certain case, a prosecutor might feel more compelled to prosecute the case. In the same way, a police officer thought that if there is a lot of media attention, there is more pressure on an investigating judge to take a suspect in pre-trial detention.

The Coolsaet-case presented an interesting example to the contrary. In this case the prosecution argued before the court that there was insufficient evidence against the accused who was suspected of sexual assault. During the trial, however, the media published articles stating that new complaints for sexual assault had been filed against the accused and that it was inexplicable that the prosecution did not press charges against the accused. The pressure on the individual prosecutor on the case was of such intensity due to the media coverage that the prosecution took the unusual step to publish a statement defending the actions of the individual prosecutor and explaining the reasons for the decision not to press charges. This case resulted in a heated discussion as to whether this constituted trial by media and whether so-called #metoo allegations in the media were too easily and rapidly accepted.

A third negative effect, mentioned by a lawyer, is that there already is a presumed guilt of a person before the trial has begun, making it more difficult to convince a judge or jury because they will depart from facts which they already know from media coverage. Whereas several respondents believe in the professionalism of judges (mentioned by two lawyers and a judge), in certain cases a preconceived idea based on media coverage might have an impact. A lawyer noted that in cases where certain elements had a strong impact on society and public opinion, it will be much more difficult for a judge to erase his or her gut feeling that the judge might have before the case is even heard. A judge mentions that, for that reason, s/he tends to avoid media coverage on cases they are handling, or which may be handled by them in the future in order to avoid preconceived ideas. In that way judges try to avoid situations in which the lines between what was mentioned in the media and what was mentioned in the criminal case file become blurred:

⁵⁸ See a.o. Meir-terrorist convicted for 15 months imprisonment ([Meir-terrorist’ veroordeeld tot 15 maanden cel](#)), HLN 24 May 2019; 15 months imprisonment for 'Meir-terrorist' ([Vijftien maanden cel voor 'Meir-terrorist'](#)) De Standaard 24 May 2019.

“Now when I know that a case will be heard by us, I try on purpose to keep a distance.”/ “Nu wanneer ik weet dat er zaken voorkomen bij ons, probeer ik ook bewust afstand te houden.”
(Judge, Belgium)

It is mentioned by a lawyer that such media coverage might have an even greater impact on a jury. A prosecutor acknowledges to be particularly wary of suspects that may rely on leaks or negative press to argue that the presumption of innocence is infringed.

d. Differences in media coverage concerning certain groups

When asked on different coverage in media of certain groups, such as gender, nationality or ethnicity and professional background or standing within society are raised as factors.

As to gender, a minority of respondents find that there might be more leniency when portraying violent acts committed by women than by men, assigning more emotional motives to the actions of women. A lawyer gave the example of *“the tormented wife who commits a violent offence against her husband”* where more sympathy will be for the woman. Others, however, see no difference (two lawyers, two prosecutors, a judge and police officer), or argue that this can go both ways (a third lawyer and judge). A judge provided the example whereby there may be sympathy from the public if a battered woman kills her husband, whereas a woman can be conceived very negatively if she kills her child.

As to nationality and ethnicity, certain respondents did not notice any specific different coverage in media of non-nationals in comparison to nationals. However, most found that media would add certain references to ethnicity with negative connotations among the general public (e.g. accepted by all judges and a prosecutor). A judge mentioned that the north-African descent of a person would be mentioned even though the suspect holds the Belgian nationality. Another judge mentions that it used to be *“not done”* to refer to the ethnicity or nationality of a person, but that this happens ever more often. A prosecutor noticed that:

“when burglaries are committed by East European citizens that might be mentioned. The press would refer to words such as “Roma”. The prosecution service would use more neutral terminology such as their citizenship, rather than “gypsies”/ “wanneer er inbraken worden gepleegd door Oost-Europese burgers die genoemd zouden kunnen worden. De pers zou verwijzen naar woorden als “Roma”. Het openbaar ministerie zou een neutralere terminologie gebruiken, zoals hun burgerschap, in plaats van “zigeuners”. (Prosecutor, Belgium)

As to other factors, it appears that the social status due to the job or position of a person or being a public figure will have an impact to the coverage by the media (lawyer and prosecutor, Belgium).

In addition to personal elements of a suspect or defendant, the respondents highlight that the crime itself has an impact on the reporting by journalists as well as the respect for the presumption of innocence. A recurrent example among respondents are investigations and trials in terrorist cases. A respondent (lawyer, Belgium) found journalists in such cases not to be cautious when reporting on the case.

e. Discussion of findings

The Belgian experience of the impact of media on the criminal system is a clear example of the difficulty in finding a balancing between the presumption of innocence on the one hand and the freedom of press and information on the other. Respondents acknowledge that in certain cases it might be necessary to communicate and liaise with the press in ongoing cases. Several positive aspects of media coverage are mentioned, in particular that a different light is shed on the case, new elements

appear, or systemic issues of the criminal system come to surface. Moreover, if press reports on the acquittal of a person, this might result in a redress for the defendant in the public opinion.

However, most of the respondents are overall negative as to press attention and media coverage, in particular during the investigation phase. The respondents all state to be very cautious in their interactions with the press and are weary for the potential impact on a suspect. Respondents believe that public knowledge of the investigation into a person or prosecution is a “stamp” that is not easily removed. Law enforcement, moreover, is vigilant for the fear that a defendant would later rely on the publicity of the case to argue that the presumption of innocence is violated (“trial by media”).

Moreover, several respondents maintain that the quality of reporting on criminal cases is often low and driven by sensationalism. In that respect, several respondents noticed a difference in coverage on the basis of nationality and ethnicity, the crime prosecuted and the profession or societal position of the suspect. A judge noticed that today media more easily refers to the ethnicity or nationality of a person whereas this used to be not done. In general, respondents believe media coverage not to be in the best interest of the investigation or the suspect. As such, several respondents believe it better that coverage were to be postponed to the trial phase or even after the judgment is pronounced.

Respondents mention several reasons why media coverage is possible in the phase of investigation even though all actors are bound by the secrecy of the criminal file. In the first place, respondents state that there are often leaks to the press or that other actors have communicated too soon or with too much detail. Both lawyers as law enforcement are mentioned to pass on information to the media. Whereas public prosecutors state to limit the details given during press communications, lawyers believe these communications might be one-sided and detrimental to the presumption of innocence of their client. A lawyer, however, mentions that one should not look at one party alone, because journalists have many sources to get information. Moreover, even though respondents among the several actors in the criminal system point at each other for going too far in communicating with the press, they all believe that the other actors in general also prefer calm investigations and proceedings without media coverage. E.g. a prosecutor states that in general lawyers are in favour of calm investigations, meanwhile a lawyer states that judges dislike media coverage.

In the second place, several respondents referred to the manner in which cases pending before the pre-trial court are communicated. The publicly available calendar mentions the name of the suspect and the notification number on the basis of which journalists can identify the crime for which the person is under investigation. This could easily be solved by making only a reference to the case number without the name of the suspect and the notification number. However, given the number of contacts of journalists within the criminal law system this will probably only have a limited effect.

Whereas responding lawyers, judges and prosecutors are very critical for the impact of the media on the presumption of innocence among the general public, respondents do not believe that media coverage has a substantial impact on judges when deciding the case. Judges have blocking mechanisms by not reading on cases they are or might handle. Several, however, argue that this impact might be more substantial in cases before the Assize Court where a jury of layman decides the case. A prosecutor noticed in that respect that these are in particular the cases that will receive the most media attention.

Moreover, it appears that the public ministry and magistracy in recent times try to take back the initiative in communication by writing themselves press communications (e.g. as mentioned by a prosecutor and a judge) and organising press conferences.

C.3 The presentation of suspects and defendant persons

There are no specific legal rules in the code of criminal procedure governing the manner in which a defendant is presented before court. The rules on handcuffing or other security measures following either from guidelines or from the Act of the Police (see B.5) whereby the focus is put on security and safety.

a. Measures used to present the defendant and its impact on their presumption of innocence

There are certain guidelines as to the transport of detainees to the court as well as on the presentation of a defendant before court. These guidelines are based on the risk of evasion or general safety assessment. As to the transport, detainees are regularly handcuffed. In certain cases, e.g. high-risk terrorist cases, they are also blindfolded or even chained at their feet. A lawyer presented detainees who were blindfolded and fitted with a belt to which their handcuffs were connected during the transport to court. This might lead to nausea during the transport.

As to presentation in court, the general restraining measures are the handcuffing of detainees and the presence of police, in practice specific security police agents for the court. In front of the judge, detainees are in principle not handcuffed. This means in general that the handcuffs are taken off in front of the judge. If a defendant is moving a lot during an audience or the case is considered a “high risk”, the defendant may be handcuffed during the audience. This seems in particular the case for defendants in terrorism trials. In such case, there may also be more security police present. In such context, a judge mentions that it happens that s/he may be asked whether it is permissible to keep the defendant handcuffed. Another judge held to have great difficulty with the practice of keeping defendants handcuffed and found it “inhuman”. A prosecutor noticed that in 99,9 % of the cases defendants are not handcuffed in court but accompanied by security staff. As to the court of Assize (criminal court with a jury), it is a standard practice the handcuffs of detainees will be removed before walking into the court. This is considered a good practice by a lawyer as a jury might be more influenced by handcuffs than a professional judge. A lawyer and a judge recall cases (high-risk cases) where defendant may be chained to their feet. These measures are implemented based on an assessment of risk of evasion and attack, for instance, one responding lawyer witnessed a suspect leaping forward in the pre-trial court towards the president.

“Sometimes people are cuffed with their hands in front of them and sometimes the cuffs are behind their back. If one is annoying towards the guards, the handcuffs are put on much tighter, leaving red traces. A blindfold during transport is particularly annoying because it causes nausea. The guidelines are linked to risk of evasion and risk of an attack. I have once witnessed a person leaping forward in the pre-trial court towards the president.” / “Soms van voor boeien en soms van achter boeien. Als men ambetant doet handboeien markant harder vast, rooie sporen van handboeien. Blinddoek bij vervoer is bijzonder vervelend omdat misselijkheid meebrengt. De richtlijnen: gelinkt aan vluchtgevaarlijkheid of met aanvalsgevaarlijkheid. Ik heb het ook eens meegemaakt dat er een in de raadkamer rechtsprong en naar voorzitter sprong.” (Lawyer, Belgium)

Moreover, given that many of the courthouses are old buildings and not fitted to modern standards, defendants often have to walk handcuffed through the court hall or corridors portraying them in public as dangerous. In such case, the cuffs may be covered with a coat or blanket and media will be asked not to publish photos of the suspects or defendants in handcuffs. A police officer states to drive as close to the court as possible when transporting the suspect or defendant in order to shield him or her off from public attention. A lawyer remarks that it appears that more care is taken to shield off detainees suspected of minor facts than those in cases with more media attention. It is noted that certain criminal courts have a separate corridor to avoid that detained defendants have to walk through the building with handcuffs. This is considered a good practice by a lawyer and two judges. A

judge considers bringing the defendant to court through the public spaces handcuffed and surrounded by security personnel a bad practice as it raises the attention of the media.

A lawyer further noticed that in certain “high risk” cases, such as terrorist cases, the security measures are of such nature that the defendants are presented as dangerous people. Even though judges state that they are used to these procedures and will not take this into account, a judge acknowledged that such heavy measures may create a certain atmosphere detrimental to the presumption of innocence:

“Heavy cases can be cuffed at their feet too and they are guarded by a specific law enforcement unit. You need to disregard it but it could influence a court” / “Zware gevallen, die bijvoorbeeld ook aan benen geboid en bewaakt door een speciale eenheid. Je moet er abstractie van maken, maar zou ook een rechtbank kunnen beïnvloeden.” (Judge, Belgium).

It is highlighted by a judge and prosecutor that in these cases high security measures may be taken applicable to everyone entering the courthouse, and not specifically to restrain the suspect or defendant:

“In terror cases safety measures are not only aimed at the defendants but it also seeks to prevent third parties from putting a bomb package in the court room” / “Bij terreurdossiers is het niet alleen gericht tegen mensen die moeten voorkomen maar ook voor derden die zouden op het idee komen om een bompakket te leggen.” (Judge, Belgium)

b. Clothing

Detainees can wear their own clothes when appearing before the judge. There is clearly a different assessment between the respondents whether this is respected in practice, in particular in the phase of pre-trial. Several respondents (two lawyers, two judges, a prosecutor and police officer) highlight that this is a standard practice in most courts. A lawyer and judge notice that in practice, detained suspects or defendant often appear before the court in prison clothing. A lawyer argues that this is due to the fact that there is not sufficient time in the morning to give detainees their own clothes. Further, a lawyer and two judges noted that poor suspects, illegal immigrants or suspects without family connected who are detained will more often come before the court in prison clothing than those with a network to provide them with a better outfit. This may also be the case because the clothes of the suspect were seized, e.g. because the clothes are examined (Judge, Belgium).

