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A COMPARATIVE ANALYSIS OF JUDGEMENT IN ABSENTIA IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND IN EUROPEAN UNION LAW

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Abstract. In principle, judgments in absentia are permitted in the signatory states of the European Convention on Human Rights and in the member states of the European Union. This paper critically analyses the conditions under which a person convicted in absentia is entitled to a retrial, with reference to the case law of the European Court of Human Rights and the Court of Justice of the European Union. The study aims to identify practical solutions to ensure compliance with the right to a fair trial, highlighting divergences and gaps in European practice, and proposing interpretative criteria that can guide courts in protecting defendants' rights across different jurisdictions. The analysis reveals some differences (at least according to the literal wording of the law) between the case law of the European Court of Human Rights and the provisions of European Union law on trial in absentia, particularly regarding when a retrial is imperative. Based on these findings, interpretative approaches are proposed to guide courts in assessing (i) the defendant's awareness of the consequences of absence, (ii) the conduct of the chosen defence counsel, and (iii) the good or bad faith of the defendant in missing stages of proceedings.

Keywords: Trial in Absentia, Right to a Fair Trial, Failure to Appear in Court, Personally Informed.

Introduction

An accused's ability to be present in a proceeding and the ability to understand what is being said about such accused is a right so elemental that it may be taken for granted (Clooney & Web, 2021).

The report issued by the Netherlands Institute of International Relations, T.M.C. Asser, concerning trials in absentia, states that the trial is the defendant's opportunity to challenge evidence against him and to present his account. It's his opportunity to tell his version of the story. To conduct a trial without the defendant is like trying to stage Hamlet without Hamlet. The story of Hamlet cannot be fully told without the Prince himself on stage. It would not be the same play. Without the defendant (even with the best supporting cast of judges, prosecutors and witnesses) the trial is not the same trial (Trials in Absentia n.d., p. 1-2).

However, it is often impossible to conduct criminal proceedings in the presence of the defendant, either because of his will or for reasons beyond his control. In such circumstances - particularly in the latter situation - the question arises as to whether it is possible, or indeed advisable, to proceed with a trial in absentia.

When the defendant is absent during a trial, the punitive dimension of the proceedings cannot be immediately fulfilled. Nevertheless, other important objectives must be considered: delivering justice to victims and ensuring compensation; fostering reconciliation; deterring future crimes; and ending a prevailing culture of impunity. In principle, all these aims may be achieved, or at least significantly advanced, through in absentia proceedings. A trial held in absentia can serve to ensure accountability and to combat impunity - objectives that are valuable in themselves. Failing to hold a trial for a fugitive

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may create the public impression that the defendant is being rewarded for his escape. Moreover, victims' interests may favour the continuation of proceedings in absentia, particularly in systems where civil parties are entitled to participate and to seek compensation. Finally, in absentia trials can also be viewed as reinforcing the truth-seeking function of criminal justice (Report on the Experts Roundtable on trials in absentia in international criminal justice, 2016, p. 2).

If the suspect or defendant absconds during trial or declines to attend at all, there is a risk that justice will never be done. Witnesses and victims have a legitimate expectation of having their day in court; that expectation cannot be undermined by a defendant who simply decides not to attend. Lengthy delays can cause real damage to the administration of justice. Not only does the rescheduling of hearings waste public time, resources and money, but victims and indeed any co-accused who have been waiting for their trial (often whilst in custody) will be adversely affected. Delay can also have a negative impact on the trial itself; the quality of evidence inevitably depreciates over time: witnesses die, memory fades, and physical exhibits are lost. Justice delayed can be justice denied (Trials in Absentia n.d., p. 4).

The present research aims to analyse the conditions under which judgments in absentia are conducted in the signatory states of the European Convention on Human Rights (1950) and in the member states of the European Union, focusing on the compatibility of such proceedings with the right to a fair trial.

The objectives of this study are threefold: 1) To examine the principles established by the case-law of the European Court of Human Rights regarding trials conducted in the defendant's absence, identifying the circumstances under which retrials are required; 2) To present the relevant case-law of the Court of Justice of the European Union and its interaction with the European Convention, highlighting similarities and divergences in the protection of the defendant's rights; 3) To develop a set of interpretative criteria that can guide courts in ensuring compliance with the right to a fair trial, taking into account concrete procedural scenarios and practical challenges encountered in different European jurisdictions (France, Italy, Romania).

The novelty of this paper lies in its comparative and analytical approach: it identifies differences and gaps in the application of fair trial guarantees, and develops practical, harmonized solutions that can be applied across different legal systems, By emphasizing analysis over description, this research seeks to generate actionable insights for legal practitioners, judges, and scholars, offering a framework for assessing whether a retrial is necessary and under what conditions the defendant's rights are fully protected.

A doctrinal research methodology is employed in this paper, focusing on a detailed analysis of primary legal sources (such as statutes, case law of the European Court of Human Rights, and decisions of the Court of Justice of the European Union), as well as secondary sources (including scholarly articles and legal commentaries). The method involves a comparative approach to highlight differences and similarities in legal frameworks, combined with interpretative analysis to extract relevant principles and criteria.

AI-assisted technology was used in the preparation of this article for checking grammar and spelling.

1. Historical and Comparative Foundations of Judgments in Absentia

Under old Anglo-Saxon law, an accused who unjustifiably absented himself was not tried in absentia or formally adjudged guilty by default. Instead, he was declared an "outlaw". The consequences of conviction upon an accused could hardly have been more severe than those of outlawry, which included forfeiture of all property and, at least until about 1329, being subject to summary execution by anyone who came upon him. Thus, it seems more accurate to say that the impact of outlawry was in effect, a conviction, and that judgments in absentia were not entered because the same purpose was accomplished by outlawry (Starkey, 1979, p. 723-724).

Traditionally, legal doctrine distinguishes between common law systems, in which judgment in absentia is not permitted, and Romano-Germanic systems, in which it is allowed through default proceedings. Yet the validity of this distinction may well be questioned. Several observations suggest that, while not entirely unfounded, it is largely artificial. First, in a great number of legal systems - whether belonging to the common law tradition or not—judgment in the absence of the defendant is possible under certain circumstances. Second, in Romano-Germanic systems where default proceedings exist, the resulting conviction carries limited weight. Third, in the common law world - where default judgment is in principle rejected - certain functional equivalents have been developed. A limited conviction is sometimes possible (Pradel, 2016, p. 530-531).

