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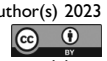

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HYA and Others: Reshaping participation at criminal trials in Europe

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Abstract

The recent decision of the Court of Justice of the European Union in *HYA and Others* has a significant impact on the use of untested witness statements in criminal proceedings. The case concerned the right to examine witnesses, which is protected under 6(3)(d) of the European Convention on Human Rights. The CJEU established a three-step test to determine whether the use of untested evidence violates the right to a fair trial and ruled out the use of 'sole or decisive' untested evidence in criminal proceedings. The Court also held that the right to examine witnesses is a fundamental right in criminal proceedings and falls within the scope of Article 8(1) of Directive 2016/343. The *HYA and Others* judgment sets a higher standard than that guaranteed by the ECtHR, preventing the use of sole or decisive witnesses in reaching a final conviction decision. Finally, the judgment extends the scope of defence rights in EU law and enhances the effectiveness of fundamental rights in criminal proceedings.

Keywords

Fair trial rights, right to be present at trial, sole or decisive rule, cross-examination, Article 52 of the Charter, Article 8(1) of the Directive 2016/343, Article 6 ECHR.

1. Introduction

This article provides an analysis of a recent judgment rendered by the Court of Justice of the European Union (CJEU or the Court), *HYA and Others*,[1] regarding the use of untested witness statements in criminal proceedings.

1. Case C-348/21 *HYA et al.*, EU:C:2022:965 (hereinafter: Judgment).

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The paper examines the CJEU's reasoning and its implications for the rights of the accused, as well as the wider context of fair trial guarantees under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (the Charter).

After a brief overview of the judgment, this article focuses on the Court's line of reasoning to exclude sole or decisive untested witnesses from the materials that can form the basis for a conviction. The decision sets out new considerations on the admissibility of such evidence under EU law and represents a significant departure from previous case law of the European Court of Human Rights (ECtHR).

Subsequently, attention will be paid to Article 8(1) of the Directive 2016/343 (the Directive),[2] which relates to the right to be present at trial, and to how the Court carved out the right to cross-examine a witness from that provision. Moreover, it is argued that, following the Court's approach, Article 8(1) of the Directive can be used as a 'vehicle' to acknowledge all other defence rights linked to the presence of the accused at trial in the European Union (EU) secondary law.

Lastly, the judgment under examination is analysed against the settled case law of the ECtHR on the 'sole and decisive rule' topic, comparing the two (different) standards used by the two courts. The position of the Luxembourg Court is to be welcomed, as first and foremost it shows that the CJEU appears keen to autonomously define the content of defence rights, and most importantly because it has raised the threshold for the protection of suspect's rights as opposed to the ECtHR's approach on the matter.

2. Factual and legal background

The judgment was triggered by a request for a preliminary ruling lodged by the Bulgarian Specialized Criminal Court and concerned criminal proceedings carried out vis-à-vis Mr HYA and other defendants, who were accused of being part of an organized criminal group, allegedly involved in migrant smuggling activities.

The Bulgarian public prosecutor, during the preliminary investigation phase, intercepted some of the irregular migrants whose entry into the Bulgarian territory would allegedly have been facilitated by the suspects. They were examined several times, by the public prosecutor themselves or by the judicial police, without the presence of the suspects. At a later moment, given the alleged risk posed by the third-country nationals of absconding, the public prosecutor, pursuant to Article 223 of the Bulgarian Code of Criminal Procedure (NPK), formally required to hear them before a judge. Indeed, when there is a serious risk that potential witnesses will be unable to appear before a trial court, the public prosecutor must present them before a judge to obtain their testimony.[3] Accordingly, the hearings took place without the suspects or their defence counsels present, as there was no formal indictment yet. Notably, the suspects were formally 'accused' a few hours after the last witnesses' hearing.[4]

2. Directive 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings [2016] OJ L 65/1.
3. Article 223 NPK, entitled 'Witness examination before a judge', foresees that the witnesses' examination *shall* be carried out before a judge, pending preliminary investigations, should there be a risk that the individual concerned will be unable to appear before the trial court. Where a suspect has been already formally indicted, and hence has already become 'accused' of a certain criminal offence, he/she shall have the opportunity to take part in the conduct of such an examination.
4. Judgment, para. 14–18 read in conjunction with Opinion of Advocate General Michael Collins in Case C-348/21 *HYA and Others*, EU:C:2022:539, para. 15–16 (hereinafter: Opinion).

