1. Firstly I would like to thank the Project Team, in the person of Professor Andre Klip, for inviting me to take part in this Symposium.

2. I have been asked to read the Project report and to give a contribution from the perspective of the defence.

3. The Project report is a detailed and praxis-driven contribution, enlightening many of the difficulties arising in the context of trials “in absentia” (as in the report, I use this expression to refer to any trial conducted in the physical absence of the defendant).

4. As the report acknowledges, FD 2009/299 had a two-fold purpose:
    a. to improve mutual recognition by establishing a common standard for refusals to cooperate on the grounds of trials *in absentia*,
    b. **<u>while</u>** maintaining a high level of protection of the rights of the accused, in particular the right to be present at his or her trial, which is normally a precondition for being able to exercise other participatory rights during that procedural stage.

5. Naturally, my perspective as a defence lawyer has a main focus on the second goal of the FD.

6. The comments I will make are also inextricably linked with the role of defence lawyers acting in EAW cases.

7. The role of the defence lawyer lies in knowing which matters i) may and ii) should be raised in a case, in the best interests of his or her client.

8. **Performing this role in an effective manner in EAW cases is only possible by means of acting as a team made up of both lawyers in the Issuing and in the Executing state (*dual defence*):**

From: http://handbook.ecba-eaw.org

**"Dual representation enables genuine reasons for refusal of execution of an EAW to be properly argued and spurious ones to be discontinued. Therefore, the intervention of a lawyer from the Issuing State is essential to help both the lawyer and the court in the Executing State to assess the verification of any refusal grounds as swiftly as possible. Many, if not most, rights of the requested person in EAW proceedings may only be exercised effectively by the two lawyers in cooperation."**

**"The role of the lawyer is to act in the best interests of his/her client. This will involve ensuring that the rights of the requested person are observed by, in appropriate cases:**

- **Persuading the Executing State not to surrender a requested person;**
- **Persuading the Issuing State to withdraw an EAW;**
- **Advising the client to consent to surrender, if that is in his/her best interests, taking into account both Executing and Issuing State's laws;**
- **In cases where a person is surrendered, ensuring that the surrender procedure is carried out in accordance with the relevant law (for example, by ensuring that any time spent remanded in custody in the Executing State is taken into account in the Issuing State (see Art 26 of the Framework Decision) and that relevant time limits are observed)."**

The EAW is merely a tool for giving effect to criminal prosecution in the Issuing State. Therefore the root of the problem is in the *Issuing State* and can only be solved in the long-term with the intervention of a lawyer there. Therefore it is apparent that the effective exercise of a person' rights in the scope of EAW proceedings is not possible without dual representation.

The arrested person has the right to the assistance of a lawyer in the Issuing State pursuant to Directive 2013/48/EU on the right of access to a lawyer. This states that the ISL's role is:
*"to assist the lawyer in the Executing State by providing that lawyer with information and advice with a view to the effective exercise of the rights of requested persons under Framework Decision 2002/584/JHA"* (article 10 (4) Directive 2013/48/EU).
This Directive recognised explicitly the need for "dual representation" or "double defence" in EAW cases, which had been advocated for many years.

9. The field of *in absentia* trials is precisely a field where the need for cooperation is manifest: the issues pertaining to Article 4a FD EAW, as amended by FD 2009/299, are directly linked to understanding the information provided as to the proceedings in the Issuing state, expunged from technical interpretations upon the basis of domestic law, and analysing it in the light of autonomous EU-Law concepts, as the Report rightly points out.

10. A lawyer in the executing state is only able to adequately and efficiently argue those issues by working together with a lawyer in the issuing state. This cooperation will allow to **both dismiss ill-founded arguments about *in absentia* trials, and to adequately raise such arguments, when pertinent**.

*I am often contacted by an Executing state lawyer. He or she tells me that their clients complain that they were tried in their absence and had had no knowledge about the trial. These are typically young persons who moved to another EU MS due to economical reasons. I am asked to consult the case files in Portugal, and prepare a report outlining how the proceedings unfolded, including the description on whether the client was present at his or her trial (and, if not, why), as we well as an explanation on how the summons were executed. I am also asked to explain whether the client has a right to a re-trial*