Since the purpose of this article is not to provide an exhaustive analysis of in absentia proceedings in comparative law, only three jurisdictions have been selected for discussion. With respect to common law systems, the paper briefly examines the situation in the United States of America. As mentioned above, in countries belonging to the Romano-Germanic legal tradition, the regulation of in absentia proceedings differs considerably. Accordingly, the study presents the German system, which in principle does not permit trials in absentia, and the Italian system, which generally allows them, subject to certain exceptions.

In the United States, according to rule no. 43 of the Federal Rules of Criminal Procedure, a defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances: (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial; (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or (C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behaviour, but the defendant persists in conduct that justifies removal from the courtroom.

In Crosby v. the United States, the Supreme Court held that Rule 43 prohibits the trial in absentia of a defendant who is not present at the beginning of trial. The Rule's express use of the limiting phrase "except as otherwise provided" clearly indicates that the list of situations in which the trial may proceed without the defendant is exclusive. Moreover, the Rule is a restatement of the law that existed at the time it was adopted in 1944. Its distinction between flight before and during trial is also rational, as it marks a point at which the costs of delaying a trial are likely to increase; helps to assure that any waiver is knowing and voluntary; and deprives the defendant of the option of terminating the trial if it seems that the verdict will go against him (Crosby v. United States, 1993).

In the United States, a defendant who has been personally summoned and fails to appear commits the separate offence of bail jumping, punishable by imprisonment, and will face this charge once apprehended (Pradel, 2016, p. 531).

German law does not permit trials in absentia. It should be noted that the German Code of Criminal Procedure distinguishes between an absent person and a person who fails to appear. According to Article 276 of the German Code of Criminal Procedure, an absent person is someone whose place of residence is unknown or who is known to be abroad.

In such cases, trials in absentia are excluded, and the court may only conduct judicial proceedings for the purpose of preserving evidence for the trial, which will be postponed until the defendant appears (art. 285).

In the second case, when the court knows the place where the defendant can be summoned, according to Art. 230 of the German Criminal Procedure Code, no trial will be held in the absence of the defendant, and when the defendant cannot provide sufficient reasons for his absence, a summons or a preventive arrest warrant will be issued. However, the defendant may be tried in absentia either if the court considers that his presence is not indispensable, or if the defendant intentionally causes a condition that affects his ability to take part in the trial, thus preventing the proper conduct of the trial (art. 231a), or if the defendant has been removed from the courtroom for inappropriate behaviour (art. 231b).

The main hearing may be held in the defendant's absence if he or she was properly summoned, and the summons referred to the fact that the hearing may take place in his or her absence and if only a fine of no more than 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is to be expected. An increased penalty or a measure of reform and prevention may not be imposed in the defendant's absence. Disqualification from driving is admissible if the defendant was informed about this possibility in the summons. The main hearing does not take place without the defendant if the summons was affected by publication. (art. 232).

In all these cases, as well as when the offense for which the defendant has been brought to trial is punishable by less than six months' imprisonment, the trial may take place in absentia at the express request of the defendant. If the court grants the request, it shall inform the defendant of the legal consequences to which he or she is exposed (art. 233). Where permitted by law, the defendant may be absent from the trial and may be represented by up to three lawyers who may submit conclusions on the merits of the case (art. 234).

For the same purpose, to discourage defendants from failing to appear at trial, the appeal will be dismissed without a substantive review if the defendant-appellant fails to appear in court and does not provide sufficient reasons to justify his absence. For example, in one case the defendant and their lawyer were both absent during the main appeal hearing (Berufungshauptverhandlung). The appellate court continued the trial in their absence. The Federal Constitutional Court (Bundesverfassungsgericht) declared the proceeding in violation of the defendant's constitutional rights. Courts may allow in absentia hearings in appeals, but they must explicitly justify that the defendant's absence does not compromise the defence. Automatic continuation without such an assessment is unconstitutional (Bundesverfassungsgericht [BVerfG], 2025, 27 March, 2 BvR 829/24).

In another case, the defendant was absent for the appeal hearing. Their attorney held a general power of attorney covering representation even if the defendant was absent. The Federal Court of Justice (Bundesgerichtshof) clarified that, under § 329 StPO, an attorney may effectively represent the defendant in appeal proceedings, potentially substituting for physical presence. The power of attorney must explicitly authorize the attorney to act in the defendant's absence. So, the court held that the proceedings could continue legally in absentia because the attorney was properly authorized and effectively represented the defendant (Bundesgerichtshof [BGH], 2023, January 24, 3 StR 386/21).

In Italy, Law No. 67 of April 28, 2014 introduced a significant reform in criminal procedural law, abolishing the procedure for trials in absentia and appropriately amending the provisions relating to trials in absentia.

According to article 420 bis Criminal Procedure Code, if the defendant, free or detained, is not present at the hearing and, even if unable to appear, has expressly waived his right to be present, the Preliminary Hearing Judge shall proceed in his absence. The Preliminary Hearing Judge shall also proceed in the absence of the defendant if the latter has already declared or chosen an address for service during the proceedings, or has been arrested or placed under temporary detention, or has ordered a precautionary measure, or has appointed a retained lawyer. The Judge shall also proceed when the defendant is not present at the hearing but has been served the notice of the hearing personally, or it is in any case certain that the defendant is aware of the proceedings or has voluntarily avoided to be informed about either the proceedings or the documents thereof.

The defendant who, after appearing, leaves the hearing room or, having appeared at a hearing, does not attend subsequent hearings, is considered present and represented by their lawyer.

Except for this situation and in cases of nullity of the service, if the defendant is not present, the Preliminary Hearing Judge shall adjourn the hearing and order the notice to be served personally on the defendant by the police. When it is impossible to serve the notice, the Preliminary Hearing Judge shall direct by order suspension of the trial against the defendant who failed to appear. During suspension of

trial, the Preliminary Hearing Judge shall, upon request of a party, gather non-deferrable evidence following the procedure established for the trial (art. 420 quater).