After the indictment, the witnesses were never questioned again. Moreover, the public prosecutor, without a specific ground, rejected an accused person's request to this end.[5] It is noteworthy that expulsion proceedings were commenced vis-à-vis the third-country nationals, due to their irregular stay in Bulgaria.[6]

During the trial phase, the competent judge unsuccessfully attempted to summon the prosecution's witnesses. It was found that the witnesses had been expelled from Bulgaria, fled the country, or, in other cases, it was impossible for national authorities to trace and locate them.[7] Accordingly, the public prosecutor requested to read at trial the witnesses' statements obtained during the pre-trial stage, before a judge, as per Article 281(1) NPK.[8] Such reading would render the declarations part of the material based on which the court can rule on the merits. Importantly, those statements, in the referring court's view, would have represented the sole and decisive evidence on which to establish the defendants' criminal responsibility.[9]

Against this background, the referring judge was unsure whether Article 281(1) NPK, read in conjunction with Article 223 NPK, might comply with Article 8(1) of Directive 2016/343, which envisages the right to be present at trial, in the light of Article 47(2) of the Charter (right to fair trial).[10] The main concerns of the Bulgarian court regarded the joint application of the two national provisions. Indeed, it is worth noting that during the investigative phase, the participation of the accused person in a hearing where a witness is examined is guaranteed solely after the indictment has been made. This structure within the investigative process opens a potential loophole in domestic law. It allows investigative authorities to exploit this gap by formally issuing an indictment only after the witness hearing has concluded. Hence, the prosecution might be able to collect important, probably decisive, witnesses' statements in the absence of the accused person, and be able to use them in a later stage pending trial.

The referring judge considers this an arbitrary conduct on the part of investigating authorities that may undermine the defence rights of the accused person and accordingly violate EU law.[11] Hence, it asked the CJEU whether the application of national provisions allowing for the conviction of an individual on the *sole* basis of *decisive* untested witnesses might comply with EU law.

One year after the preliminary ruling request, Advocate General (AG) Collins provided a comprehensive Opinion on the case. Firstly, the AG warmly welcomed the domestic court's standpoint in interpreting Directive 2016/343 in light of the settled ECtHR's case law.[12] Secondly, according to the AG, as the right to examine witnesses is plainly enshrined in Article 6(3) ECHR, which, in turn, is part of the rights of the defence protected by Article 48(2) of the Charter, the latter provision

5. Judgment, para. 19.
6. Ibid., para. 18.
7. Opinion, para. 19–20.
8. That domestic provision allows witnesses statements to be read at trial, should the latter have been collected during the pre-trial phase, before a judge, as per Article 223 NPK. Remarkably, such reading is permitted where, *inter alia*, 'the witness, duly summoned, cannot appear before the court for a prolonged or an indefinite period of time' or the witness 'cannot be found in order to be summoned'.
9. Judgment, para. 24.
10. Although the preliminary ruling also mentioned Article 6(1) of the Directive, the present comment will focus solely on Article 8(1) thereof. It is worth recalling that the Court deemed the former provision inapplicable in the present case (Judgment, para. 31–33).
11. See Judgment, para. 26, 'as it happened in the present case'. The referring court is aware of the loophole present in domestic law and the elusive practice of the public prosecution.
12. Opinion, para. 32–34.

shall also be taken into account by the CJEU in the present case.[13] Referring to the extensive ECtHR's case law on fair trial rights,[14] the AG urged the CJEU to find that the Bulgarian national provisions were incompatible with Article 8(1) of the Directive, read in conjunction with Articles 47 and 48(2) of the Charter,

> if the testimony given at the pre-trial stage of the proceedings by witnesses who cannot be examined for objective reasons is introduced at the trial stage of the criminal proceedings, whereby those witnesses were examined solely by the prosecution and without the participation of the defence, but before a judge, and *the prosecution could have provided the defence with the opportunity to participate in that examination at the pre-trial stage, but did not do so*.[15]

To reach this conclusion, the AG pointed out *inter alia* that the right to be present at trial, as enshrined in Article 8(1) of the Directive, must be interpreted as providing the suspect or the accused person with *active* rights, such as the right to question prosecution witnesses. Interestingly, the AG emphasized the fact that, on the one hand, there was no obligation burdening the prosecution to re-examine a witness already heard before a judge, in the absence of the defence, at the latter's subsequent request; and, on the other hand, there was no effective remedy within Bulgarian legal framework to challenge the prosecution refusal to re-examine such witness.[16]

3. The Court's decision

From a substantive standpoint, the judgment rendered by the CJEU largely followed the AG's line of reasoning. This can be observed in the multiple references made by the CJEU to the AG's Opinion.[17] In this regard, the CJEU acknowledged: (i) that Article 48 of the Charter was relevant in the material case; (ii) that Article 6 of the Directive, called into question by the referring court, was inapplicable; (iii) that Article 8(1) of the Directive, in providing suspects and accused persons with the right to be present at trial, also confers to those individuals all the rights of the defence, guaranteed by Article 48 of the Charter. A divergent interpretation would have rendered meaningless the very essence of the right to a fair trial, enshrined both in Article 47 of the Charter and Article 6 ECHR.[18] The right to be present at trial thus infers a right to participate, according to both the CJEU and the AG.