*or appeal during which the merits of the case may be assessed, or allowing him to participate and to provide fresh evidence.*
*Since the second question in Portugal is clearly answered in the negative, it all revolves on knowing whether the client was present at any of the trial hearings, how he or she was summoned and also on the obligations impending on him to inform the Court of his new address, as well as on the acts performed by the authorities in order to locate his or her whereabouts. This will allow me to inform the defence lawyer in the Executing state and to, together with him, analyse whether a refusal ground on the basis of Art. 4a(1) should be raised, or whether any of the exceptions apply and there is no room for making such a claim. This work is essential, in particular due to the often nationally-technically-biased description included in the EAW.*

11. From this viewpoint of a practising defence lawyer in a "dual defence" context, I would like to make some specific comments to the Project's Recommendations:

*Recommendations to the Issuing judicial authorities*

- #4: clear, correct, comprehensive and factual manner avoiding domestic legal classifications. This is a very important recommendation, since it is an indispensable requisite for a EU-conform analysis of the applicability of the refusal ground in relation to trials *in absentia*.

  *However, while it is important that the factual information provided by the issuing authorities is accurate, it is also important that the requested person is able to challenge such information (as to meet the burden of raising a problem that should be investigated by the executing judicial authority), which can only be made with the help of a lawyer in the issuing state (see Article 10, 3 and ff, Directive 2013/48/EU).*

- Hence, I would suggest adding as a recommendation that, where the trial was conducted in the absence of the accused,

the Issuing judicial authorities include in the EAW form information on who was the defence lawyer who represented the accused, as well as the lawyer's contact details (Name, Address, e-mail, telephone and fax numbers);

- additionally, information on the languages spoken by the lawyer
- and /or information on how the accused, if he or she does not understand the language of the Issuing state / spoken by his or her lawyer, is able to avail himself of "interpretation […] for communication between suspected or accused persons and their legal counsel in direct connection […] with the lodging of an appeal or other procedural applications" (see Article 2, para. 2, Directive 2010/64/EU).

*In fact this will allow the person sought (and his or her lawyer in the executing state) to be able to contact the lawyer in the issuing state in order more easily and swiftly and to be able to effectively raise matters in relation to Art. 4a FD* (see Article 10, 3 and ff, Directive 2013/48/EU).

This would also save time, since otherwise the lawyer in the executing state may request for additional time in order to be able to locate a lawyer in the issuing state.

- #6 – ensure that the cause of refusal is addressed in a subsequent EAW. This is a very positive recommendation.

It could also be applied, as I read it, in situations in which the refusal was due to a conclusion that, based on the evidence produced during EAW proceedings, the domestic procedures did not comply with the requirements of ECtHR/EU Law. However, in some legal systems, such as mine, it might be legally impossible to repair these errors, since the court will have no power to amend its decision on the regularity of the

summons. Hence, a recommendation to domestic legislators (or EU legislators?) should be made.

*Should there not be some cases of mutual recognition of decisions to refuse surrender due to trial in absentia? (e.g. if a MS on European Law grounds has established that the conditions in Art. 4a(1)(a) to (d) were not or could not be met? Could we then accept that the person loses his or her right to free movement and becomes "imprisoned" in a MS?*

*Recommendations to the Executing judicial authorities*

- #9 – Explain reasons for request for additional information. In this regard, I would recommend that, whenever the doubts have been raised by the defence lawyers during the EAW proceedings, the Executing Judicial authorities explain the matters raised by the defence lawyer, in order to obtain a direct reply to those.

- Furthermore, I would suggest to add a recommendation that, wherever the trial was conducted *in absentia*, the executing judicial authorities explicitly inform the requested person and his or her lawyer of the contact details of the issuing state lawyer who represented the accused (Name, Address, e-mail, telephone and fax numbers);

- of the languages spoken by the lawyer (if available);

- and /or information that the accused, if he or she does not understand the language of the Issuing state / spoken by his or her lawyer, should be able to avail himself of "interpretation […] for communication between suspected or accused persons and their legal counsel in direct connection

[…] with the lodging of an appeal or other procedural applications" (see Article 2, para. 2, Directive 2010/64/EU).

This would save time, since otherwise the lawyer in the executing state may request for additional time in order to be able to locate a lawyer in the issuing state. *(the name of the lawyer should be available in the EAW form, or should be requested from the Issuing Authority).*

- It could be recommended that executing judicial authorities, when a matter in relation to trial *in absentia* has been raised, indicate to the requested person that he or she should also seek as soon as possible legal assistance in the Issuing State, since, if there was a violation of his or her fair trial rights, it can only be remedied definitively in the Issuing state (as the Report refers, the refusal on the basis of Art. 4a(1) does not entail as a consequence that the EAW may no longer be enforced, since there is no mutual recognition of refusal grounds).