Within one year from the date the order was issued, or earlier if needed, the Preliminary Hearing Judge shall order new searches for the defendant in order to serve the notice upon him. The Judge shall decide likewise at the end of each successive year, in case the proceedings do not resume. The Preliminary Hearing Judge shall revoke the order of suspension of trial: a) if the defendant is found after the searches; b) if in the meantime the defendant has appointed a retained lawyer; c) in any other case where it is certain that the defendant is aware of the proceedings against him. The Preliminary Hearing Judge shall set the date for the new hearing in the order of suspension of trial and the notice thereof shall be served, as ordered by the Judge, upon the defendant and his lawyer, the other private parties and the victim, and shall be forwarded to the Public Prosecutor (art. 420 quinquies).

It is mentioned that in Italy, if it is impossible to serve any document to the defendant, the judicial authority shall order a new search to find him, particularly at his place of birth, his latest habitual or temporary residence, the place where he usually works, and the central prison administration. If the defendant is not found, the judicial authority shall issue a decree stating that he cannot be found. After appointing a lawyer for the accused person who may not have one, the judicial authority shall order by the same decree that service be affected by delivering the copy of the document to the lawyer. Service effected in this way shall be valid to all intents and purposes. The person who cannot be found shall be represented by his lawyer (art. 159).

If it is found that the case was wrongly tried in the absence of the defendant because the provisions on the suspension of the trial were applicable, Article 604(5)(bis) states that the appeal court shall declare the judgment null, and order the case file be returned to the first-instance court. The appeal court shall also annul the judgment and order the case file be returned to the first-instance court if the defendant proves that his absence was due to his inculpable unawareness of the first-instance trial.

2. The European Court of Human Rights' Approach to Trials in Absentia

Article 6 of the European Convention on Human Rights guarantees the right to a fair trial. In the entire case law of the European Court of Human Rights (ECHR) it is shown that, although this is not expressly mentioned in paragraph 1 of Article 6, the object and purpose of the Article taken as a whole show that a person "charged with a criminal offence" is entitled to take part in the hearing. Moreover, sub-paragraphs (c), (d) and (e) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person", "to examine or have examined witnesses" and "to have the free assistance of an interpreter if he cannot understand or speak the language used in court", and it is difficult to see how he could exercise these rights without being present. Although proceedings that take place in the defendant's absence are not of themselves incompatible with Article 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself, or that he intended to escape trial (ECHR, Sejdovic v. Italy, 2006, para 81-82).

The defendant could not be considered to have waived his rights, as the authorities had designated him a "fugitive" based on a presumption lacking sufficient factual basis (in concrete terms, the presumption was founded on the fact that, prior to the commencement of proceedings, he moved from his registered address without notifying the authorities). In this context, account was taken of the fact that the defendant was unaware of any charges against him and that, in other criminal cases, the judicial authorities had been able to ascertain his new residence and interview him. The Government's argument that the defendant was to blame for his failure to appear in court, due to not informing the competent authorities of his change of residence, was also rejected. The Court observed that such conduct could amount to no more than a mere misdemeanour, and that the consequences imposed by the Italian authorities were clearly disproportionate in light of the fundamental role that the right to a fair trial plays in a democratic society (para. 32) (ECHR, Colozza v. Italy, 1985).

Although a defendant's flight may constitute evidence that he waived his right to be present at trial, the national authorities remain obliged to investigate the circumstances to determine whether the defendant has indeed fled, and such a conclusion must be supported by solid evidence rather than merely presumed from his absence (ECHR, Hermi v. Italy, 2004).

If the defendant was never notified of the proceedings against him, it is irrelevant that a public defender actively represented him, attending all hearings and requesting the testimony of numerous witnesses. It also bears no legal significance that the applicant was identified by several witnesses, as long as he was unable to attend the hearings to question them (ECHR, Sejdovic v. Italy, 2006).

In some cases concerning convictions in absentia, the Court has shown that informing a person of a prosecution brought against him is a legal act of such significance that it must be carried out in accordance with procedural and substantive requirements capable of guaranteeing the effective exercise of the accused's rights; vague or informal notification cannot suffice. The Court cannot, however, exclude the possibility that certain established facts may provide an unequivocal indication that the defendant is aware of the existence of the criminal proceedings against him, of the nature and cause of the accusation, and that he does not intend to participate in the trial or seeks to evade prosecution. This may arise, for example, where the defendant publicly or in writing declares that he will not respond to summonses of which he has become aware through sources other than the authorities, succeeds in evading an attempted arrest, or when evidence brought to the attention of the authorities unequivocally demonstrates that he is aware of the pending proceedings and of the charges he faces (ECHR, Shkalla v. Albania, 2011, para 70).

The Convention leaves Contracting States wide discretion as regards the choice of the means calculated to ensure that their legal systems are in compliance with the requirements of Article 6. The Court's task is to determine whether the result called for by the Convention has been achieved (ECHR, Sejdovic v. Italy, 2006, para 83).

When a defendant has been formally notified of the charges but cannot be located at the indicated address, prior involvement in other criminal proceedings is a relevant factor in assessing whether he was aware that his case could be brought before the courts, and thus in evaluating the fairness of a trial conducted in his absence. Authorities are obliged to take all reasonably necessary measures to secure the defendant presence at trial, including attempting to locate him at his known correspondence addresses. Where a defendant cannot be located despite reasonable efforts, the proceedings may lawfully continue in his absence. A defendant's prior acknowledgment of the charges and expressed willingness to participate in proceedings based on admission of guilt are significant in evaluating whether his absence affects the fairness of the trial (ECHR, Lena Atanasova v. Bulgaria, 2017, para. 45–52).

Imprisonment based on a final judgment rendered in default of appearance does not, in itself, constitute a violation of Article 5, as such deprivation of liberty falls within the scope of Article 5 para. 1(a). However, the refusal to reopen the trial - such as in the present case, where the application for retrial by a person convicted in absentia was dismissed because the case file had been destroyed - renders the deprivation of liberty unlawful from the moment the retrial request was rejected (ECHR, Stoichkov v. Bulgaria, 2005).