Several respondents believe that the clothing has limited impact on the presumption of innocence, given that professional judges are trained not to take regard. A judge highlights that for them it does not matter and they do not take account of the clothing when taking a decision. A prosecutor believes handcuffs to have a more profound impact in general on the media and public, than the clothing. Yet, a public prosecutor argued that in certain cases a good story in combination with decent clothes increases your chances of a positive outcome. A judge pointed out that appearance may indirectly play a role as it may signal whether a person entered the court as a free man or woman or already detained. The latter is obvious if a person enters the court in prison clothing. Interestingly, a judge highlights that certain details of clothing or accessories might influence the appreciation of the suspect, e.g. designer bags raise attention when alleged drug dealers have to show up in court. A judge highlights that the defendant and suspects often are afraid this will matter and are concerned when they know they will appear in prison clothing.

c. Presentation of vulnerable groups

There are specific rules for minors, but it is noted that less attention is provided when they approach 18 years. A lawyer notices that in certain regions there was a practice to transfer minors by taxi to the

courthouse and not by police or detention house cars. This practice is meanwhile discontinued. However, a police officer states that minors will be escorted by unmarked police cars. Minors wear their own clothes and will in general not be handcuffed. For the most serious crimes (e.g. home evasions) or if there is evasion risk also minors may be handcuffed according to both police officers. In addition, minors will not be held in waiting cells before the audience, but in one of the offices.

Also, vulnerable defendants may be shielded or not held in the waiting cells, in particular when there are discussions on the fitness to trial. Moreover, a judge mentions that upon request certain defendant may use the corridor of the judges, shielding them from press attention. It is remarked, however, that in certain cases vulnerable people that should be shielded from press attention do not get this protection in practice due to the lay-out of the court houses. In general these are old court houses where it is difficult or impossible to ensure such protection, e.g. because there are no separate corridors or only a few entrances. A judge mentions that person in a wheelchair cannot move through the shielded corridors of the courthouse.

d. Reactions to presenting defendant as being guilty

First of all, an accused could mention that the presumption of innocence is infringed which could be taken into account to decide on an acquittal or decide on a lower sentence. However, in practice two out of three judges mention that this will only scarcely happen.

Secondly, lawyers will make the court notice when certain safeguards are not in place or highlight the potential impact on the position of the defendant. Lawyers can ask for adjustment of the safety measures in court during the trial or, if denied, demand that their remarks are noted on the report of the audience. Two out of three lawyers highlight that they will often rely on informal practices trying to talk to the register of the court or the investigating judge beforehand to see adjustments or in order to ensure that account is taken of the impact on the presumption of innocence.

Thirdly, judges, prosecutors and police are aware of the impact of handcuffs, security police or other restraining measures on the general impact and try to limit exposure, e.g. by covering the handcuffs with a blanket, using the corridors of the judges to enter the court, or limiting the walking distance to the court by driving the vehicle transporting the accused as close as possible to the court. Further, a judge can decide to hear the case behind closed doors in a sensitive case or if minors are concerned. Victims can ask the judge that their case is heard with closed doors.

Finally, judges or prosecutors can try to shield the accused from media attention. A judge mentions that in principle it is never allowed to film in the court. However, the media may still film in the corridors.

e. Discussion of findings

In general, respondents believe that judges are sufficiently professional not to be influenced by the manner of presentation of an accused. Two judges mention that raising awareness or being aware of the potential risk is the best coping mechanism. A judge explained this clearly:

“One needs to take care not to be influenced by the defendant’s behaviour during the hearing. If you are aware of it, then you have the best chances not to be influenced by it” / “Je moet ervoor zorgen dat men zich niet laat beïnvloeden door het gedrag van de verdachte tijdens de hoorzitting. Als u zich ervan bewust bent, dan heeft u de beste kansen om u er niet door te laten beïnvloeden.” (Judge, Belgium)

Nevertheless, where clothing in general appears to have a minor impact, several respondents notice that stringent restraining measures might create an atmosphere or portray the accused as dangerous. This is in particular the case, according to a lawyer, when restraining orders are taken with regard to an accused who already has a criminal record. A judge argued that handcuffs may have more effect on those magistrates who did not work as a lawyer before becoming judges. Other respondents, however, mentioned that you become accustomed to these measures. Nevertheless, judges clearly dislike presiding audiences where an accused remains handcuffed. A lawyer protested that such restraining measures are too easily applied by means of habit without a proper risk analysis. S/He stressed that any measure should be taken with the utmost respect for the person. A balance should be struck: is there a reason to use a measure of restraint. Certainly when restraining measures are taken in Court of Assize cases, it should be clearly mentioned to the jury that they cannot take this into account. For this reason, other practices are applied in these proceedings, ensuring that in general accused will enter the court room without handcuffs.

A prosecutor and police officer accept that restraining measures have an important impact on the general public. For this reason, several measures are in place to limit the fall-out, including covering handcuffs, trying to limit the walk to the court, using the judges' corridors or closing the doors for public in sensitive cases. From the respondents one of the main issues is that many courts are old buildings and not fit for current measures balancing safety and discretion.

C.4 Burden of proof

The burden of proof rests on the prosecution. In case of doubt on the facts of the case, the accused needs to be acquitted, so-called *in dubio pro reo* - principle.⁵⁹ The judge has a free appreciation of all evidence brought before his or her court, with the exception of police reports and reports of the administration of tax and customs that are considered factually correct until evidence of the contrary enjoying a presumption of truth with regard to factual claims only.

a. Exceptions to the burden of proof

In Belgian law there are certain exceptions to the principle that the burden of proof rests with the public ministry. In the first place the law provides for certain instances where there is a rebuttable presumption. Most respondents refer to proof of the illegal nature of active in money laundering cases. In such cases law enforcement only has to show that a legal origin is excluded and it is in such case for the defendant to provide evidence of the legal origin. A prosecutor warned for bias and profiling in such regard avoiding situations whereby a person from North African descent is stopped in an expensive car and needs to explain where he or she got the car. Such rebuttable reversion of the burden of proof is also present in certain areas of criminal law, such as tax and customs infringement or road traffic law e.g. with regard to the identity of the driver on the basis of the license plate. These exceptions are considered acceptable in highly complex, technical, and administrative areas of criminal law. Second, there is special evidentiary value of certain police reports which account as proof until the contrary is proven or until such police reports are reported to be false. This rule only concerns the material statements in such report, not the analysis or appreciation of facts.

A lawyer remarks that prosecutors might try to push this presumption to aligned cases where such presumption is not foreseen. Also, during interrogations or in court, the public prosecution might portray certain elements as a matter of fact, while this is not the case on the basis of the criminal file or investigation, according to a lawyer and a judge.

⁵⁹ Belgium, Court of Cassation 8 December 1999, AR P.99.0887.F, *Arr.Cass.* 1999, 1593 and Court of Cassation 6 October 2004, AR P.04.0665.F, *Nullum Crimen* 2006, iss. 2, 124.

Prosecutors mention cases where there is no exception to the burden of proof, but whereby it will be very difficult if not almost impossible in practice for defendants to establish their non-involvement with material facts. A prosecutor mentions the example where drugs or other illicit goods are brought in the jurisdiction via the airport and the drugs is found inside the body or in case of money-muggling where the analysis of a bank account clearly shows that the laundered money passed through it. It is mentioned that it will depend one prosecutor to another to what extent they will ask for additional investigation in such cases and decide to prosecute. A judge mentions that also in such cases you need to maintain an open mind and await the arguments of the defence.

b. Confession

From a legal perspective, a confession before the court has no additional value compared to other elements in the criminal file. A lawyer notes that when such confession is made in the phase of the investigation, this will often result in the prosecution closing the case and focusing on the sanctioning. A lawyer highlights that also such confessions should be met critically:

“It does not stop at the confession by the person. There can always be reasons why someone confesses. It can be because they want to protect someone else. It can be out of fear of being arrested. Sometimes it happens due to pressure of the interrogating officers” / “Het stopt niet bij een bekentenis. Kan altijd zijn dat er omstandigheden zijn waarom iemand bekend heeft. Het kan zijn om iemand anders uit de wind te zetten. Kan zijn uit schrik om aangehouden te worden. Soms onder druk van de ondervragers.” (Lawyer, Belgium)

Both police officers, in contrast, state that even after such declaration they will look further to see whether this confession matches the evidence and conduct e.g. additional financial investigative acts or telephone measures to check whether it is correct or not. Police officers indicate that they would ensure that they gather sufficient material evidence in top of the confession in order to avoid that the suspect could withdraw his or her confession and make the case fail.

At the trial phase, a confession will be checked on its accuracy. When a defendant declares before court that another person has committed the crime and the latter confesses to this, often courts will meet such declarations with suspicion as it might be a confession to get the first defendant off the hook (mentioned by a lawyer, a police officer and a judge). Judges argue that such confessions, as any element of evidence, should be analysed critically and assessed to the background of the criminal file. A judge mentions that s/he witnessed a lawyer pleading that his client no longer denied the facts, but that it was obvious from the composure of the defendant that he or she was uneasy with this strategy. A police officer provided an example where such confession might be made for other reasons, namely where someone confessed but *“it later turned out that he was protecting his son”*. However, a judge states that if such confession is made during the investigation phase and later repeated before the judge, this will be provided a great value when deciding on the guilt of a defendant.

Interrogations, within court or by police, are always accompanied with the Salduz-safeguards, including the communication of the letter of rights and right to assistance of a lawyer. The ‘Salduz-safeguards’ are the rights for suspects when interrogated as was developed by the European Court of Human Rights and later included in the Directive on access to a lawyer (2013/48/EU). The Belgian legislator included these safeguards in article 47bis CCP. The importance of the Salduz-safeguards, in particular for vulnerable suspects, is highlighted by most respondents. A prosecutor mentions that interrogations might be more direct and intense where there is no lawyer present. It is, however, very difficult to retract a confession if it is made in the presence of a lawyer, two lawyers and a judge remark. A judge mentions that such retraction should be taken into account by a court, independent

from the fact whether a lawyer was present. Two out of three judges highlight the importance of the quality and alertness of a lawyer during the investigation.

At a procedural level a confession of guilt has an impact. There is a speedy procedure that the prosecutor can initiate before the court upon an agreement between the prosecution and the suspect that the latter agrees that he or she has committed the prosecuted offences. A prosecutor accepts that this also triggers more goodwill with the prosecution whereby they may also offer the possibility of a settlement. Moreover, it is mentioned that such confession in front of the police in the phase of investigation, might result in a decision not to bring a person before the investigating judge who can decide on the detention of a suspect:

“[s]omeone who does not cooperate, strongly denies any involvement and poses a risk of informing his accomplices, then we do not have many alternatives other than presenting him to an investigating judge” / “Iemand die niet meewerkt, mordicus ontkent en risico dat hij mededaders informeert, dan zijn er niet veel andere mogelijkheden dan voorleiden” (Prosecutor, Belgium)

c. Discussion of findings

Belgian criminal law embraces the principle that the burden of proof falls upon the prosecution. There are certain exceptions to this rule, but these are rebuttable. Respondents, however, notice that in practice the prosecution might try to put the burden of proof on the defendant by presenting certain facts as given while they are not proven on the basis of the criminal file. Judges highlight that also in cases where the burden of proof is on the defendant, they need to remain open for the arguments of the defence.

Respondents also highlight the importance of a confession both as material evidence as for procedural reasons. In case of a confession other, swifter procedures might be initiated such as a guilty plea procedure or a settlement in criminal procedure. The latter is, however, surprising as a confession or admission to guilt is not required for a settlement. The accused should only accept with a retribution (payment of a fine and confiscations) and, if applicable, remedying the damages of the victim. As to the importance of a confession as material evidence, it is noted that this will count heavy among the evidence if it is made accompanied by a lawyer and not retracted before court. Police officer, prosecutors and judges highlight, however, that a confession should be assessed critically and in the light of the criminal file as there might be other reasons for a suspect or defendant to confess. Further, police officers and prosecutors will in general continue the investigation and try to find evidence to support this confession to safeguard the investigation if the suspect would later retract his or her confessions.