- It should be considered that (if not in all at least) in *in absentia* EAW cases, a lawyer should always represent the requested person in the executing state, or one should be appointed to the requested person, if he or she cannot afford one (see Articles 4 and 5 Directive 2016/1919), because "the interests of justice so require".

*Recommendations to defence lawyers?*

- It could make sense to make recommendations to defence lawyers in relation to *in absentia* EAW – *is this in the scope of the project?*
- Recommendations should aim at:

- Training and awareness to the autonomous nature of the concepts in the EAW FD (extension of recommendation #27 to defence lawyers?)
- Recommendations in terms of how to act if an EAW as executing state lawyer if the EAW is “in absentia” or if the client claims that he had no knowledge of his or her trial – essentially identifying what are the questions to be raised, how to raise them, how to get evidence (contacting lawyer in the Issuing State), etc. And also on being able to advise when there is no “case” for arguing for such a refusal ground. (also via training?)
- Training for issuing state lawyers – how to raise the issue of violations of the right to be present under European law, in particular interpretations or laws that are not in conformity with the Directive 2016/343 (or in general with EU Law / ECHR).
- Training on requests for a preliminary ruling.
- Dissemination of the project outputs to defence lawyers
- See also ECBA EAW Handbook http://handbook.ecba-eaw.org in particular http://handbook.ecba-eaw.org/e-2-optional-refusal-grounds/#e2viii

*Recommendations to MS*

- #25 (and #35 to EU) – this might be difficult due to the advanced stage of proceedings (the issuing authority that has a final judgment could not “transmit” proceedings that would entail “returning” to the previous stage? However, maybe additional jurisdictional criteria could be created? (i.e. the executing state would become competent for the case) (legal basis?)

- #26 – (centralization of Courts) I completely agree, this is essential. Maybe it could be coupled with requiring a certain degree of specialization of defence lawyers acting in these cases, too?

*Now turning to the perspective of a defence lawyer acting in criminal cases in a system where trials in absentia often occur.*

12. Being a mere defence lawyer, I cannot but contribute from my practical experience concerning trials *in absentia*, in particular in the scope of the Portuguese legal system, but also in relation to EAW (when PT is a issuing authority).

13. This system has its idiosyncrasies, but they show a tendency that has been outlined in the Report: **instead of being the exception, trials *in absentia* rather represent a *common place***, permitted by the introduction of procedural formalities created in order to put on the accused the burden of making sure that he or she is able to receive any summons from the authorities, subject to being tried *in absentia* on the basis of a presumption of knowledge of the date / place of the trial.

14. In fact, once the "train of criminal proceedings is moving" (paraphrasing a description in the Report), it becomes a "non-stop moving train" in which a trial *in absentia* takes place on the basis **of requirements of diligence from the part of the accused coupled with legal presumptions of knowledge, which, in practice, can hardly be rebutted in an effective way by the defendant** (unless he can show that he was impeded by a fact *de force majeure*, such as a natural disaster, severe illness; but I had a case where a person had been tried in his absence despite being detained in Argentina on the basis of an extradition request from Portugal and the Court still considered the summons "valid" due to non-communication of the new address; … *if there is a remedy available to prove his impediment, since, in systems such as the Portuguese system, it is not possible to produce evidence*

*at appellate stages, hence it would be impossible, if all principles would be strictly applied, to prove such an impediment)*.

15. In my view, as a defence lawyer, this perspective often places upon the accused an accrued (in my view often excessive) duty of diligence, and symmetrically relieves the authorities of any (or at least any enhanced) duty of diligence, resulting in a weakening of the right of the accused to a fair trial, but **also in an increase of the risk of wrongful (or unfair) convictions** [2] **as will be shown below**; **and it does not necessarily result in a speedier resolution of a criminal case[1]**.