Similar to the other guarantees provided under Article 6 of the European Convention on Human Rights, the ECHR does not impose specific or rigid obligations, but is instead concerned with the overall fairness of the proceedings. Indeed, given the diversity of legal systems among the signatory states, such an approach would have been impossible in practice. Accordingly, the Court grants a wide margin of appreciation to national courts, while maintaining the requirement that the criminal proceedings, taken as a whole, must be fair. In this regard, in the view of the ECHR, the trial of a case in absentia is permissible. National courts must, however, ensure compliance with the other guarantees provided under Article 6 of the Convention, take all reasonable steps to inform the defendant of the charges brought against him, and safeguard the right to defence. As the right to be present at trial is a relative one, the defendant may choose to waive it.

However, in order to protect a person who has been tried without ever being aware of the criminal proceedings, it is necessary that, once such person has been found, they be granted the opportunity to request the reopening of the trial. In effect, that person must be fully reinstated in their previous procedural position, enjoying all the rights available to a defendant who has been aware of the proceedings (for example, the right to challenge the legality of evidence, the right to question witnesses, or the right to submit evidence). To prevent any element that could render the proceedings unfair, in cases involving individuals who have never been officially notified of the existence of the criminal process, the refusal to reopen the proceedings is acceptable only where it can be established with certainty that the defendant had actual knowledge of the charges against him.

3. Trials in Absentia under European Union Law: Legal Framework and CJEU Interpretation

In European Union law, references to trial in absencia and the guarantees to be provided in such situations are to be found in Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial and in Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

The Court of Justice of the European Union (CJEU) ruled in Melloni that Article 4a(1) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, is compatible with the requirements set out in Articles 47 and 48(2) of the Charter of Fundamental Rights of the European Union (CJEU, Melloni, 2013).

In Dworzecki, the summons was sent to the address indicated by Mr. Paweł Dworzecki and was received by an adult resident at that address, namely Mr. Dworzecki's grandfather - pursuant to Article 132 of the Code of Criminal Procedure, which provides that "in the event of the addressee's absence from home, the summons is to be served on an adult resident there." A copy of the judgment was also sent to the same address and received by an adult occupant.

The Court ruled that Article 4a(1)(a)(i) of Framework Decision 2002/584, as amended by Framework Decision 2009/299, must be interpreted as meaning that a summons, such as the one in the main proceedings, which was not served directly on the person concerned but handed over at that person's address to an adult member of the household who undertook to pass it on, does not in itself satisfy the conditions set out in that provision, particularly when it cannot be ascertained from the European arrest warrant whether, and if so when, that adult actually delivered the summons to the person concerned (CJEU, Dworzecki, 2016).

According to the Council Framework Decisions, a trial in absentia is compatible with the right to a fair trial if at least one of the following conditions is met:

- The person was summoned in person and thereby informed of the date and place of the trial that led to the decision;
- The person actually received, by other means, official information about the scheduled date and place of the trial, in such a way that it can be unequivocally established that the person was aware of the trial.

In both of these cases, the person must also have been informed that a decision may be handed down in the event of their failure to appear.

- The person, being aware of the scheduled trial, gave a mandate to a lawyer, either appointed by the person themselves or by the State, who effectively defended them at the trial.
- After being served with the decision and explicitly informed of the right to a retrial or appeal - which allows for the re-examination of the facts, including fresh evidence, and may result in the original

decision being quashed - the person expressly stated that they did not contest the decision or did not appeal it.

Although at first sight the criteria set out in the two Framework Decisions appear similar to those applied by the European Court of Human Rights, it will be shown below that a number of differences exist.

In fact, it can be observed that even at the level of European Union legislation there are slight nuances regarding these conditions. In this context, it is necessary to mention Article 8 para. 2-4 of Directive 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, which stipulates that:

2. Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or

(b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.

3. A decision which has been taken in accordance with paragraph 2 may be enforced against the person concerned.

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 suspects or accused people are informed of the decision. In particular, when they are apprehended, they are also informed of the possibility of challenging the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9.

Also, according to article 9, Member States shall ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States shall ensure that those suspects and accused people have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of defence.

Thus, although the directive reiterates the requirement to inform the defendant that a judgment may be rendered in their absence if they fail to appear, unlike the two Framework Decisions, it no longer requires that the defendant must have actually been defended in the proceedings by the lawyer appointed by them.

4. The Types of Cause Justifying the Reopening of Proceedings in Case of Trial in Absentia

First of all, it is necessary to consider the type of proceedings in which the absence of the person concerned requires a retrial. The case law of both courts appears to be consistent in this respect, as it concerns cases in which a "criminal charge" within the meaning of Article 6 of the European Convention on Human Rights is brought.

For example, in the Samet Ardic case, the Court of Justice of the European Union held that, where a party has appeared in person in criminal proceedings that resulted in a judicial decision definitively finding him guilty of an offence and, as a consequence, imposing a custodial sentence - execution of which is subsequently partially suspended subject to certain conditions - the concept of "trial resulting in the decision" does not include subsequent proceedings in which that suspension is revoked on grounds of breach of those conditions during the probationary period, provided that the revocation decision does not alter the nature or level of the sentence initially imposed.

The Court emphasized that the concept of "trial resulting in the decision" must be given an autonomous and uniform interpretation within the European Union, independently of national classifications and procedural rules in criminal matters, which naturally differ among Member States. It refers to the proceeding that led to the judicial decision finally sentencing the person whose surrender is sought under a European arrest warrant.

The Court also stated that the concept of "trial resulting in the decision" includes subsequent proceedings at the end of which a judicial decision finally amends the level of one or more previous sentences, insofar as the authority adopting that decision enjoys some discretion in that regard. In paragraph 75 of the Ardic decision, the Court emphasizes that this ensures Article 4a(1) of Framework Decision 2002/584 is interpreted and applied in accordance with the requirements of Article 6 of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights (CJEU, Ardic, 2017).