The assistance of a lawyer is considered an improvement and safeguard by all respondents. It is mentioned that filming the interrogation might be an additional safeguard. In practice this happens for the interrogation of minors but will almost never happen for adults. This could, however, be of great value as it shows the context of a confession.

C.5 The right to remain silent and not to incriminate oneself

The protection of the right to remain silent and prohibition of self-incrimination is entrenched in article 47bis CCP concerning the interrogation in criminal cases whereby the suspect is informed of his or her

right to remain silent and the prohibition of self-incrimination.⁶⁰ This article further provides that these rights are to be respected. Further, assistance of a lawyer is provided for every suspect to ensure the respect for these rights.⁶¹ There is, however, no general provision protecting these rights outside the context of interrogations in the code of criminal procedure. As such, in these cases the courts will rely on article 6 § 2 ECHR and the case law of the European Court of Human Rights with regard to the right to remain silent and the prohibition against self-incrimination.

a. The right to remain silent in practice

All respondents acknowledge the importance of the right to remain silent and apply this right in practice. Lawyers will explain to suspects what the right to remain silent entails and in general prepare clients before interrogations. It is mentioned by a lawyer that the quality of the lawyer preparing and assisting the suspect will have an impact as to what and when suspects speak. Police put the right to remain silent in practice by refraining from putting pressure on the suspect to talk and by informing them of their rights. A prosecutor made reference to the situation where a person is arrested by police:

“[S]ometimes they spontaneously declare things, meanwhile the police knows that that is not an interrogation and that they have to first bring the person to the police station, provide them with their rights and not ask question before that”/ “Bij de politie na vrijheidsberoving. Soms verklaren ze spontaan dingen, politie weet intussen dat dit geen verhoor is en dat ze dus eerst moeten meenemen en rechten geven en geen vragen moeten stellen.” (Prosecutor, Belgium).

Police try to limit the probing during interrogations once a suspect has invoked the right to remain silent formally or indirectly by refusing to speak. If it concerns the interrogation right after the offence, the police officer will try to ask two or three questions but stop the interview if there is no response. However, if a suspect no longer answers during an ongoing interrogation, the officer officers mention that they will first try to ascertain whether the right to silence is invoked only for the particular question or as to the whole of the interrogation. In the latter case, the interrogation will be stopped.

Judges argue that invoking the right should not have an impact on finding a suspect guilty. A judge assessed that the number of suspects relying on the right to remain silent has gone up after the introduction of the Salduz-guarantees, in particular the assistance of a lawyer. As such, judges do not see such reliance as an indication of guilt, but rather the expression of a certain strategy. It is mentioned that only rarely suspects remain silent throughout the investigation and trial phase. Most will provide some explanation in a later phase. Equally, a judge accepted that this might actually be a good strategy for certain suspects in the beginning of the investigation when there is still a lot of uncertainty (*“What are they really accusing me of, what do they know, what don’t they know?”/ “Waarvan gaan ze me nu eigenlijk beschuldigen. Wat weten ze, wat weten ze niet?”*) (Judge, Belgium). In general, respondents believe it better to rely on the right to remain silent than to lie or provide inaccurate information as the suspect will later be confronted with these inaccuracies.

Yet, respondents accept that it is not necessarily in the best interest of a suspect to invoke the right to remain silent as it may be taken in account by the court. In case there is material evidence against the defendant and no counternarrative due to the continued reliance on the right to remain silent, this might work against the defendant and result in a conviction. To the contrary, when someone very early-on provided a coherent explanation of the facts, this will more easily be believed. A prosecutor refers to his/her experience that a defendant sometimes for the first time provides an explanation of

⁶⁰ Belgium, Article 47bis, Chapter IV, Book I, Code of Criminal Procedure ([Code d’instruction criminelle/ Wetboek van strafvordering](#)) Publication in Belgian Official Gazette 24 November 2016, Entered into force 27 November 2016 [last accessed 10 March 2020].

⁶¹ Belgium, Article 47 § 2, Chapter IV, Book 9, Code of Criminal Procedure only provides for assisting interrogations on crimes punishable with a prison sentence.

the facts in court which could have saved him or her from being prosecuted in the first place. Moreover, this might also lead to a higher sentence, or in a lower sentence when there is cooperation. As such, lawyers counsel caution when invoking the right to remain silent:

"I inform clients of the right to silence, but it is no guarantee to be set free. By staying silent one makes oneself a suspect. If it is not needed, I advise not to invoke it." / "Ik zeg in Salduz je hebt recht om te zwijgen, maar het is geen garantie om vrij te komen. Door te zwijgen maak je je verdacht. Als het niet moet, dan raad ik niet aan om het in te roepen." (Lawyer, Belgium)

b. How is information on the right to remain silent and not to incriminate oneself shared with the defendant?

This is done in a formal manner by handing over the letter of rights at the moment of arrest, before the start of an interrogation or sent along the summons to court for the audience. The public prosecution provides of a standard model in no less than 46 languages in plain language.⁶² A lawyer mentions that in practice suspects will be asked to sign that they have received the letter of rights. Often suspects or arrested persons will not read this themselves. As such, they will be informed of their rights either by a lawyer assisting them and/or by the police officer who will conduct the interrogation.

Further, it is considered a core task for lawyers assisting suspects to inform them of these rights in a manner that the suspect can understand. A lawyer mentions that it is *"difficult to imagine that you would not know"* if you are assisted by a lawyer. A police officer mentions that today an adult suspect can waive his or her right to assistance of a lawyer during an interrogation without a previous confidential consult with a lawyer, whereas this was previously not possible. The police officer finds this unhelpful.

Finally, before the investigation starts the police officer or investigating judge will ask whether the suspect understands his or her rights and whether they ought to be repeated. A lawyer noticed that in practice the rights are often not read aloud to the suspect nor are the consequences of remaining silent made clear. In consequence, if they have not been assisted by a lawyer, they will often not know. Moreover, a police officer notices that where the communication with the suspect runs via an interpreter, it sometimes is difficult to assess whether the suspect has truly understood.

In case this information on the Salduz-rights is not provided, one can ask for the exclusion of the statements. It should be noted that on the basis of Belgian procedural law (in particular Article 32 preceding title of the criminal code) such statements will only be excluded if they have an impact on the accuracy or reliability of the statements, or if there is in the particular case an infringement of the rights of defence. According to a judge, this is the case if a suspect clearly invoked the right to remain silent, but later made statements under pressure.

During the court hearings, the judge can also ask the defendant questions. The defendant is not obliged to answer these and a judge state not to probe. However, in this setting it depends on the judge whether the defendant is reminded of his or her right to remain silent, according to two judges.

c. Self-incrimination

⁶² There are three versions: one for persons who are not detained, one for persons being detained and on for persons when being detained following an EAW. Available at: https://justitie.belgium.be/nl/themas_en_dossiers/documenten/documenten_downloaden/verklaring_van_rechten [last accessed 31 March 2020].

The right not to incriminate oneself is mentioned in the letter of rights provided to the suspects. The assistance of a lawyer is supported by their role in controlling that this right is respected. It appears that not all enforcement authorities take the right to assistance of a lawyer seriously. A lawyer mentions that there are strong rumours that in a certain police area suspects are threatened or told that there are not sufficient lawyers available to push them into waiving their right to a lawyer. A police officer in contrast mentions that he would always advise suspects to ask for the assistance of a lawyer.

Not all information provided by a suspect during an interrogation is considered self-incriminating statements. It is accepted that biometrical materials such as urine or DNA do not fall under the prohibition of self-incrimination. The same is true for the obligation on directors to cooperate with the liquidator of a company, including handing over accounting documents which may be used in proceedings. In recent cases, the Court of Cassation⁶³ and Constitutional Court⁶⁴ argued that it is equally permissible to force a suspect to provide encryption codes under the pressure of a prison sentence or fine. These judgments followed a lengthy discussion in courts and jurisprudence on the permissibility of such sanction in the light of the prohibition of non-incrimination with reference to both the ECHR and case law of the European Court of Human Rights and the Directive on the Presumption of Innocence. The court of appeal of Ghent argued in that respect that such sanction is in violation of the Directive.⁶⁵

Two police officers and a prosecutor mention that they will first always ask this information or material on a voluntary basis. According to two lawyers and a police officer, suspects will often voluntarily provide the password or encryption code. It is mentioned that there might be other reasons to refuse providing a password than merely hiding evidence, e.g. because there might be personal sensitive material (a prosecutor mentions a picture of a mistress). A judge highlights her unease with these rulings holding to find such pressure to provide passwords contrary to the right against self-incrimination, whereas another judge considered this to be a “political choice”.

A lawyer mentions her issue with a new investigative procedure, i.e. the polygraph that can be used as evidence in court.

Lawyers argue that in practice relying on the right to remain silent is seen as proof that the suspect was involved. A prosecutor argued that in such case one first needs to try to understand why the suspect wants to remain silent and consider additional investigation, but acknowledges that in his/her perspective a person renders himself/herself suspicious by relying on the right to remain silent. A police officer held that investigating judges often take this position as an admission of guilt. Moreover, when a suspect does not speak, this will often result in a decision to bring a suspect before an investigative judge or a decision by the investigative judge to put the suspect in pre-trial detention, even though it should not have an influence on the basis of the legal framework. In that respect, a lawyer mentions that the (fear of) deprivation of liberty is in his/her view the strongest pressure on a person to speak. S/He witnessed many suspects that first relied on the right to remain silent provide statements after a certain period in pre-trial detention.

Two out of three lawyers find the warning by law enforcement officials or by judges in court that the refusal to answer questions may be taken into account to constitute pressure on the defendant to speak. A prosecutor in contrast believes this does not come down to compulsion but is inappropriate. However, a prosecutor highlights that it might be important that police inform a suspect of the potential consequences. In his/her account, it depends upon the framing of the message to the

⁶³ Belgium, Court of Cassation 6 February 2020, AR P.19.1086.N, Journal des Tribunaux 2020, iss 6807, 202.

⁶⁴ Belgium, [Constitutional Court 20 February 2020](#), nr. 28/2020.

⁶⁵ Belgium, Court of appeal of Ghent 14 May 2019, nr. 2019/NT/20, Tijdschrift Strafrecht 2019, iss. 6, 359.

suspect (information vs threat). A police officer states that he would explain to the suspect why silence might come across as an admission that you might want to hide something (*“Try to put yourself in my position. What effect do you think it has?”/ “Probeer je in mijn positie te plaatsen. Wat voor effect denk je dat het heeft?”*) (Police officer, Belgium).

d. Discussion of findings

The focus of the protection of the right to remain silent and the prohibition of self-incrimination is put on the phase of investigation. This is natural as in Belgian criminal procedure this will be the phase where evidence is gathered and analysed and the framework is set for the trial on the substance. All respondents agree on the importance of these rights and the pivotal role of a lawyer to inform suspects on these rights and control these. It appears that in so far as a person is assisted by a lawyer, respondents consider that a suspect will be aware of the meaning of these rights because the lawyer will explain this, but also because they are aided by the letter of rights.

Highlighted good practice: Belgium has an excellent practice on the letter of rights provided to suspects when detained or invited to an interrogation. These letters can be found on the website of the ministry of justice both for suspects interrogated with being detained, without being detained and when being detained following a European arrest warrant. The letter of rights is drafted in easy language and translated in 59 languages. The letter of rights is provided to the suspect and the suspect can keep the letter of rights during and after the interrogation.

https://justitie.belgium.be/nl/themas_en_dossiers/documenten/documenten_downloaden/verklaring_van_recht_en

Nevertheless, the assistance of a lawyer is an added safeguard as often suspects will not read it (e.g. because they are nervous) or might be illiterate. It is advised that law enforcement should more readily check whether the suspect actually understands the rights, in particular if a lawyer is not present. Law enforcement in that respect highlight the difficulty to assess when they have to work with an interpreter.