[1] *In many cases I found in practice, due to the configuration of the Portuguese system, the person has made a "statement of identify and residence" (SIR) when he or she was questioned by the police, subject to a search, etc. This statement implies an obligation of informing the authorities on changes of address or absence of the identified address for longer than 5 days. The person is also informed that all papers will be sent to such address without acknowledgment of receipt. Then the case moves on, there is an indictment and thereafter there is an order setting up the trial date, all of which are sent to the same address. It should be noted that many years might have elapsed between the date of the facts and the date on which the SIR The trial starts and proceeds since the court invariably considers the presence of the accused unnecessary and does not try to bring him to court. Often the hearing is terminated the same day and an additional day is set for the pronouncement of the judgment. The judgment is pronounced. The court is then obliged to look for the defendant in order to have the sentence served to him in person. Hence, the taking place of the trial did not imply that a final decision is reached in a speedier manner, since the decision will not be final before the defendant receives it in person and does not appeal, or, having appealed, the appellate court renders its judgment. In many cases, after the pronouncement of the judgment, the Court easily finds the accused by asking for his or her whereabouts via SIS. Hence, I ask, why didn't the Court make use of such tools* **before** *proceeding with a trial in absentia, which would have*

*allowed it to find the person and give him or her the chance to exercise their rights of presence and participation without much delay?*

16. In addition, systems such as the Portuguese have as a consequence that the person can no longer fully bring his case to Court: he or she has no right to participate in person in appellate hearings and making statements, or to provide evidence.

*I am then often confronted with cases in which not only a person has evidence that he or she was not aware of the trial (since he or she resided abroad) and that such a person has evidence that is relevant for the outcome of the case (guilt and / or sentencing). But I cannot present it to the Court (I try, of course…). The same for revocation of suspended sentences (which, in Portugal, entails a decision on whether the violation of the duties was reproachable).*

[2] *Two examples: in one case I had, the defendant was convicted in absentia for "coercion" and only found out after he was served in person with the judgment. However, he had not been aware of the trial date, since the letter had been sent to his former address, which he had given in the SIR, and where is ex-wife still lived, but the latter never informed him. His account of the facts was opposed to that of the complainant, he had live witnesses to the scene, and the facts he told me about would imply that he was innocent or, at least, and acted under a cause for justification. I only managed to win the case on appeal (with an acquittal) since some technical formalities had not been respected (this case had been closed by the prosecution and reopened upon a challenge by the complainant). Would that not have been the case (as in most proceedings), I could have not obtained an acquittal, and I would not be able to get a new trial since, even though my client was abroad and could not have received the letter, that is irrelevant for our courts, since trial in absentia can operate as a "sanction" for the breach of the duty to indicate a new address.*

*In another case, the person contacted me upon receiving notification in person in another EU MS of a conviction of 6 years imprisonment for drugs trafficking. Among others, this person clearly had a drug use problem (which would imply that the offence he might have committed was a less serious one) and also serious psychiatric issues, which had not at all been analysed by the trial court. Again, I could not raise any of these issues on the basis of new evidence, since it is not possible to adduce new evidence. In this case, the person had been summoned for the trial abroad, and was considered to waive his right to be present. But there was no alternative investigation about his person and conditions, which would have shown that he was a vulnerable person (could he waive such a right?). The ex officio lawyer was never able to establish contact with him. Had I not won the case for technical reasons (unlawful search, annulment of the whole proceedings), a wrong conviction would have stood.*

17. Hence, it is my belief that the assurance of a high level of protection of the right to a fair trial, in particular the right to be present (and consequently also the reduction of the risk of a wrongful or unfair conviction) requires that all involved stakeholders comparatively analyse the situation throughout the EU and, learning from each other, instead of (or at least in addition to) seeking to find a minimum common understanding of what makes a trial *in absentia* legitimate, refocus their attentions on the **primary concern which should be to seek to find a minimum common understanding on the best way to avoid trials *in absentia* and in particular what level of diligence (and means are expected to be used, in particular whereabouts notices) should be required from MS (and from the accused) in order to be able to *fairly* conduct a trial *in absentia***.

18. For example, one should critically look to EU Systems where there is a high number of trials in absentia, and compare them to those where there are no trials in absentia, or a very low number of such trials.

19. Why is there this difference? Does the fact that a system does not perform trials *in absentia* make it less effective than other systems? Why are domestic authorities able to find and locate the accused in certain legal systems, while this appear to be impossible in others? Is it that more persons abscond in a certain MS? Is it due to the lack of effective diligence to find the accused person? Or is it because in some MS criminal proceedings take many years, while in others they are faster? (in Portugal I often have petty cases in which the investigation took 3 to 5 years).

20. In particular, in what concerns the MS "due diligence" – shouldn't the mere fact that we live in a free movement area, which is also a common justice area (the AFSJ), imply that persons residing in another EU MS should not have been considered to have fled or absconded? Or that at least it is required that MS authorities diligently ascertain whether an accused has moved to another EU MS? (by doing a simple request for whereabouts in the Schengen System?)