In another case, the Court of Justice of the European Union reiterated the same principles, stating that proceedings leading to a decision - such as a judgment imposing a cumulative sentence by combining one or more previously imposed sentences- necessarily result in a more favourable outcome for the person concerned. For instance, a lighter penalty may be imposed following the enactment of new legislation penalizing the relevant offence less severely. Similarly, after multiple convictions, the sentences may be aggregated into a cumulative sentence that is lower than the sum of the individual sentences imposed in previous decisions. The guarantees incorporated in Article 6 of the European Convention on Human Rights apply not only to the finding of guilt but also to the determination of the sentence. Compliance with the right to a fair trial entail that the person concerned has the right to be present at the hearing due to the significant consequences the proceedings may have on the severity of the sentence. This is particularly relevant in proceedings determining an overall sentence, where the process is not purely formal or arithmetic but allows the competent authority a margin of discretion, for example, by considering the individual circumstances or personality of the defendant, or mitigating and aggravating factors. It follows that proceedings resulting in a judgment imposing a cumulative sentence - such as in the main proceedings, where a new determination of previously imposed custodial sentences is made - must be considered relevant for the application of Article 4a(1) of Framework Decision 2002/584, when they entail a discretionary assessment by the competent authority and result in a decision that finally determines the sentence (CJEU, Zdziaszek, 2017).

Regarding the types of cases that require the reopening of proceedings when the person concerned was not present, the case law of the two courts is similar.

In practice, in post-conviction proceedings the reopening of proceedings following a judgment by default will only apply to those cases where the courts have a margin of discretion regarding the nature and severity of the sentence imposed. If the sentence is modified following a factual analysis, a default judgment and the refusal to retry will result in a violation of the right to a fair trial. For example, in the case of a bad-faith failure to pay a criminal fine, the fine will be replaced by imprisonment. Under current Romanian legislation, the term of imprisonment to be served in the event of non-payment of the fine is determined at the moment the fine is imposed. Under the old rules, however, the court replacing the fine with imprisonment had the power to determine the length of the imprisonment. While in the first case, the court dealing with the subsequent proceedings does not have any discretion in determining the exact length of imprisonment (once bad faith has been established), in the second case, determining the duration requires a factual analysis. In these circumstances, only the second procedure falls within the scope of the right to a fair trial.

5. Possible Contradictions between the Case-law of the European Court of Human Rights and European Union Law

5.1. The condition of informing the defendant that a decision may be handed down if he or she fails to appear in court

A first potential area of conflict between the European Convention on Human Rights and the instruments adopted at European Union level concerns the requirement under the latter that the person concerned must have been informed that a decision may be rendered if he or she fails to appear at the trial.

In none of the cases identified in the case law of the European Court of Human Rights is there any explicit reference to such a formal requirement. The Court adopts a more pragmatic approach, examining in each case whether the person concerned was aware of the existence of criminal proceedings against them, and whether they could reasonably have foreseen the consequences of not appearing. As noted, a retrial may not be necessary even where the defendant was not formally informed of the proceedings, provided it can be unequivocally established that they were aware of their existence.

The case law of the European Court of Human Rights (as discussed in Chapter Two of this paper) establishes that a person must have been notified, in accordance with national law, of the existence of criminal proceedings against them. In principle, such notification is sufficient to make the person aware of the consequences of failing to appear before the judicial authorities. Therefore, if the person subsequently changes their residence after being notified of the charges and cannot be located despite reasonable efforts by the court, they can no longer claim a violation of the right to a fair trial. Furthermore, the right to a fair trial may still be considered respected even if the person was never personally notified, provided it can be clearly established that they were aware of the criminal proceedings against them.

By contrast, the two Council Framework Decisions appear to require a retrial in all cases where the defendant has not received formal notification of the proceedings, without taking into account whether the defendant may have learned of the proceedings through other means.

However, legislation subsequently adopted at European Union level allows for the possibility of rejecting a retrial request where, even though the defendant was never personally notified, it can be established beyond any doubt that they were aware of the trial.

In this regard, it should be recalled that recital 39 of Directive 2016/343 allows Member States to adopt and enforce a decision in absentia when a suspect or accused person cannot be located despite reasonable efforts, such as when the person has fled or absconded. Interpreting these provisions, the Court of Justice of the European Union appears to follow reasoning similar to that of the European Court of Human Rights, ruling that a retrial is not mandatory as long as it can be unequivocally established that the defendant absconded.

In one ruling, the Court held that under Articles 8 and 9 of Directive 2016/343, an accused person who cannot be located despite reasonable efforts may be tried and convicted in absentia. They must generally be allowed, once notified of the conviction, to request a reopening of the proceedings or an equivalent remedy to have the case re-examined in their presence. However, this right may be denied if precise and objective evidence shows that the person received sufficient information to know they were going to be brought to trial and, by deliberate acts with the intention of evading justice, prevented the authorities from officially informing them of that trial (CJEU, IR, 2022). According to paragraph 49, such precise and objective indicia may, for example, be found to exist where that person has deliberately communicated an incorrect address to the national authorities having competence in criminal matters or is no longer at the address that he or she has communicated.

However, the judgment does not reveal the Court's reasoning in the event that the defendant was notified of the charge but not of the consequences of failing to appear. Regarding the importance of this issue

(including in the case of a defendant who changes their address during the trial), reference is made to paragraph 50, which states that " in considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should 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 that information" and paragraph 54, according to which, "it is for the referring court – in order to determine whether IR should enjoy the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case – to examine whether he was informed, in due time, of the trial and, if he was not represented by a mandated lawyer, of the consequences of non-appearance, and whether he waived, tacitly, but unequivocally, his right to be present at that trial".

Therefore, there is a difference between the standard of the European Court of Human Rights (which requires that the person must have been aware that they could be prosecuted and that the judgment could be delivered in their absence) and the standard of the Court of Justice of the European Union (which requires that the person must have been informed of the consequences of their failure to appear).

It is emphasized, for example, that under Romanian law, no provision expressly requires that the defendant be informed of the possibility that a judgment may be rendered in their absence if they fail to appear at trial. According to Article 108 of the Code of Criminal Procedure, the defendant is indeed informed of the obligation to notify the court within three days of any change of address. However, they are warned that, if they fail to comply with this obligation, summonses and any other documents sent to their original address remain valid and are deemed to have been received by them.