In practice law enforcement also appears to respect this right by not insisting if it is clear that the suspect invokes the right or refuses to speak. There is more discussion on whether law enforcement can issue a warning as to the consequences of invoking the right, namely that it might be taken into account by a judge when deciding the matter. From the respondents it is clear that the manner in which this message is communicated, sets the line between genuinely informing the suspect on the potential consequences of such action and illegitimate pressure by threatening the suspect. Respondents agree that not so much the long-term consequences, but rather the short-term decision of an investigating judge to put a person in pre-trial detention will constitute pressure on the suspect to speak. Relying on the right to remain silent cannot be a justification for pre-trial detention, but respondents highlight that in such case it will often lead to this decision, e.g. because if the suspect does not speak, the risk remains that the suspect would collude with others to streamline his or her declarations. However, this may also constitute illegitimate pressure whereby warning with pre-trial detention might result in making confessions contrary to the will of the suspect.

In the same manner, discussion exists as to the consequences of remaining silent on a conviction by a court or the sentence. Judges accept that invoking the right to remain silent is an acceptable strategy. Where this is done in one investigation or for specific questions, this must not result in a negative outcome. However, in those cases – considered exceptional by judges – where the accused throughout the proceedings has remained silent, all respondents accept that this will have an impact

as the narrative of the prosecution is not counter-balanced by the arguments of the accused. It may also play a role in sentencing, as loyal cooperation by the accused can result in a lighter sentence.

Finally, there is disagreement among the respondents as to putting the prohibition of self-incrimination into practice. Where all respondents agree with the principle, several respondents appear unaware whether and to what extent suspects can be forced to hand over material or intellectual evidence, such as passwords and encryption codes. The Court of Cassation and Constitutional Court recently argued that a suspect can be forced to provide such encryption code. Yet, respondents remain unconvinced. A judge found this practice to be in violation with the presumption of innocence and opposed the practice. Respondents note that in practice suspects will often provide these data voluntarily.

C.6 The right to be present at the trial and to have a new trial

a. Consequences of non-appearance

Belgium provides of a right but not an obligation to attend trial. In exceptional cases, a judge may request the presence of the defendant. Moreover, some sanctions cannot be passed if the defendant is not present, because the judge needs to establish that the defendant understands the consequences of the particular punishment and agrees to this, e.g. community service. It is mentioned that the absence can have an important impact, as judges will in general accede to the requests of the prosecution in such cases. A judge argued that this depends on one judge to another whether they will examine the case at length or simply find the defendant guilty.

There is a clear disagreement as to the number of *in absentia* cases: one judge noted a very high number of trials *in absentia*, while another judge mentions this to happen only rarely.⁶⁶ Several reasons are mentioned by the respondents for the absence of a defendant, in particular the manner in which a summons to court is served as the language of the summons to court.

Defendants are informed by letter (formal summons to court) of the date and place of the hearing, the right to inspect the criminal file and the right to assistance of a lawyer. The standard procedure is that the prosecution service and bailiff both control the postal address of residence of the respondent in the public registry. If the person cannot be located, the summons to court is presented to the prosecutor himself. It falls in such case upon the prosecution to look for the address, but this is not done in practice. The manner of serving the summons to court is an important reason for *in absentia* trials. Lawyers criticise that the public prosecution does not take sufficient care to ensure that the defendant receives the information of the audience, e.g. a defendant is informed by letter at his/her residence, even though s/he is still in pre-trial detention. A judge highlights that the software relied upon by law enforcement simply does not allow them to see whether a defendant is in detention. Further, a prosecutor argues that it is often difficult to inform the defendant correctly when they do not have a fixed address or live in illegality. Finally, it is remarked that often defendants who are detained will not be transported to the court due to a miscommunication with the prison. A judge believes that today the public ministry should take even greater care to get the residence correct, e.g. by controlling the registered address with information in the criminal file, because of the more stringent rules to get a retrial:

⁶⁶ In a report by the COE, the Belgian authorities communicate that trials in absentia are “very common in Belgium”. See COE (European Committee on crime problems), [Questionnaire concerning judgments in absentia and the possibility of retrial, PC-OC \(2013\) 01 Rev.3.Bill.](#),20.

“Actually, one should look for the real place of residence. Now it is even more important, because it has become more difficult to get a new trial. One should avoid that a person is judged in absentia without having been informed properly (at least they should in such cases be able to get a new trial).” / “Eigenlijk zou je op zoek moeten gaan naar zijn eigenlijke verblijfplaats. Nu zou het des te meer moeten gebeuren gelet op het bemoeilijken van het verzet. Je moet echt zorgen dat mensen niet bij verstek worden veroordeeld zonder dat ze ingelicht zijn (minstens moeten ze in verzet kunnen gaan).” (Judge, Belgium)

Also, the language and information in the summons to court has an impact on the high level of *in absentia* trials. Several respondents (two lawyers, a judge and a prosecutor) believe that the language of the summons to court is too complex and difficult consequence of which many will not understand the language and defendant are not aware of the consequences. A lawyer states in that respect:

“[Y]ou should ask ten ordinary citizens what is written in that form. I assure you that of those ten citizens without legal background, eight will not at all understand what is written there”/ “Je zou eens moeten vragen aan een steekproef van tien modale burgers wat staat hier nu geschreven. Ik garandeer u dat van die tien modale burgers die geen juridische achtergrond hebben, er acht helemaal niet doorhebben wat daar geschreven staat.” (Lawyer, Belgium)

As such, it is mentioned that making the content clear to a defendant is an important task of a lawyer, but that more should be done. A lawyer states in that respect that:

“[E]veryone should be informed in a way that one understands that he or she is expected in court and that the case file can be consulted”/ “Iedereen moet op zodanige wijze worden geïnformeerd dat men begrijpt dat hij in de rechtbank wordt verwacht en dat het dossier van de zaak kan worden geraadpleegd.” (Lawyer, Belgium)

On the other hand, a prosecutor mentions that often convicted defendants simply do not trouble to seek advice or be informed as they are simply not bothered.

Finally, a judge highlights that cases against persons in an illegal situation will be held in their absence even if they have already been removed from the territory. It bothers the judge as in this situation there is no possibility for the defendant to defend him – or herself.

The summons to court recommends that one attends his or her trial but does not state the consequences of being absent from the trial. It is remarkable that several respondents believe that this is mentioned in the letter of summons to court (a lawyers and two prosecutors) or state they do not know (a judge). After inspection by respondents during the interview it becomes clear that it is not included in the summons to court. A lawyer mentions that s/he believes this should be introduced in the letter.

The Belgian procedural code provides for a right to a retrial in case of an *in absentia* trial. In recent years, the conditions have been restricted. Under these new rules it is provided that a retrial is only possible if the absence of the defendant was due to *force majeure* or other exceptional circumstances.

⁶⁷ A judge criticised this change arguing that when the summons to court is not presented to the defendant in person, one should not assume that the person is aware of the audience. The

⁶⁷ Belgium, Act of 5 February 2016 amending the criminal law and criminal procedure and laying down miscellaneous justice provisions ([Loi du 5 février 2016 modifiant le droit pénal et la procédure pénale et portant des dispositions diverses en matière de justice/Wet tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie](#)) Publication in Belgian Official Gazette 19 February 2016, entered into force 29 February 2016 [last accessed 10 March 2020].

constitutional court interpreted this provision in a lenient way taking into account the rights of defence.⁶⁸ As such, it suffices if a defendant raises a reason why he or she was not present that does not indicate a knowledgeable waiver of the right to attend. Once the defendant mentions during the retrial that he or she wanted to attend, it is upon the prosecution to show that this was actually not the case. A lawyer mentions, however, that the summons to court does not make clear that there is no automatic right to a retrial:

*“[P]eople are not aware that they can no longer just not show up and get a new trial “/”
“Mensen zijn niet op de hoogte dat ze niet zomaar meer verzet kunnen aantekenen.”* (Lawyer, Belgium).

A judge maintained that a person needs to provide a *“really good reason”* for his or her absence to get such retrial, but that mildness should be applied when assessing this reason.

b. What has been understood as “effective participation”?

All lawyers argue that there is only effective participation if the defendant is present or represented by a lawyer, understands for what one is being prosecuted and has the possibility to tell his or her version of the facts. However, there might be barriers to effective participation. A first barrier might be linguistic. A lawyer highlights that interpreters are often not available and by times the quality of interpretation is low. Whereas availability remains a major issue, it is mentioned that the quality of interpretation has improved. A second barrier is the vulnerability of the defendant, illiteracy or limited education because of which the person might not understand what is being said or happens in court. A third barrier, according to a lawyer, is the effectiveness and quality of the representation and/or preparation by a lawyer.

A lawyer believes that access to the criminal file, and sufficient time to study it as well as to consider its content with his or her lawyer, is an important guarantee to effective participation.

Police and prosecutors believe that the possibility to be present, participate and to answer questions are essential to the effective participation. As such, according to a prosecutor, the parties need to be able *“to play an active role”* in the proceedings. Several procedural guarantees were mentioned. First, if a defendant does not understand the language (sufficiently), an interpreter needs to be present. If this is not the case, the audience will be rescheduled. Second, the defendant will always have the last word. Third, a prosecutor mentions that already during the investigation a suspect should have the possibility to ask for additional investigation and appeal against a refusal. At current, such possibility is only open in the course of a judicial investigation instructed by an investigating judge, but not in general investigations instructed by the public ministry (which accounts for +/- 90% of prosecutions). Fourth, it is mentioned that certain cases are very technical. In such cases, a prosecutor found that it happens that the defendant will answer to the question of the judge in that sense that he or she has not fully understood what was happening.

Judges appear to have a different appreciation of what effective participation entails: for one judge being present or represented suffices, while active participation should be enabled according to two other judges. A judge found that the representation by a lawyer does not suffice for an effective participation as the personal presence of a defendant is very important to understand a person’s character. A judge accepts that often the defendant is not aware of what is happening in court and argue that this is due to the fact of a strict time management or limited time.

c. Vulnerable groups

⁶⁸ Belgium, Constitutional Court 21 December 2017, nr. 148/2017.

There are no specific formal arrangements for vulnerable groups, except for minors who will be prosecuted before specific juvenile courts with additional guarantees and protection mechanisms. It appears to come down to the lawyer to ask for additional safeguards in case of adult vulnerable accused. Respondents appear to be uneasy with this lack of guarantees, in particular where they believe the person to be unfit to stand trial. A judge recounted a case where it was clear that the defendant could not understand what was happening due to his mental state, even though he was assisted by a lawyer and interpreter. Yet, according to the court appointed expert this person was considered fit to stand trial.

There are, however, some good practices by actors taking into account the vulnerability of the defendant. A prosecutor mentions that in specific cases of vulnerability (e.g. the defendant is very sick), they will make sure to send the summons to court also to the known family or lawyer. It is, however, based on the willingness of the prosecutor to go the extra mile. A judge mentions that in such case they will also look into the file for officious addresses and ask for a new summons to court.

Lawyers can ask the judge for specific arrangement in case of specific vulnerabilities in order to ensure the effective participation (e.g. to have an interpreter for a defendant with a hearing impairment). A lawyer mentions that this is easier in cases where there is an introductory hearing to arrange the trial. Moreover, in such cases the respondents will try to assess whether the defendant can actually participate, in particular when they are not assisted by a lawyer. If they are not accompanied by a lawyer and there is a clear vulnerability, the prosecution will ask to delay the case in order to arrange for legal assistance.

Judges provide that the court can appoint a defence counsel if they consider the defendant unable to defend him – or herself. However, in certain cases this will not even work, namely if the defendant simply denies all representation or communication. A judge mentions a case where the defendant clearly could not understand what was being said, but refused a lawyer and the appointed lawyer did not want to represent the client because s/he could not have any reasonable communication with the client. The judge believed the defendant simply unfit to stand trial.

d. Discussion of findings

Whereas in principle the right to be present and to a retrial after a case *in absentia* is strongly anchored in the Belgian legal system, in practice there are many hurdles to being present and participate in a criminal trial.