21. In this regard, I draw your attention to Recitals 38 and 39 of Directive 2016/343:

"(38) When considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should, where appropriate, **also be paid to the diligence exercised by public authorities in order to inform the person concerned and to the diligence exercised by the person concerned in order to receive information addressed to him or her**." (vs Recital 8 FS 2009/299).

"(39) Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but the conditions for taking a decision in the absence of a particular suspect or accused person are not met because the suspect or accused person could not be located despite **reasonable efforts having been made**, for example because the person has fled or absconded".

22. And to Article 8(4) of the Directive:

"4.Where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in paragraph 2 of this Article **because a suspect or accused person cannot be located despite reasonable efforts having been made**, Member States may provide that a decision can nevertheless be taken and enforced. In that case, Member States shall ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9".

23. One should also reflect on whether trials *in absentia* should be allowed for any offence, irrespective of the sanction faced by the defendant, if convicted; whether they should be allowed for vulnerable defendants; etc.

24. Finally, one should inquire why do defendants (even when summoned) fail to appear to trial in another MS – is it because they are negligent? Or just because they cannot afford to travel to the trial MS? If the latter, how could this be remedied?

25. There should also be procedural remedies allowing for challenging the knowledge of the trial, and the fairness of the decision (and eventually getting a fresh trial; or an appeal that allows him to present his case) if, despite the defendant having been regularly summoned, he or she shows that there is risk that the conviction is wrong or unfair due to the circumstance that relevant facts were not brought to the attention of the Court. It should be noted in this regard that the role of the defence lawyer can normally not be efficiently discharged if the defence lawyer has no contact to the client.

26. This improvement of common standards is desirable and would certainly contribute for fostering mutual trust and improving mutual recognition of foreign judgments in the EU, including in the scope of EAW, and reducing the need to request for supplemental information, and the risks of impunity and of violation of the fair trial.

27. Directive 2016/343 might be insufficient, since the same *technical-nationally-biased* interpretations identified in the report in relation to the FD will find their way in the interpretation of the Directive, with the consequence that most MS will believe that they do not need to change their domestic legislation (as is the case with PT).

28. There are also views by domestic authors (e.g. Alexandre Au-Yong) stating that they believe that the Directive offers less protection in terms of the burden of showing that the accused was aware of his or her trial, which I suspect will be present in many MS, since the Directive did not harmonise or precise the applicable rules.

29. The recommendations of the Project report seem to point also in this Direction, which is very welcome.

30. For example:

    *Recommendations to MS*

    a. #19 – amending legislation on summons to be "Dworzecki-proof" *(would this not be required by the Directive?)*
    b. #20 – do the utmost to ensure that the accused has an effective opportunity to exercise the right to be present (problem with rules that do not require a positive indication that the accuse is aware – formalising requirements, not taking account of the material facts)
    c. #21 – standards for summons abroad (*summons abroad are in my view a systemic problem within the EU, which has many consequences, such as the ones highlighted in the report, but also excessive use of PTD - → hence it should be address also*

*at EU Level, as appropriately pointed out in Recommendation #31 to the EU).*

d. #22 – explore the possibilities of the virtual presence of the accused. Personally I believe that this could be a very important step in order to reduce the number of trials *in absentia* when a defendant is abroad. If a defendant is in the country, arrangements for attendance should in principle be made → for accused persons abroad, there should be EU intervention – see below #32.

There are many criminal cases in which an accused is in one MS different than the forum MS. In many instances, the physical presence of the accused in not necessary for the trial. However, some MS require the physical presence of the accused for the trial. Or they make the exercise of the rights of the accused depend on such physical presence. The possibility for the accused to participate in the procedural acts, upon his or her request, by means of videoconference would be beneficial since: i) it would make it unnecessary for MS to issue EAW to bring a person to an arraignment or trial hearing, where his or her physical presence is not necessary but the law still requires that the person is presence; ii) it would enable the accused to be present and take part in the procedures and exercise his rights. This is highly relevant for cases of low and medium criminality.