From our perspective, a specific, case-by-case analysis is necessary to determine whether, given the particular circumstances of each defendant, they were aware of the consequences of not appearing. For instance, a lawyer cannot reasonably claim ignorance of the possibility of being tried in absentia, whereas a person with limited education may not be aware of this consequence.

The nature of the crime committed must also be taken into account. A person who has committed murder could hardly argue that they were unaware that the case would proceed to trial, whereas a person who stole an item of minimal value might reasonably be unaware of this. Although changing one's place of residence is generally considered evidence of evasion, at least under Romanian law, there are frequent situations in which individuals who commit minor offences - and for whom no custodial sentence would be imposed - change their address without notifying the authorities, often due to a lack of legal knowledge.

Consideration is given to situations in which a person is caught in the act, taken to the police, and questioned about their actions—thus having a criminal charge brought against them within the meaning of Article 6 of the European Convention—without, however, being formally charged. In such cases, under Romanian law, the person is not even informed of their obligation to notify the authorities of any change of address.

There are numerous situations in which criminal prosecution, even in relatively minor cases (such as traffic offenses or shoplifting), takes several years, often with long periods of inactivity by the prosecuting authorities. In this context, individuals who were caught in the act may change their place of residence without reporting it, not necessarily to evade justice, but because they are not truly aware of the risks they face. For such offences, no person present at trial in Romania is typically imprisoned unless they have a prior criminal record; therefore, there is no logical reason for the defendant to attempt to evade justice. However, under Romanian law, imprisonment becomes mandatory if the defendant fails to appear before the court to give consent to perform community service, as none of the non-custodial measures may then be applied.

With reference to paragraph 98 of the Sejdovic judgment ("In the particular circumstances of the present case, the question arises whether, if official notice was not served on him, Mr. Sejdovic may be regarded as having been sufficiently aware of his prosecution and the trial to be able to decide to waive his right

to appear in court, or to evade justice"), it appears that any reopening of proceedings must be considered on a case-by-case basis. Applying the standard of the Court of Justice of the European Union, reopening should not be refused to a person who cannot be clearly identified as having absconded (it must be reiterated that a change of address does not always signify evasion) and who has not been formally notified of the charges.

In such circumstances, Romanian case law reflects a degree of controversy regarding the possibility of requesting a reopening of criminal proceedings. In one case, the accused was caught red-handed by the police, made a statement, and took part in an on-site investigation before formal proceedings began, without being notified of the obligation to report any change of residence. Although an address had been provided, the defendant could not be located once formal proceedings had started. The court held that, as long as no formal charge had been brought in accordance with procedural rules, it could not reasonably be argued that the defendant was aware of ongoing criminal proceedings and their consequences. Consequently, his request for a retrial was granted (Curtea de Apel București, 16 December 2014, Decizia penală nr. 1566 [unpublished; Criminal Decision no. 1566].

On the contrary, another court rejected the defendant's claim that he could not have known criminal proceedings would be initiated against him. Although formal proceedings had not yet begun and he had not been informed of any legal obligations, the defendant signed a report and a handwritten statement acknowledging he was under investigation for aggravated theft (Curtea de Apel București, 9 October 2014, Decizia penală nr. 954 [unpublished; Criminal Decision no. 954].

Doctrine has emphasized that a person's awareness of the existence of criminal proceedings cannot be presumed solely on the basis of their participation in preliminary proceedings prior to the formal initiation of criminal proceedings. The mere presence or involvement in various evidentiary actions - such as on-site investigations or house searches - does not suffice to establish such awareness if these proceedings were not followed by an official notification of criminal charges (Udroiu, 2021, p. 749).

Another author notes that applying the conventional standard regarding notification of charges against a defendant, when national law does not permit notification prior to formal indictment, constitutes a violation of Article 20(2) of the Constitution, which prohibits the use of conventional standards in cases where national law affords a higher level of protection (Constantinescu, 2023, pp. 2875–2876).

A similar view can be observed in Italian case law. On 22 July 2014, four days after disembarking in Italy, the accused was identified by the State Police in Genoa and provided false personal details. He was informed that proceedings would be initiated against him for illegal entry, and a public defender was appointed. The accused elected to receive correspondence at the lawyer's office. This act was considered by the first-instance court - pursuant to Article 420-bis, paragraph 2, of the Code of Criminal Procedure - as proof of knowledge of the proceedings as well as an intention to evade awareness of the proceedings and their acts. However, the Court of Appeal held that this assessment was incorrect, noting that such an act, especially before the formal registration of his name in the in the register pursuant to Article 335 of the Code of Criminal Procedure, does not prove actual knowledge of the proceedings. The Supreme Court was asked whether the mere election of domicile at the lawyer's office could justify declaring the defendant absent and proceeding in his absence. The Court emphasized that the right to defence and the adversarial principle require the defendant's meaningful participation in the trial. Procedural safeguards must ensure real and effective knowledge of the proceedings, as mere formalities are insufficient and may undermine procedural fairness and human rights guarantees (Corte di Cassazione – Sezioni Unite Penali, Italy, 2020, Sentenza n. 23948 [Judgment No. 23948]).

5.2. Obligation to retry the case in relation to the conduct of the chosen lawyer

A second possible element of differentiation with regard to the mandatory retrial of the case concerns the conduct of the chosen defence counsel.

According to the two Framework Decisions set out above, a retrial is not required if the defendant, being aware of the trial, has mandated a lawyer who has been appointed either by the person concerned or by the State to defend him or her at the trial, and was indeed defended by that lawyer at the trial. Per a contrario, if the defendant (who has not been formally notified of the charge against him or her) appoints a chosen defence counsel, the judgment rendered in absentia will be quashed and the trial will be retried if the chosen defence counsel has not appeared.

Although the case law of the European Court of Human Rights does not expressly address this precise scenario, it must be considered, based on the principles outlined above, that the denial of a retrial in such circumstances would not constitute a violation of Article 6 of the European Convention on Human Rights.