First, respondents agree that there are deficiencies in the way parties are alerted of the date of the audience and their rights. It appears that defendants often do not receive the summons in court. Whereas in several cases this is due to an unknown address, potentially due to illegality of the accused, there are also structural issues. An issue clearly to be remedied, is the situation where a defendant is detained but will not receive the summons in court due to the fact that the summons is served at his or her residence or that the defendant has received the summons, but is not transported to court. This is due to the software used whereby the public prosecutor cannot check whether and where the defendant is detained, at least there is no automatic signalling of the detention, and to the lack of effective communication with the prisons who should be put on transport to court. Further, it is mentioned that the public ministry does not always take sufficient care. E.g. when it is clear from the criminal file that a person is residing at another address than his or her official residence, the summons will still be served at this address and the defendant will not be aware. However, from the part of the prosecution services both the required (communicating) software is lacking as well as a legal framework for alternative communication. There is no legal possibility yet to also inform the defendants via other communication means, such as e-mail or text. On the other hand, there also appears a certain fatigue and resignation to the non-appearance of the defendant. One prosecutor

suggested that defendants often do not bother and only act once they have been convicted. Finally, a judge mentions that defendants will still be summoned even though they have already been deported from the territory making it in fact impossible to exercise the right to defence.

As to the court summons itself, several shortcomings are mentioned. First, the document is considered too complex to understand. Whereas much effort has been put in a legible and clear letter of rights for interrogations, the summons to court and explanation of the rights of the accused are written in legal and complex language which even practitioners find difficult to understand. Second, the summons is not standard accompanied with a translation, even if it is clear from the file that the defendant speaks another language. Third, the court summons recommends attendance but does not stipulate the consequences of absence from the audience. Interestingly, respondents often think that it is included or do not now and take an actual summons in their possession from a concrete case to check during the interview. They ascertain during this review that the consequences are not mentioned in the summons. Respondents believe that this should be mentioned.

It is mentioned as well that recently the possibility for a retrial has been limited. Whereas previously a retrial was considered an unconditional right, nowadays the defendant will have to prove that there was no intention to waive the right of attendance. Whereas a judge and prosecutor acknowledge that the possibility to have a retrial is now made more difficult, two judges mention that they assess the explanation of an accused for his or her non-appearance in the first trial with leniency. A judge believes a retrial should always be possible if the summons to court is not served in person as in that case you cannot be sure that the accused actually received the summons in court.

Second, respondents disagree as to what an effective participation in court entails. Some respondents state that the fact that the accused is present or represented by a lawyer suffices. The court rules allow for sufficient time for pleadings and for the judge to ask questions to the defendant. Other, however, believe that there can only be effective participation if the accused can truly participate in the trial, understand for what he or she is summoned and provide answers to outstanding questions.

Several issues arise to that effect. In the first place, several respondents highlight that there are not enough interpreters and sometimes they are of low quality. The shortage of interpreters, partly due to them being reimbursed late and infrequent by the state, is an ongoing saga for many years but little improvement is realised. In consequence, it is often unclear whether the accused can really follow the proceedings and cases have to be rescheduled. In the second place, respondents deplore the lack of formal procedures or mechanisms to compensate the position of a vulnerable suspect. It often comes down to the goodwill of the prosecution or a judge to make amendments. A judge mentions a case where s/he had to decide a case believing the defendant to be unfit to stand trial where s/he was confronted with an expert opinion to the contrary. In this case the judge clearly felt that the defendant was mentally not capable to understand the trial, even though he had an interpreter and an attorney to his assistance. However, according to the court appointed expert, he was fit to stand trial and the judge proceeded with the trial. In the third place, both lawyers as judges state that often time-management can be an issue because lawyers sometimes do not have sufficient time to inspect the file and discuss this with clients (i.e. in cases where there are no terms provided to file legal briefs) and judges to deal with cases in depth due to the caseload. Finally, judges mention that the low quality of lawyers can play a role as well. This has also been mentioned by several respondents, including lawyers, with regard to the assistance of lawyers during interrogations. For the assistance of lawyers during an interrogation of suspects a new training has been introduced with the Flemish bar and assistance during an interrogation is now only possible for certified lawyers.⁶⁹ Also, for procedures

⁶⁹ This is an application of the European Supralat-project (Project Strengthening suspects' rights in pre-trial proceedings through practice-oriented training for lawyers'), as funded by the European Union (<http://www.salduzlawyer.eu/>).

before the Supreme Court, lawyers will have to complete a training and pass an exam. For general criminal cases there is no specific training provided, apart from having a Master in law and had a training of 3 years under an established lawyer.

C.7 Challenges and improvements

a. Challenges

Respondents mention three clear challenges: the impact of new media, the balance between freedom of press and information and the presumption of innocence, the time taken for investigations and cases and structural deficiencies to court houses.

A first challenge mentioned by almost all respondents is the impact of new media, in particular social media, on the presumption of innocence. There is no control over these media. In addition, it has increased the speed of media reporting and in result, the lack of serenity and analysis. A prosecutor remarked:

“In the past we only had newspapers and then the news was published only after two days. Now everyone has a smartphone, is present on Facebook, Twitter and they immediately start video recording. People are convicted before a police report is drafted.” / “Vroeger met krant was het met twee dagen vertraging. Nu heeft iedereen smartphone zit op facebook, twitter en ze maken direct filmpjes. Mensen veroordeeld voor ere en direct veroordeeld. Vaak zelfs voor ere en [Pro Justicia] is.” (Prosecutor, Belgium)

As a second challenge, connected to the first, respondents mention that a new balance should be found between the right to information and press freedom on the one hand and the presumption of innocence and the possibility of a serene debate on the other hand. Respondents believe that the balance is tilting too much to sensationalism rather than genuine information gathering and critical analysis van investigative journalists. The speed of reporting and lacking analysis warrant a rethink of the balance as well as the manner of communication by judicial actors. A prosecutor stated:

“Compared to fifteen years ago: one had a newspaper and news on the television at Midday and at night. In between journalists had the time to make sure they bring correct information forward. Now one is immediately confronted with social media. It needs to go online very quickly. That is where the challenge lies to find a balance between informing the public and the right of defence. We need to go back to well-founded news. The prosecution service needs to continue to develop its communicative role, but no go too far.” / “In vergelijking met 15 jaar geleden toen had je een krant, jaartal 's middags en jaartal 's avonds. Daartussen hadden journalisten blokken van drie vier uur om correct te brengen. Nu zit je met onmiddellijkheid van sociale media. Het moet heel snel online verschijnen. Daar ligt de uitdaging om een evenwicht te vinden tussen het informeren van de bevolking en het recht van verdediging. Men moet terug naar onderbouwde berichtgeving gaan. Wij als openbaar ministerie moeten onze communicatieve rol verder ontwikkelen, maar niet te fel overhellen.” (Prosecutor, Belgium)

Respondents also believe that the other actors can play a role in that respect. Some even suggest that it would be better if neither lawyers nor the prosecution services would communicate in ongoing cases. Whereas in current times an efficient and transparent communication by judicial actors is important for trust in the rule of law, lawyers believe that the public ministry should communicate with more reserve, in particular in ongoing cases. A lawyer emphasized the responsibility of public ministry in this regard:

“I think it is crucial that the public prosecutor is more reserved in his/her communication. You cannot expect a journalist to do that. Such reserve should exist within the department of justice” / “Ik denk dat het belangrijkste is dat het openbaar ministerie meer reserve aan de dag moet leggen. Je mag niet van een journalist verwachten dat hij een terughoudendheid heeft. Die reserve moet binnen justitie aanwezig zijn.” (Lawyer, Belgium).

Also, other actors should take up this responsibility in the view of the respondents, including lawyers and judges. A judge expressed his/her discomfort with the mediatization of cases and believes that cases should be dealt with in the court first and not in television studios. The impact of reality programs following cases is mentioned in so far broadcasts are made on ongoing cases (see more on this under C.2). Judges assume responsibility as well by making it very clear that they are not put under pressure by public opinion or negative coverage. A judge mentions that they, in particular the press magistrate, should be vocal in making clear that a person is presumed innocent until the defendant is found guilty by a court.

Third, the impact of time on the presumption of innocence is mentioned as a challenge as well. On the one hand lengthy investigations can impact on the presumption of innocence given that the period during which a person is considered under suspicion of having committed an offense last longer and the public stamp can be more ingrained. Police, however, mention that it becomes ever more difficult to keep the time of investigation limited. A police officer states that obtaining material evidence takes a lot of time, e.g. getting financial account data from a bank can take over 3 to 4 months during which the suspect remains in limbo. A lawyer and a judge highlight on the other hand that the restricted time to deal with a case in court due to the heavy caseload and certain inefficiencies in the procedure result in the fact that there is simply not sufficient time to provide the defendant with all the opportunities to prove his or her innocence and refute the thesis of the prosecution.

Fourth, it is mentioned that the infrastructure of many courthouses is inapt for the current tasks of criminal justice and does not have the layout to guarantee the presumption of innocence, e.g. to shield suspects or defendants from the press. E.g. a lawyer mentions that it would be better if courthouses would be laid out in such a way that detainees do not have to walk through courthouses. This challenge was also mentioned by other respondents during the questions on the representation before the court.

b. Improvements

There is an overall agreement among respondents that the introduction of the Salduz-guarantees, first on the basis of the ECHR case law and afterwards on the basis of the Directive on access to a lawyer, was a major improvement and resulted in a better protection of the rights of defense. From the interviews with law enforcement it is clear that the values of Salduz-guarantees, including the right to remain silent, are now ingrained in the mindset of most judicial police and they actually welcome the assistance of a lawyer. Lawyers find that police much easier accept the decision of a defendant not to speak and not continue to probe. A police officer holds the rights of defense to have improved as lawyers can now intervene during questioning. A judge states that lawyers are even not informed sufficiently on these rights or do not rely on them as much as they could. In this respect, a lawyer highlights that the bar associations should put more emphasis on the role of a lawyer to protect the presumption of innocence.

This has also shifted the manner in which prosecuting authorities are conducting their investigations. They much less put all focus on the interrogations and looking for confessions but rely on material evidence. A police officer with more than twenty years of experience remarks:

“At that time we worked towards obtaining declarations. I rely more on the strength of material evidence” / “Toen werd er gewerkt naar verklaringen. Ik ga meer uit van de sterkte van materieel bewijs.” (Police officer, Belgium)

On the other hand, several respondents also noticed setbacks. First, the tightening rules with regard to a retrial in case of *in absentia* trials and the casualness towards trials *in absentia* are mentioned. Moreover, it is noted that judges no longer insist on the active participation of defendants in trial. A lawyer mentions that it has become much more accepted that you would represent a client who is not present. Judges, however, seem to regret this evolution stating that they still believe the presence of the defendant to be of importance as you can assess the personality of defendant and ask questions.

Further, it is noted that while the presumption of innocence is reinforced within the justice system, in the public sphere the respect for this principle is diminishing with media having no reservation as to the manner and information they broadcast.

“A bit of both. Within the justice system the presumption of innocence has been confirmed/reinforces, outside the justice system, there are more and more cases that are being commented on in the press while they are ongoing, also attorneys tend to participate in that at times. That is maybe a challenge, cases should be addressed in court, not in the studios of the VRT or VTM (broadcasting companies).”/“ Alhoewel er zijn voor en tegens. Evolutie binnen justitie bevestiging/versterking van vermoeden van onschuld, wat erbuiten gebeurt, meer en meer in detail zaken becommentariëren in de pers die nog niet afgelopen zijn, advocaten doen daar soms aan mee. Daar is misschien een grote uitdaging, zaken moeten in de rechtbank behandeld worden, niet in de studio’s van de VRT en de VTM.” (Judge, Belgium)

c. Suggestions

Several clear suggestions were made. In the first place these suggestions concern the active participation and possibility to ensure the defence of defendant. It is mentioned that while the legal protection of the rights is in place, they should be made practical and effective, as one respondent mentions *“The rights are available, but they cannot be filled in”*. In this approach, the following suggestions were made:

- Ensure available and qualitative interpreters;
- Make sure that the summons to court are clear and legible;
- Include in the summons to court the consequences of non-appearance;
- Provide sufficient time in court to deal with the case and fight assumptions.

Second, specific recommendations are made in order to shield suspects from media attention. As several respondents mention the impact of the public calendar of cases to be dealt with, a judge suggests that the names of the parties should not be mentioned on the available calendar of the court room. Throughout the replies of the respondents, references are made as to finding a new balance in communicating with the press, without a concrete suggestion. In general, in addition to the presumption of innocence, it is mentioned that more consideration for the privacy of suspects should be taken by the justice system.

A third suggestion made is that more focus should be put on training and awareness, both with lawyers and police, as the importance of different experiences. A judge mentions that her past experience as a lawyer enabled her to see the other side more easily, be aware of bias and prejudice and disregard contextual elements that might have an impact on the presumption of innocence.