*One example: in Portugal many courts understand that the accused must be physically present in court. If he or she does so, he or she is able to make a confession. That will enable him or her to pay less court costs and to have a lower sentence (sometimes a specially or mitigated sentence). Many EU citizens from other MS are subject of criminal proceedings for low or medium criminality (for example DUI and driving without a license, resisting the authorities, simple bodily harm, defamation/slander, illegal graffiti, etc.). If they are primary offenders, they will highly likely be sentenced to a fine which could be of less than 1000,00 Euro (depending on the circumstances of the case). Typically they will make a confession. However, they cannot do it in written or by video-link. Hence, if they want to benefit from the confession, they would be obliged to travel to Portugal, which requires at least three days and bear the direct costs of their travel (three days absence at work, travel and accommodation) just in order to be present a court hearing that might take one hour. If the accused does not want to be physically present, and asks to participate by video-link, he should be entitled to this, otherwise his or her position in relation to an accused living in Portugal is much worse.*

If being able to participate by video-link, upon his or her request, at least the accused would be able to hear the evidence and to follow the proceedings against him or her, instead of being tried *in absentia* due to the impossibility or significant difficulty of attending in person. Initiatives in this field should also address the particularities of legal assistance (and of interpretation) in this special constellation. **Participation by video-link should be of sufficient quality for the defendant to see all participants, and for the whole participants to see the defendant, should cover all trial sessions and should only take place if the accused requests or agrees thereto.**

*In addition to this, would it not make sense for member states to foresee, as they normally do for witnesses, the possibility of financial support to the defendant for travelling to his or her trial, if he or she cannot afford to travel?*

e. #23 – not substituting the personal service for service to the lawyer – in this regard, it should be clear that the lawyer cannot normally exercise his role appropriately if he has no contact with the client. He or she can mount a technical defence, but cannot make sure that all relevant facts are brought to the knowledge of the court. In particular, state-appointed lawyers who never had any contact with the accused, nor speak his or her language are not able to discharge their roles effectively (and often also feel that it is not their obligation to do anything if the client does not contact them). In this regard, awareness-raising of lawyers in important.

f. #24 – to make abundantly clear what is the ambit of a legal counsellor's mandate in national systems – same as before. The lawyer can never substitute the defendant, unless there is a specific and clear mandate (and the lawyer is also able – and should – waive the mandate if he or she does not have any contact with the client and feels that he or she cannot appropriately defend the client – *also training for lawyers?* Should judges not inquire from lawyers whether there was contact and when such contact was made? Before or after the

indictment? Before or after the determination of the trial date? Before or after the judgment was pronounced?).

*Recommendations to EU*

a. #31 – see above #21
b. #32 – see above #22
c. #33 – temporary transfer of detained persons for trial

31. The Project recommendations are welcome and, if applied throughout, including in the improvement of domestic laws and the creation of EU standards for trials in absentia / summons / retrial, would contribute to improve defence rights and the right to a fair trial, in my modest view.

**32. However the Report could stress more strongly the need to avoid from the outset trials *in absentia* (which implicitly derives from the recommendations outlined above, and is conveyed at times during the text).**

**33. MS and the EU should adopt a far-reaching approach. They should strive to understand the domestic systems and to comparatively analyse them, in order to develop best practices for:**

a. avoiding trials *in absentia* from the outset;
b. ensuring that the accused does become aware of the trial and of the consequences of not being present at his or her trial, and
c. developing common standards in relation to trials *in absentia*, in particular:
    i. summons;
    ii. reasonable diligence to locate an accused,
    iii. effective remedies in order to allow for a challenge of the conclusion that the defendant was aware of his or her trial

to be heard and, if accepted, allow for a “re-trial” (“safety valve”) .

iv. the right to a re-trial.

34. **The focus on the importance of the presence of the accused in his or her trial should be dual:**
    a. **it is essential not only as a subjective right that the accused may waive if he or she wishes (which would have no other impact in the overall fairness of criminal proceedings, if there was a waiver),**
    b. **but also as a requisite for reducing the risk of wrongful (and unfair) convictions.**

35. **Ensuring the presence of the accused as a rule, while respecting the rights of defence, proportionality and the right to a fair trial, should be put back on the focus, rather than focusing on *how to legitimise a trial in absentia*, which entails the risk of changing [or rather said maintaining] the mind-set [of authorities]: seeing the procedure as a formal non-stop train, and overlooking or forgetting the importance of the participation of the accused in his or her trial.**

36. Although I recognise that it might exceed the scope of the Project – it could have also been interesting to explore further whether Directive 2016/343 establishes a minimum protection that cannot be violated, i.e. which infringement entails a flagrant denial of justice, or a breach of the essence of the right to a fair trial? Would this mean that the refusal ground would become a mandatory rather than an optional one? This would also depend on whether Art. 8(2) of the Directive cover exactly the same constellations as Art. 4a(1)(a) to (d), or not.

*I hope more Projects will be conducted in which these aspects, or others, may be dealt with.*

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