Fairness in criminal proceedings requires that the defendand be adequately defended at all stages. Courts must ensure that counsel has the opportunity to defend the accused person, even in absentia. However, the State is not responsible for every deficiency of legal aid or privately appointed lawyers, as the conduct of the defence primarily remains a matter between the defendant and their counsel. Intervention by authorities under Article 6 §3(c) is required only when ineffective representation is manifest or clearly brought to their attention (ECHR, Sejdovic v. Italy, 2006, para 91-95).

To better understand this distinction, according to Article 466(2) of the Romanian Criminal Procedure Code, a convicted person who has appointed a defence counsel or representative is not considered to have been tried in absentia if that counsel or representative appeared at any point during the proceedings. The wording used, which resembles the two framework decisions, allows a retrial in cases where the defence counsel did not appear before the court.

This provision was designed to ensure comprehensive protection for the convicted person, not only against potential flaws in the summons procedure, but also with respect to the manner in which the lawyer exercises the right to defence (Crișu, 2020, p. 393). However, some scholars have criticized it, noting that the mere appearance of the lawyer or representative at a trial concerns only how the right to defence is exercised, which can lead to the arguably absurd situation where a retrial would be granted even if the chosen counsel had been hired solely to submit written conclusions (Constantinescu, 2023, p. 2878).

From our perspective, the absence of a chosen defence counsel is indeed equivalent to a lack of effective legal assistance, and such a flaw is evident. Nevertheless, the judge can appoint a public attorney to ensure effective defence and notify the defendant, assuming the defendant has communicated his or her contact details. Any bona fide person with average intellectual capacity would be expected to take an interest in the progress of their criminal proceedings. Therefore, if the proceedings continue for a certain period after the chosen counsel fails to appear, it is reasonable to expect the defendant to take steps to ascertain the situation. A person who does nothing in this regard and, moreover, fails to provide any telephone number or address for summons, cannot reasonably claim that their right to a fair trial has been violated if the trial proceeds in their absence. Accordingly, it must not be considered that international human rights regulations on the right to a fair trial require reopening proceedings solely because the chosen counsel did not appear, provided the defendant has demonstrated no subsequent interest in the case and the court has been unable to contact them due to a lack of information.

5.3. Situation where the defendant is only present at certain stages of the criminal proceedings

Another potential element of distinction regarding the possibility of trial in absentia concerns situations in which the defendant was not present at certain stages of the criminal proceedings. In our view, this does not reflect a substantive divergence between the two courts, but rather an apparent contradiction.
If the trial occurred at multiple levels of jurisdiction and the defendant, although absent at the first instance, was present before the appellate court, he cannot, in principle, claim that his right to a fair trial has been violated. For example, in the case-law of the Court of Justice of the European Union, in the Tupikas case, it was held that where proceedings take place at several instances resulting in successive

decisions, at least one of which was rendered in absentia, the term "trial resulting in the decision," within the meaning of Article 4a(1) of Framework Decision 2002/584, should be understood as referring to the instance that issued the final ruling. In these circumstances, even if the rights of the defence were not fully respected at the first instance, such a breach may be remedied during the second-instance proceedings, provided that these proceedings fully guarantee the requirements of a fair trial (CJEU, Tupikas, 2017, para 81 and 85-86).

It must be said, however, that respect for the right to a fair trial is not ensured by the mere participation of the defendant. The court examining the appeal must itself provide all the guarantees set out in Article 6 of the European Convention, such as hearing the defendant, ensuring that they have the opportunity to ask questions directly to the persons whose statements form the basis of the accusation, and ensuring that they have the opportunity to present evidence.

From the perspective of the European Court of Human Rights' case law, the relevant case is Coniac v. Romania. The Court reiterated that the proceedings as a whole may be considered fair if the defendant was allowed to challenge a conviction rendered in absentia and was entitled to attend the hearing before the appellate court, thereby opening the possibility of a full factual and legal examination of the criminal charge. However, the High Court in this instance relied solely on evidence submitted in the defendant's absence at the lower courts, without hearing him in person, despite the fact that the matters under review concerned factual issues, including the defendant's intent. This omission is particularly problematic given that the applicant had been previously acquitted in similar proceedings for lack of direct intent to commit fraud (ECHR, Coniac v. Romania, 2015).

What is relevant, therefore, is for the appellate court to ensure that, with regard to the criminal proceedings as a whole, the defendant has, at least at some stage, been afforded all the guarantees required by Article 6 of the European Convention. The European Court of Human Rights has also held, in Abdelali v. France, that offering an accused person - who has never been notified of the existence of criminal proceedings against them - the right to lodge an objection in order to be retried in their presence, but without being able to challenge the validity of the evidence against them, is insufficient, disproportionate, and deprives the concept of a fair trial of its substance (ECHR, Abdelali v. France, 2012). The same conclusion was reached in Abbou v. France (ECHR, Abbou v. France, 2017).

The situation becomes more problematic when the defendant's absence concerns the stage of the criminal proceedings at which the final decision is delivered. This includes cases in which, although the defendant participated in the criminal investigation, they no longer participated in the trial phase, or cases in which, although they participated at first instance, they no longer participated at the appeal stage.

In Tupikas, the CJEU held that in criminal proceedings involving several levels of jurisdiction, where at least one decision is delivered in absentia, the concept of a 'trial resulting in the decision' under Article 4a(1) of the Framework Decision 2002/584 refers only to the final instance that determines the defendant's guilt and imposes a penalty after a full re-examination of the merits. An appeal proceeding, such as that at issue in the main proceedings, in principle falls within that concept. It remains, however, for the referring court to satisfy itself that it meets the characteristics set out above (CJEU, Tupikas, 2017).

A literal application of this principle would lead to the conclusion that whenever the defendant does not participate before the court delivering the judgment- whether at first instance, when they were present during the criminal investigation and no appeal was lodged, or at the appellate court, when they appeared before the first court - they would be entitled to request a retrial. It must not be considered that the Court of Justice of the European Union intended such reasoning, which would apply irrespective of the defendant's conduct during the criminal proceedings. In this regard, the decision explicitly states that the case law of the European Court of Human Rights must be taken into account. Paragraphs 78–80 of the Tupikas judgment clarify this point.