PART D. GENERAL ASSESSMENT

Overall research findings

In general, respondents of the various respondents agree on many issues as to the improvements, setbacks and challenges with regard to the protection of the presumption of innocence. To name a few:

- Salduz guarantees as a positive evolution;
- Importance of the assistance of a lawyer;
- General awareness of the importance of the presumption of innocence, including the right to remain silent and non-incrimination;
- Vigilance as to the potential impact of contextual elements on the presumption of innocence, such as the wearing of handcuffs, having of a criminal record, ...
- Negative appreciation of media intervention during ongoing investigations;
- Assessment of the court summons as too complex and inapt.

The several respondents all register a high level of trust in the general functioning of the justice system as to the respect for the presumption of trust in the trial phase. This is evidenced by the fact that respondents highlight several elements that may have an impact on the presumption of innocence (presentation in court, factors specific to the suspect such as ethnicity or a previous criminal record, ...), but state that in general they trust the professionalism of judges.

In contrast, the respondents among the several actors look with distrust to the journalists specific and the public opinion in general. They are very critical of the positive impact of reporting on criminal cases, believe sensationalism to be the driving force of reporting on the criminal justice system today and highlight the low quality of coverage of media trials. Most respondents indicate not to see the merit of media coverage of a case during the investigations. Further, they believe that factors that may have an impact on the presumption of innocence (e.g. handcuffing, security police, being identified as suspect in an ongoing investigation ...) will be amplified by the media and result in a presumption of guilt among the public opinion. Many respondents believe a new balance should be found between the right to information and media freedom on the one hand and the presumption of innocence, secrecy of criminal investigations and the right to privacy on the other.

Whereas this commonality among the different actors with very different interests within the criminal justice system might be surprising, this can easily be explained both by the context of the Belgian criminal justice system as the research selection. First, the Belgian legal order is anchored within a firm and stable rule of law context. In such context, actors will in general be more trusting towards each other.

Second, there are factors that increase the familiarity between the several respondents as professional groups both as to structural elements as to interpersonal elements. Often magistrates will have a previous career as lawyer and/or public prosecutor. Public prosecutors will often have previous experience as a lawyer. Finally, previous colleagues or trainees of established lawyers may continue to become prosecutors or judges. More, it is often mentioned as positive that a judge or prosecutor has previously trained as a lawyer given that this will increase the respect for the presumption of innocence. As such, the respondents are familiar with each other. In addition, the introduction of the Salduz-guarantees has further resulted in a closer contact between lawyers, prosecutors and police. Whereas in the beginning the assistance of lawyers was feared as potentially having a negative impact on investigations, law enforcement today sees the benefits. E.g. a police officer mentions that he will always advise suspects to seek assistance of a lawyer.

Third, for reasons of comparability the sample of respondents was all chosen within the same regional context and have many years of experience. All respondents work in a metropolitan context (Brussels,

Antwerp, and Ghent) and are accustomed to dealing with serious crime daily (from international economic financial crime over terrorist and sex crimes). They all have considerable experience and have assumed positions with responsibility. As several respondents state, experience may result in more vigilance for the presumption of innocence. All in all, the outcomes of this research, including the finding on a high level of similarity in replies and trust/distrust analysis, may be different in another sample. Yet, certain factors remain the same, such as the rule of law context and constant interaction between the actors both in investigations and trials.

Presumption of innocence

Among the several respondents there is a high level of awareness of the importance of the presumption of innocence. The several respondents engage with the presumption in a different manner from their proper role in the criminal justice system:

- Roles lawyers take in respecting the presumption of innocence:
 - o Controlling the respect for the presumption of innocence by law enforcement authorities or in court;
 - o Counter-balance bias or presumptions of guilt that is not founded on material evidence in the phase of investigation and during a trial;
 - o Being open-minded when entering into contact with a client.
- Roles police and prosecutors take in respecting the presumption of innocence:
 - o Keeping an open mind during the investigation towards arguments of the suspect;
 - o Ordering additional investigation to sustain an argument from the suspect;
 - o Respecting a high threshold as to indications of guilt before bringing a suspect before court for alleged crimes.
- Roles judges take in respecting the presumption of innocence:
 - o Keeping an open mind when hearing the arguments of the defendant;
 - o Maintaining a high threshold before finding a person guilty for alleged crimes, namely beyond reasonable doubt;
 - o Being aware of potential bias or prejudice, in particular not relying on a previous criminal record when assessing whether or not a person is guilty.

Whereas these roles follow naturally from the respect of the presumption of innocence for each actor, two perspectives mentioned are noteworthy given that this is underrepresented in research but also – following several actors – in the training or guidelines of the professional codes.

First, the role of lawyers in respecting the presumption of innocence in their contacts with clients is underexposed. In general, the focus is put on the lawyer as controlling other authorities in respecting the presumption of innocence. A lawyer highlights that too little attention is actually paid by lawyers in general to the presumption of innocence. Judges as well highlight that it is only scarcely invoked and following a judge too little. The start, according to a lawyer is the fact that a lawyer him – or herself should keep an open mind when entering into contact with the client the first time. S/He highlights that if you are sceptical towards clients or do not believe them from the start, it will be difficult to ensure an effective representation.

Second, public prosecutors remark that they should take a high regard for the presumption of innocence and should not only respect the right, but also put it into practice as well. A public prosecutor remarks in that prosecutors should maintain the same level of respect for the presumption of innocence as a judge.

As to the factors that may have an impact on the presumption of innocence, several recurrent elements were mentioned, of which three elements were clearly shared by all respondents:

- Timing of the investigation: once law enforcement has decided on a given hypothesis, the openness for counterarguments and alternative perspectives diminished. This may have an

impact on the questions that are asked during an investigation, open assessment of counterevidence or willingness to ask for additional investigation.

- Previous criminal record: a previous criminal record is accepted by several respondents as a bias that can have an impact on the presumption of innocence, in particular if in the past the defendant has already been convicted for a similar crime.

It is argued that such bias can be countered in the first place by awareness of the potential factors that may affect the presumption of innocence in order for actors to recognise it with themselves or others. This can be done by voicing the potential of bias in a case, e.g. by a lawyer during pleadings or during an interrogation. This should also be done by constant training of lawyers, police, prosecutors and judges. Further, it is mentioned that having a previous experience as a criminal defence lawyer may render a prosecutor or judge more attentive to such bias.

Public reference

The respondents mentioned both the positive and negative impact of media on the presumption of innocence:

- Positive:
 - Highlight in a specific investigation certain elements or deficiencies that were not considered or disregarded by the public ministry or court;
 - Bring systemic deficiencies of the criminal justice system to the attention of the general public or policy makers;
 - Redressing a general negative appreciation of a suspect when reporting on the case after an acquittal or counterbalancing with new arguments.
- Negative:
 - Creating an enduring stigma for a person if he or she is named in the media as a suspect or defendant in a criminal case;
 - Reporting incorrectly on the crime causing additional stigma to the situation of the person;
 - Disabling a serene debate in court due to reporting on elements that are not yet publicly known or discussed in court;
 - Undermining a criminal investigation by reporting on not yet known outcomes of the investigation;
 - Creating pressure on the public prosecution to prosecute a certain suspect (e.g. see the Belgian Bo Coolsaet case where the public ministry felt compelled by the media reporting to issue a public statement defending the individual prosecutor who had not pressed charges against the defendant);
 - Blurring the pre-conceived knowledge of judges (in particular with potential jury members) and the actual elements of the criminal file.

In general, the respondents are very negative towards press attention finding that it disenables a serene debate and has only limited added value. This is, according to the respondents, due to the lack of sufficient qualitative journalists, a lack of knowledge on the functioning of the criminal justice system among journalists, the ever faster reporting whereby insufficient time is taken to check, and the focus on sensationalism. Respondents deplore the number of leaks and highlight that this is not due to one person or actor, but that journalists have a broad network of contacts. Further, respondents hold that there is different coverage of cases in the media towards certain ethnicities and nationalities, as well as towards persons with a certain profession/function or who are public figures. In addition, respondents remarked more sensationalist coverage in cases regarding certain crimes, such as terrorist cases.

Several respondents mention that the intervention of politicians in their capacity of mayors can have a negative impact on ongoing investigations and the presumption of innocence as they report for

political reasons and might undermine as well the effectiveness of investigations. In the Belgian media cases, one case is mentioned where the mayor of the city of Antwerp communicated on a suspected alleged terrorist act, even though the public ministry had explicitly requested not to do this. The allegations later turned out to be erroneous, but the stigma remained on the suspect being labelled a “terrorist” even though he was prosecuted for different facts and no terrorist motive was found.

The respondents believe that other actors should also take more care when communicating in the media and a new balance is found. In particular the following practices are highlighted as detrimental to the presumption of innocence:

- The communications by the public ministry as coming too soon in the investigation or being too detailed allowing for the identification of the person;
- Lawyers communicating during an ongoing procedure before the press or in TV studios with insufficient reserve;
- Ongoing “reality” / “human interest programs” on ongoing cases and investigations.

Whereas respondents believe in general that judges will not be influenced by media coverage when deciding and judges quote several coping mechanisms such as not reading on these cases, the respondents point out that the real fall-out is as to the position of the suspect or defendant in the eye of the public opinion and potentially might have an impact on jury’s in trial before the Court of Assize.

As to the organisation, within the authorities the communication is centralised via spokespersons who are trained and have certain guidelines. However, it is remarked that the spokesperson for the magistracy receives little guidelines.

Presentation in court

Different restraining measures are used during the transport to court, including the transfer within the court from the police cells to the chamber of trial, and when before the judge. The severity of the measures depends on the risk assessment, either based on the actions of the defendant (moving too much), the person of the defendant or the case itself (e.g. terrorist cases). It is mentioned that there should be more attention for an individual assessment and restraining measures are too easily used. In practice, the general restraining measures are the handcuffs and assistance of security police assisting the detainee to court and remaining there during the trial. The handcuffs are removed before the judge but might be kept in high risk cases. This practice appears quite regular in terrorist cases and depending on the practices of the specific court. Judges express their discomfort with the practice of keeping a defendant handcuffed during the trial.

Whereas in general respondents believe the judges to be sufficient professional do disregard restraining orders, in certain cases the measures are of such severity that both lawyers and judges agree that indirectly it creates an atmosphere where the defendant is portrayed as a dangerous person. Respondents agree that such measures do have an impact on the general public and that many courthouses are not equipped nor structured to avoid encounters between the media and the defendant. As such, police try to be creative to avoid such public scrutiny, e.g. by using blankets over the handcuffs, driving as close as possible to the court entrance.

As to clothing there appears a very wide divergence of practice from one prison to another, from one defendant to another. It is mentioned that detainees from some prisons will mostly appear in prison clothing due to insufficient time in the morning to change, while other prisons manage to ensure that most defendants are wearing their own clothes. Having sufficient means and a network of family and friends is considered an important factor for the fact whether or not they will appear in prison clothing. Prison clothing is not considered to have an impact on the appreciation of judges. However, being well dressed in combination with a good story is considered by several respondents to have a positive impact on the court.

The main remedy for infringements upon the presumption of innocence are located within the criminal trial, namely to argue that the case is inadmissible or the defendant should be acquitted due to an irreparable violation of the presumption of innocence. This argument is raised seldom and in general not successful as judges state that in general they will not be influenced by media coverage, restraining measures or clothing to such extent as to extinguish the essence of the presumption of innocence. Yet, it might result in a lesser sentence. Further, there are several civil options such as starting a procedure for libel and slander, asking the rectification in press, injunctions against broadcasting during an ongoing investigation or trial. These civil remedies are considered in general not very effective, partly because of the strong protection of the right of information and press freedom in Belgian constitutional law.

Finally, respondents in general believe that there are insufficient measures to protect vulnerable defendants (with the exception of minors where there are different rules when appearing before the juvenile court). E.g. vulnerable defendants are not specifically shielded from the media. As such, accommodations to balance the vulnerable state of a defendant are not formalised but depend on the actions of lawyers and goodwill of the judge.

Burden of proof

The burden of proof rests in general on the prosecution. There are certain exemptions to this general rule, e.g. on the illicit origin of suspected money-laundered specimens or the material observations of police in a police report. In certain cases where there is no rebuttal of the burden of proof, all respondents agree that it may be very difficult for the defendant to prove his or her innocence, e.g. in case of finding drugs upon a defendant. Law enforcement and judges highlight the importance of remaining critical and open in such cases not to alter the burden of proof upon the suspect / defendant.

Confessions will have a procedural impact as this may open other, speedy procedures such as a guilty plea or may convince the prosecution to propose a settlement. After the intervention by the constitutional court on these procedures, today a court will have to assess whether the defendant accept such procedures or settlement out of free will and knowingly. Further, the judge will check whether the fine or sentence is not disproportional.

As material evidence, lawyers state that such confessions may often count heavy as to the proof of guilt and investigations may be closed afterwards. Yet, law enforcement states that they do assess such confessions critically and will still seek for additional elements of evidence supporting the confession, either because there may be alternative reasons for such confessions than the intention to come clean or loyal cooperation or because they fear the defendant to retract such confessions. Judges also highlight that a critical approach is needed in order to ensure that the confession is made knowingly and in accordance with the facts of the case. All respondents highlight that the introduction of the Salduz-guarantees has been a major improvement. Lawyer add, however, that it is now much more difficult for suspect to convincingly retract confessions if they are made in the presence of a lawyer. As such, the quality of the lawyer assisting and advising the suspect is of high importance.

Right to remain silent and prohibition against self-incrimination

All respondents highlight the importance of the right to remain silent and the prohibition against self-incrimination. On this point as well, the respondents highlight the importance and improvement of the introduction of the Salduz-guarantees. Due to the clear letter of rights and the assistance of a lawyer, all respondents agree that assisted suspects will be aware of their rights and understand its importance. These values seem moreover ingrained as police and prosecutors argue that the investigations should respect their rights and there should be no probing if a suspect has invoked the right to remain silent.

Judges accept that invoking the right to remain silent is an acceptable strategy and must not signify the guilt of a person. However, both prosecutors and judges mention that if the defendant has remained silent during the investigations and trial and there is material evidence against the defendant, this will in general result in a conviction and often higher sentence. In such cases there are no elements to counterbalance the arguments of the prosecution. As such, police might warn of this effect and all respondents find it often in the best interest of the suspect to provide his or her account of the facts. Respondents state that it happens seldom that defendants invoke the right to remain silent during the whole of the investigations and trial.

More problematic is the assessment of many respondents that if a suspect decides to invoke the right to remain silent to all questions, there is a much higher risk for pre-trial detention. It is mentioned that the threat to be presented before an investigating judge who can decide on pre-trial detention is a much more effective pressure on the suspect to speak than the long-term consequences.

The prohibition against self-incrimination is also accepted as an important right by the respondents. However, it is clear that respondents are often unsure as to what is exempted from this protection. Whereas they all know that biometrical material such as urine or DNA can be asked from the suspect under pressure of a sanction, not all respondents are aware of the possibilities to enforce information such as a pin code, password or encryption code. Even though the Belgian court of cassation and constitutional court recently decided that the investigating judge can enforce providing the encryption key to digital devices under threat of a prison sanction or fine, many actors – including judges – believe this is in violation with the prohibition of self-incrimination. They state, moreover, that in general suspects will provide this information voluntarily. The question, which is not examined in this interview, is whether suspects provide this information willingly and knowledgeable, or because they believe they have no choice.

The right to be presence

Judges and lawyers highlight the importance of the presence of defendants and the possibility to participate during a trial. It is mentioned that in practice there are certain limitations to the possibility to actively participate:

- The technicality and complexity of a trial;
- Vulnerability of the defendant, based on physical, intellectual or psychological basis, but also Illiteracy or limited education are named;
- Not speaking or understanding the language of the court (Dutch for the Dutch speaking courts, French for the French speaking courts), the limited availability and sometimes low quality of interpreters;
- The limited time for hearing the trial due to the high caseload.

It is mentioned that ever more representation by a lawyer is accepted. Yet, judges believe there to be merits for a defendant to be present, namely that they can assess the defendant (including elements of vulnerability or fitness trial) themselves, the possibility to ask questions and the fact that certain sentences can only be decided on with the explicit agreement of the defendant in person.

Yet, in fact there are often *in absentia* trials. Judges disagree on the frequency: some state that is very common, while others find this to be in a limited number of cases. Lawyers agree that this happens often. In Belgian procedural law the right to be present as well as the right for a retrial is provided. However, new admissibility criteria for a retrial have been introduced limiting the possibility to have a judge reassess a judgment rendered in absentia. It should be mentioned that the constitutional court significantly broadened the possibilities to have a retry by interpreting the provisions in favour of defendants and judges state to assess the reasons given by defendants for their absence with leniency. Several reasons are mentioned why *in absentia* trials occur:

- How the summons in court are served:

- Due to the software the public prosecution does not always have a clear sight as to who is in detention or prison and where serving the summons in court at the private residence;
- The official residence might not match with the place where a person actually lives or the defendant might not have a fixed address (e.g. persons in illegality);
- Not sufficient care was taken to control whether the official address matches with the address mentioned by the defendants in the criminal file;
- Summons in court will only be served in paper by a bailiff upon request by the public ministry and other means of communication are not / cannot be used (e.g. text or mail);
- Often the summons in court are served too close to the date of the audience, in result not leaving sufficient time to find a lawyer, all the more when a pro bono lawyer needs to be appointed, inspect the file and discuss the findings with the client.
- Content of the summons in court:
 - The content of the summons in court is too complex, lengthy and difficult for the general public;
 - The summons is not translated when served within Belgium even though the person does not speak Dutch and another language of communication was mentioned in the criminal file;
 - The summons in court recommend attendance but do not inform of the consequences of absence and the conditions for a retrial.
- Deportation of defendants: it regularly happens that a person who is summoned to appear before a criminal court is already deported to his or her home country or country of first entrance in view of the Dublin-regulation.
- Disinterest and resignation: certain defendants do not understand, fear or do not care the importance of being present during an audience and would only take action after a conviction.

It is clear that there is much room for improvement in informing a person on the procedure on the substance before the trial court. As much as Belgium can boost its good practice on informing suspects of their rights before an interrogation by means of the invitation to an audience and the letter of rights (the many translation, clear language, repetition and explanation of the rights, assistance of a lawyer), it is failing the required level of clarity when informing defendants on their rights during a trial, the importance of their presence, how they can actually participate, the need to take swift action in contacting a lawyer and the consequences of non-appearance. All respondents agree that the text of the summons in court is too complex, translation is lacking and the manner of serving unsatisfactory. Several respondents mention “a lack of care” taken and the absence of additional safeguards for vulnerable defendants. The public prosecution highlights that they are restricted by the law and means and sometimes take additional measures, e.g. in case of vulnerability also informing the lawyer and family if known.

More in general, there appears a lack of sensitivity in the Belgian criminal justice system for vulnerable defendants (with the exception of minors), both in the phase of investigation and trial phase.

Challenges

Several challenges are explicitly mentioned by the respondents:

- How to deal with new media, in particular social media: this is an uncontrollable medium, not bound by the same rules of deontology and puts pressure on the media to communicate ever faster;
- Rebalancing the right to information and freedom of press with the presumption of innocence, serenity of trials and effective investigations: respondents hope for a new focus on qualitative investigating journalism and analysis after the judgment instead of erroneous and sensationalist coverage based on leaks and anonymous sources during the investigations.

Questions are raised as to the cooperation of law enforcement, police and magistracy to reality / human interest programs and discussing the cases (including by lawyers) in TV studios while a case is ongoing;

- The impact of time: on the one hand ensuring an investigation within reasonable time even though investigations are becoming ever more complex, technical and transnational whereby police is depending on the cooperation of other non-judicial actors and on the other hand to have sufficient time in court to discuss the case even though there is an important caseload and limited time;
- The infrastructure of the courthouses: the old courthouses are inapt to guarantee the presumption of innocence by shielding of detainees from the media and to ensure that restraining measures can be kept to the minimal.

Other challenges are mentioned as well during the interviews when answering other questions:

- The general lack of knowledge and awareness among lawyers of the presumption of innocence and what this entails for their work + how they can use it.
- The all too swift focus on a given hypothesis in a criminal investigation in consequence of which other options or arguments of the defendant might be disregarded;
- The lack of individual assessment whether restraining orders are required for the specific individual defendant;
- General lack of adequate safeguards and measures concerning vulnerable suspects (with the exception of minors appearing before the juvenile courts): there is no standardised procedure to test, assess or evaluate vulnerability, there are no specific measures to shield such suspects or defendants from media attention, there are no moratoria towards the press as to reporting on such defendants, there are now compensating measures as to the presentation or assistance of such defendants or to ensure the participation. Much depends on goodwill of the prosecutors and judges and the actions of a lawyer, if appointed;
- The lack of qualitative interpreters and lack of translation of summons in court;
- The manner in which a person is summoned to court (how and content) and mentioning of the consequences of non-appearing.

Improvements

The respondents all mention the Salduz-rights as a major improvement in the phase of the interrogation. This includes:

- The assistance of a lawyer;
- More understanding and appreciation of the right to remain silent and prohibition of self-incrimination by law enforcement;
- The drafting, use and translation of the letter of rights.

The impact on the investigation has been profound whereby law enforcement now no longer focuses on interrogations and getting confessions, but seeks to get as much material evidence as possible. This is also the case if there is a confession, because law enforcement or a judge would want to establish the accuracy of such confession and also because law enforcement calculates that the suspect would retract his or her confession.

Some respondents mention, however, that certain guarantees remain theoretical for certain suspects, in particular with regard to qualitative translation and in those cases where a lawyer might not be present. It is noted, moreover, that in recent years the exceptions to the prohibition of self-incrimination have broadened, in particular with the recent extension to providing an encryption key or password as non-incriminatory material. Further, it is highlighted that the conditions for a retrial after an *in absentia* judgment have been restricted.

Suggestions

The respondents made several suggestions:

- Ensure available and qualitative interpreters;
- Make sure that the summons to court are clear and legible;
- Take more care in ensuring that the summons in court are served to the person;
- Include in the summons to court the consequences of non-appearance;
- Provide sufficient time in court to deal with the case and fight assumptions;
- Put in place more guarantees and safeguards for vulnerable suspects;
- Do not mention the names of the parties or indications of the alleged crime on the available calendar of the courtroom;
- Take more care to shield suspects from the public eye;
- Ensure training and awareness among the several actors on the importance of the presumption of innocence.

PART E. CONCLUSIONS

To conclude, there are several key findings:

1. **Trust:** there is a general high level of trust among actors in the respect for the presumption of innocence by judges and that they are sufficiently professional to disregard elements of bias, prejudice, coverage in the media or contextual elements such as restraining measures.
2. **Distrust:** there is a general high level of distrust among actors towards the media and the impact of coverage on the general public opinion. It is considered a “stamp” on the suspect that does not easily gets away.
3. **Discontent:** there is a general high level of discontent among the actors as to the manner of relationship with the media and the quality of reporting, in particular in ongoing cases. It is noted as well that this is not only due to leaks, but also to active communication by the public ministry or lawyers in ongoing cases as well as through reality programs on the work of the police, public ministry of courts. Reservation and serenity are lost. The respondents in particular fear the impact of social media on the presumption of innocence.
4. **Tunnel visions:** several respondents express their frustration as to the lack of openness to suggestions or counter narratives during the investigation once law enforcement has settled on a hypothesis. Law enforcement officials acknowledge that at that moment the openness might disappear and the presumption of innocence is restricted.
5. **Bias:** from the respondents having a criminal record appears to have an important impact on sustaining the facts of a new case. All respondents are aware of this bias, but yet they all consider this to have an impact in practice and it might shift the internal conviction on guilt. The criminal record is standard included in the criminal file.
6. **Vulnerability:** respondents argue that there is not sufficient care for vulnerable suspects or defendants, both in the phase of investigation as in the trial phase. Several issues in that respect are raised: the lack of qualitative and available interpreters, the difficult languages used in the summons in court as during trials, the lack of safeguards to shield vulnerable suspects from the public idea, lack of accommodation as to restraining measures.
7. **In absentia trials:** it is noted that not sufficient care is taken to ensure that a person is actually present during the trial. The summons in court are too complex, essential information (as to the possibilities of a retrial or consequences of absence) are not mentioned, there is no standard translation, the manner of serving the summons is inefficient, the software of law enforcement does not allow to locate a detained person in a given prison and defendants may be deported before the audience.
8. **Structural deficiencies:** on several accounts respondent highlight structural deficiencies in the criminal justice system that impact on the presumption of innocence, such as the old and inapt courthouses, the lack of time to deal with cases during trial, the limited availability of

interprets, the rigidity of serving the summons (by paper by a bailiff and not by modern means of communication) in court and inadequate software, lack of training and experience or understanding of certain judges in lawyering practice.