What the European Court requires is that the defendant be given the opportunity to participate in the proceedings and be informed thereof. Therefore, if the defendant was officially notified of the charges against them and was aware of the possibility of the case being tried in their absence, their failure to appear in court - provided the court took all the necessary steps to ensure their presence - cannot justify the reopening of the proceedings.

This is the prevailing view in Romanian case law. However, there are also court rulings that take a different approach. For example, in a court of appeals decision, applying the criteria from the Tupikas case - incorrectly, in our view - it was held that, although the defendant was aware of the existence of criminal proceedings during the criminal investigation phase, this did not necessarily amount to knowledge of the trial phase. The reasoning was that the formulation of a criminal charge does not automatically imply a decision to bring the case to trial (C. Apel Constanța, Romania, 2023, Decizia nr. 143 [Judgment No. 143]).

In another case, it was held that the defendant could not be considered unfamiliar with the criminal proceedings against him, since, having been arrested in a separate case, he had been brought before the criminal investigation authorities and questioned. On that occasion, he was also informed in writing, under signature, of the charges against him and of his obligation to notify the judicial authorities of any change of residence. Under these circumstances, the defendant was obliged, after his release from detention and prior to the issuance of the indictment in the present case, to contact the prosecutor's office or the police station to communicate his new address. After being released, he neglected to notify the criminal investigation authorities of his new residence. However, there is no evidence that the change of residence was intended to evade trial, which had not yet commenced at the time of his release. In these circumstances, it was decided that the case should be retried (C. Apel București, Romania, 2019, Decizia nr. 1580 [Judgment No. 1580]).

It is important to underline that this decision was handed down by the highest court of appeal in Romania. Romanian doctrine, however, considers that a defendant who was aware of the criminal proceedings against him and of all the essential elements of the accusation is not entitled to a retrial if he fails to appear before the court (Magdalena, 2017, p. 137; Micu, Slăvoiu & Zarafiu, 2022, p. 782; Constantinescu, 2023, p. 2874–2875).

From our point of view, in such a case, the defendant is responsible for the situation that has arisen, and invoking his own conduct to obtain a procedural advantage - namely, the retrial of the case - clearly violates the principle of nemo auditur propriam turpitudinem allegans. Similar reasoning was also adopted by the European Court of Human Rights in Lena Atanasova v. Bulgaria.

With regard to the defendant's absence from the appeal hearing, if the appeal was lodged by him and he was lawfully summoned, it must not be considered that his failure to appear can justify a retrial. If he does not appear after receiving the summons, fails to collect it, or does not communicate the address where he actually resides, reasoning otherwise would be to allow him to benefit from his own fault.
For example, in Ivanciuc v. Romania, the European Court of Human Rights held that the defendant could not claim that his right to a fair trial before the appeal court had been violated as long as he demonstrated total disinterest in the proceedings, missing all hearings before the domestic courts (ECHR, Ivanciuc v. Romania, 2005).

French case law is also similarly with this opinion. Thus, it has been stated that the procedure for default in criminal matters is not applicable before the Assize Court sitting in appeal when the defendant, absent without valid excuse, is the appellant (Cour de cassation – Chambre criminelle, France, 8 February 2023, n° 22-84.280 [Judgment No. 22-84.280]).

At the same time, if the appeal is lodged shortly after the judgment of the first court by the prosecutor or the injured party, it must not be considered that a retrial would be justified as long as the defendant has been lawfully summoned. For any person with an average level of education, it is obvious that the judgment of the first court could be appealed. It is therefore reasonable to require the defendant to be

diligent in checking his mail (so that he cannot later claim that he did not check his mailbox for a certain period) and, in the event of a change of domicile, to communicate this to the authorities.

There may, however, be situations in which an appeal is lodged a considerable time after the judgment of the first court. For example, in many jurisdictions the time limit for an appeal runs from the legal communication of the first court's judgment. In cases of unlawful communication, an appeal may be lodged even long after the judgment has been rendered. The aggrieved party could also request an extension of the appeal deadline if prevented from filing an appeal for good cause. Thus, if a long period has elapsed since the judgment was delivered, the defendant may reasonably consider the judgment to have become final. In such a situation, a person cannot be criticized for failing to check their mailbox over a certain period or for changing their domicile without notifying the authorities or completing the required legal formalities. It must be considered that the conclusion of the Court of Justice of the European Union in the Tupikas case could be taken into account in such scenarios.

Conclusions

The comparative analysis of the ECHR's case law and the EU rules on trials in absentia shows certain divergences - at least at the level of the literal wording - particularly concerning situations in which a retrial is mandatory. At the same time, CJEU jurisprudence consistently reflects the standards developed by the ECHR. Based on the three hypotheses presented in the previous chapter, the following interpretative proposals are advanced:

1. Awareness of the consequences of absence

In the absence of explicit information on the consequences of non-appearance, courts should apply an individualised assessment of whether the defendant could reasonably have foreseen the risk of being tried in absentia. Relevant indicators include the defendant's background, cognitive abilities, the seriousness of the offence, and the extent of participation in earlier stages of the proceedings.

This approach accommodates the nuanced distinctions identified in national practice, including the need to offer a retrial in cases where the defendant was apprehended in flagrante delicto, but did not subsequently participate in the criminal procedure.

2. Conduct of the chosen defence counsel

Where the defence counsel designated by the defendant fails to appear, the court's duties should be limited to appointing a public defender and notifying the person concerned. A defendant who demonstrates no diligence in maintaining contact with his lawyer should not be permitted to invoke the absence of counsel as a ground for requesting a retrial. Intervention by the court to remedy inadequate defence by chosen counsel should occur only in exceptional and manifest cases, in line with both ECHR and CJEU standards.

3. Establishing the relevance of good or bad faith when the defendant was present only at some stages of the trial

If the defendant was present during earlier procedural phases, but absent when the final judgment was rendered, the decisive criterion should be the defendant's good or bad faith, provided that the authorities undertook all reasonable steps to secure proper notification and attendance.

These proposals aim to harmonise the interpretative approaches of national courts with the converging standards of the ECHR and the CJEU. They seek to clarify when a retrial should be granted following a conviction in absentia, while safeguarding both the effectiveness of criminal proceedings and the fundamental right to a fair trial.

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