9. **Improvements:** respondents all acknowledge the major improvements of the Salduz-rights, including the assistance of a lawyer and the letter of rights. These rights appear moreover ingrained as essential safeguard among law enforcement. The same mentality switch appears needed at the trial phase.

ANNEX – CASE STUDIES

Belgium - case study/ media coverage #1		
1	Reference details/Name/Title	Mohammed R. / Meir Terrorist – case
2	Brief description of the case (overall impression of the incident)	On 23 March 2017 the police was informed that a car with French license plate drove at high speed and recklessly over the main shopping street of the city of Antwerp (Meir). The driver ignored the orders of two military forces present and fled (in the aftermath of the 2016 terrorist attacks in Belgium, military patrolling was introduced in some parts of Antwerp). He was later localised on a public parking in his car while listening to music and clearly under the influence of substances. Under the passenger seat, the police found an airsoft weapon. Further, two decorative daggers, a disassembled riot gun, a military camouflage vest, a water bottle, a (stolen) laptop, USB sticks and four mobile phones were found in the trunk. He also had 1,500 euros in his pocket. The mayor quickly communicated in the press that this was mostly likely an attempted terrorist attack, even though the public ministry already had doubts regarding this incrimination at the time and requested the mayor not to communicate. The context, camera images and further investigation confirmed the finding of the public ministry that it was a case of driving under influence, and that no terrorist motive was present. However, the communication of the mayor was picked up widely and the suspect, Mohammed R., was further referred to in the press as the “Meir terrorist”.
3	Timeline of events (briefly outline major events in order to capture the extent of the case)	The facts were committed on 23 March 2017 at 10:35 AM. Only ten minutes later he was captured in Antwerp in his car and arrested. On the same day, at 14:15, the mayor together with the head of the local police communicated on an ‘attempted terrorist attack’ and that ‘worse could have been avoided’. On 22 November 2018 the federal prosecution services communicated that they would only prosecute Mohammed R. for possession of illegal weapons, reckless driving and substance abuse, but not for terrorist offences or offences with a terrorist intention. He was convicted along these incriminations by the judgment of the criminal court of 24 May 2019.
4	Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference?)	The media nick-named the suspect directly after the press conference of the mayor of the city of Antwerp the “Meir terrorist”. His blurred photo image as well as his arrest was published in the media. Even though that it became clear after only a few days that there was no terrorist intention, the media continued to refer to Mohammed R. as the ‘Meir terrorist’, up until the decision of the correctional court of 24 May 2019. As such, it is clear that the stigma due to the quick and unsubstantiated communication of the mayor resulted in a continued stigma.
5	Key issues (major allegations in public, where the	Both national and international media communicated after the press conference by the mayor of the city of Antwerp on the attempted terrorist attack. At that moment, as it would turn out later, the federal

	presumption of innocence was concerned, reactions of persons involved and the media)	prosecution and the public ministry of the court of Antwerp had asked the mayor not to communicate on the issue as they already suspected that there was possible no terrorist motion. Nevertheless, the mayor mentioned the allegations of terrorist threat. In consequence, what could have been a case of reckless driving with limited local press media, became an issue published by national and international outlets and no doubt also intensified the scrutiny on the suspect.
6	Key consequences or implications of the case (with a focus on the comments stemming from the publications in the media)	After it became clear that no terrorist incentive was present and the public and federal prosecution services had requested the mayor not to communicate, the mayor was forced under pressure of critique in the media (both reactionary critique from the media itself as critique from other politicians) to provide information on the sequence of events and the reason why he decided to communicate contrary to the advice. The minister of justice was later questioned on the incident, and in particular on the coverage of the incident by the mayor of the city of Antwerp and press. In the competent commission of the parliament, the minister of justice Geens held that the federal prosecution services had prohibited the mayor to disclose details on the investigation as at the time of communication, the true intentions of Mohamed R. were not yet clear and it was therefore difficult to assess the correct nature of the entire incident. In consequence, the rules on communication in the press by authorities was reiterated and a debate on prudence and diligence of communication followed in press coverage.
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered		
7	What was the decision of the case (summarize briefly and indicate reference details of the case)?	In its judgment of 24 May 2019, the correctional court of Antwerp found Mohammed R. guilty of the illegal possession of weapons (as found in his car), the possession and purchase of cocaine, the recovery of a stolen laptop and driving under the influence of cocaine and alcohol. He was sentenced to 15 months of prison, a driving ban of one month and a fine of 9,600 euros, of which 800 euro suspended on the condition that he would not commit new crimes.
8	What right(s) in the Charter of Fundamental Rights of the EU is mainly at stake? Which provisions in national law were mainly discussed?	Article 48.1 EU Charter, i.e. the presumption of innocence. In the national press also the secrecy of criminal investigations was considered (article 28quinquies, Book I, Chapter IV Code of Criminal Procedure) as an ongoing investigation on the incident was ongoing and the communication could have a negative effect on the investigation.
9	How was the reaction of the media?	Whereas the press at first eagerly published the communication of the mayor and labelled the suspect the 'Meir terrorist', the press afterwards equally covered the finding that there was no terrorist motive and the discussion whether or not the mayor had communicated too early and without the necessary care. However, the debate remained focused on the mayor and his communication, and not on the potential responsibility of the press. Afterwards, the media continued to use the terminology 'Meir terrorist' to discuss the further prosecution of Mohammed R.

Sources that reflect the problematic role of the media (articles in newspaper that indicate the presumption of innocence is not or barely respected)				
Author	Type of Publication	Title (original language and English)	Date of publication	Main fundamental rights issue(s)
Patrick Lefelon (Belga)	Media coverage	'Meir-terrorist' veroordeeld tot 15 maanden cel [Original] / 'Meir-terrorist' convicted to 15 months prison' [EN]	24 May 2019	Article 48.1 Charter
AvH (Het laatste nieuws)	Media coverage	Was die persconferentie wel nodig? De Wever geeft documenten van timing Meir-incident vrij [Original] / Was that press conference necessary? De Wever releases documents of timing Meir incident [EN]	25 March 2019	Article 48.1 Charter
Belga	Media coverage	Geens: 'Parket verbod De Wever wel degelijk te spreken' [Original] / Geens: "Prosecution services prohibited De Wever to speak"	29 March 2017	Article 48.1 Charter
Milan Schreuer (New York Times)	Media coverage	Man in Antwerp, Belgium, Tries to Drive Into Crowd	27 March 2017	Article 48.1 Charter

Belgium case study/ media coverage #2		
1	Reference details/Name/Title	Bo Coolsaet - case
2	Brief description of the case (overall impression of the incident)	<p>Doctor Bo Coolsaet is a famous urologist who was frequently present in the press and media. In 2015, a former patient filed a criminal complaint against the now pensioned urologist for sexual assault. She claimed that when being examined by the doctor during 2006 - 2009 when she was still a minor, the urologist used unorthodox measures with the incentive to provide her with an orgasm. The public prosecution argued before the court that there was insufficient evidence against the doctor and therefore, he could not be convicted. Media outlets informed at the start of the trial in 2019 that when the case was mentioned in the press, several other victims stepped forward and filed a complaint at the public prosecution services. The media and the counsel of the victim mentioned that these complaints gave credibility to the arguments of the victim who originally filed the complaint of sexual assault. Further, the media raised the question why these complaints were not reviewed. The lawyer of the victim requested the adjournment of the case. Under public pressure following the media reports, the public prosecution felt compelled to publish a statement on 27 November 2019 that it had received 5 new complaints in the running up to and during the procedure, but had added these complaints to the criminal file in contrary to media reports (https://www.om-mp.be/nl/article/persbericht-antwerpen-mededeling-zaak-coolsaet). On the basis of these facts, opinions were published whether this was trial by media and the presumption of innocence was violated. In the end, the doctor was found guilty by the criminal court and convicted for a prison sentence of 4 years of which 2 years suspended on the condition that he would not commit new crimes He appealed the decision. This appeal is currently pending.</p>
3	Timeline of events (briefly outline major events in order to capture the extent of the case)	<p>The alleged facts took place in 2006. The complaint for sexual assault was filed in 2015. The case started in September 2019 before the criminal court in Antwerp. It was mentioned at the time that new reports had been filed by potential victims and the case should be adjourned, which the court refused. The court convicted the doctor on 26 November 2019.</p>
4	Media coverage (how did the media refer to the suspects? How were the suspects presented, e.g. handcuffed, in prison clothes? Did law enforcement authorities or other actors inform about the case, e.g. in a press conference?)	<p>The media played an active role in voicing the information provided by the lawyers of the victims and on the basis of anonymous sources that new complaints had been received and insufficiently reviewed. Moreover, in the press it was questioned what the motives could be for the public ministry not to press for the conviction of the doctor and whether there were some ulterior motives. The pressure was such that the public ministry felt compelled to publish a statement arguing that it had taken its stance with respect for the fundamental values of the rule of law and that this point of view was not just supported by one magistrate, but by the public ministry as a whole. In addition, several opinions were published questioning the publicity of the - at that time secret - information that new complaints were filed</p>

		and the content of these reports, stating that this was a trial by media.		
5	Key issues (major allegations in public, where the presumption of innocence was concerned, reactions of persons involved and the media)	The active role of the media as to questioning the position of the public ministry and voicing support for the claim of the victim's counsel to delay the case in order to review the additional complaints were questioned in terms of trial by media. It was discussed whether this was a trial by media, or whether full transparency as to new complaints was required in an open and democratic society in order for the population to assess the fairness of the proceedings, in particular because of the high public profile of the doctor.		
6	Key consequences or implications of the case (with a focus on the comments stemming from the publications in the media)	The direct consequence was the pressure on the public ministry to 'defend' its position in this trial and voice support for the individual public prosecutor on the case, which is an exceptional step. As such, there is considerable public pressure on the public ministry to alter its opinion on the guilt question in appeal. In addition, this led to a heated discussion as to what trial by media constitutes and whether so-called #metoo allegations in the media were too easily and rapidly accepted.		
In case the case brought before a court or a non-judicial mechanism – the following questions would also need to be answered				
7	What was the decision of the case (summarize briefly and indicate reference details of the case)?	The criminal court convicted the doctor on 26 November 2019 to a prison sentence of 4 years of which 2 years suspended on the condition that he would not commit new crimes. This conviction was appealed by the doctor. The case is currently pending and expected to be considered in the second half of 2020.		
8	What right(s) in the Charter of Fundamental Rights of the EU is mainly at stake? Which provisions in national law were mainly discussed?	Article 48.1 Charter, i.e. the presumption of innocence, including reference to article 6.2 ECHR. In addition, the obligation of loyalty of the public ministry when conducting criminal trials and prosecuting these, was mentioned (article 28bis § 3, Chapter IV, book I, Code of Criminal Procedure).		
9	How was the reaction of the media?	The outcome confirmed the approach taken by the media questioning the innocence of the doctor and the position of the public ministry. This resulted in the public statement by the public prosecution the day after the delivery of the judgment. On television, a debate was aired with the lawyer of the doctor questioning the role of the media.		
Sources that reflect the problematic role of the media (articles in newspaper that indicate the presumption of innocence is not or barely respected)				
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De Standaard	Media (analytical)	Trial by media [original / English]	28 December 2019	Article 48.1 Charter, presumption of innocence
Leo Neels	Media (opinion)	Het journalistieke schietkraam [original] /	28 November 2019	Article 48.1 Charter, presumption of innocence

		The journalistic shooting booth [English]		
P.B. Gronda (Knack Focus)	Media (analytical)	Als Bo Coolsaet onschuldig zou blijken, dan is er grote schade aangericht [Original] / If Bo Coolsaet turns out to be innocent, great damage has been done [English]	2 October 2019	Article 48.1 Charter, presumption of innocence
Kirsten Bertrand (De morgen)	Media (editorial)	Het parket vroeg zo nadrukkelijk de vrijspraak dat het bij momenten leek alsof Coolsaet een hand boven het hoofd werd gehouden [Original] / The public prosecutor demanded the acquittal so explicitly that at times it seemed as if it was protecting Coolsaet [English]	27 November 2019	Article 48.1 Charter, presumption of innocence