Against this background, the Court then focused on the very issue at stake, which is worth quoting at some length:

> (…) whether Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter, precludes a criminal judge from applying national legislation under which, where it is impossible for a witness, for objective reasons, to be present at the judicial stage of the criminal proceedings, that judge may read out statements made by that

13. Ibid., para. 35.
14. Ibid., para 44–59.
15. Ibid., para. 63, emphasis added.
16. Ibid., para 59 *in fine*.
17. Judgment, para. 32, 37 and 45.
18. Ibid., para. 29–45. It is worth recalling that the right of suspects or accused persons to examine or to have examined witnesses called to give evidence against them (Article 6(3)(d) ECHR) constitutes a specific aspect of the right to a fair trial as per Article 6(1) ECHR (ibid., para. 42).

> witness before a judge during the pre-trial stage of the proceedings, in order to rule on the guilt or innocence of the accused person, including where the accused person was not charged at the time that the hearing of that witness took place and neither the accused person nor their lawyer was able to participate.[19]

In a nutshell, has the right to be present at trial been limited in the material case through the application of domestic law? And, if so, is such a limitation in line with EU law? Not surprisingly, the CJEU acknowledged *in primis* that the application of Bulgarian provisions at stake 'could infringe' the right to be present at trial.[20] Since a restriction on a fundamental right had emerged as an issue, the Court was compelled to refer to Article 52(1) of the Charter as a useful guideline for national courts, given the judicial cooperation mandated by Article 267 TFEU.[21]

To guide national judges, the Court recalled the 'three steps test' contained in Article 52(1) of the Charter. It is worth noting that the Court used such assessment for the first time in the judgment under investigation to evaluate the fairness of the proceedings in scenarios where the defendant is denied the opportunity to cross-examine a witness during the trial.

Firstly, any restriction of fundamental rights enshrined in the Charter shall be provided by law and shall respect the essence of those rights.[22] Secondly, every limitation shall respond to the objectives of general interest recognized by the EU.[23] Lastly, the measure at stake ought to be proportionate, namely, it has to be the less intrusive among the applicable ones in order to reach the same objective.[24] To give content to the last leg of the test, the Court referred to the settled ECtHR's case law on fair trial rights and the right to examine witnesses in cases involving untested evidence. Consequently, the CJEU split into two other grounds the third leg of the test embedded in Article 52(1) of the Charter. Specifically, domestic courts have to assess: (i) whether there exist serious grounds that may justify the non-appearance of the witness; and (ii) whether, should such testimony be the sole and decisive evidence for the conviction of the accused person, there exist sufficient counterbalancing elements, such as strong procedural safeguards that might compensate for the defence's lack of opportunity to question the witness.[25]

National courts shall carefully assess all these circumstances, following a case-by-case approach.[26] As a result, in the presence of compensating factors, untested witnesses' declarations that are the sole or decisive evidence can be used by courts to convict the accused person on the merits.

Conclusively, the Court, in summarizing its findings, surprisingly depicted brand-new considerations on the case. Although developed 'in the light of all of the foregoing',[27] a specific part of that last paragraph of the judgment provides domestic courts with an unexpected addition that

19. Ibid., para. 46.
20. Ibid., para. 47.
21. Ibid., para. 49.
22. Ibid., para. 51.
23. Ibid., para 52–53.
24. Ibid., para. 54.
25. Ibid., para. 55. The Court recalled that, among those procedural safeguards, the opportunity, given to the suspect or the accused person, to examine a witness in the pre-trial stage of the proceedings is an important factor to be considered when assessing the overall fairness of the procedure. See ECtHR, *Al Alo v Slovakia*, Judgment of 10 February 2022, Application No. 32084/19, para. 56 and the case law cited therein.
26. Ibid., para. 56–58 and 59–61.
27. Ibid., para. 62.

may not be inferred from the previous line of reasoning. Indeed, the CJEU answered to the Bulgarian court that the national provisions at stake are incompatible with EU law *unless* (i) there is a good reason warranting the non-appearance of the witness at the judicial stage of the criminal proceedings; (ii) the testimony given by that witness *does not constitute the sole or decisive basis* for the conviction of the accused person; and (iii) there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused person and their lawyer as a result of the taking into account of that testimony. While the first and the third circumstances to be assessed did not raise any issue of consistency, the CJEU is *de facto* excluding that sole or decisive untested evidence may be employed, in any case, as the basis for an individual's conviction.[28]

4. Comments

A. Spectators or participants? Giving substance to the suspects' and accused persons' right to be present at trial across Europe

One of the central issues that the CJEU had to deal with was whether Article 8(1) of the Directive encompasses the right to cross-examination and, more specifically, the right to examine or have examined a prosecution witness. The question is of the utmost importance, considering that the latter represents a specific aspect of fair trial rights, as was stressed oftentimes by the ECtHR.[29] Yet, from a literal point of view, the aforementioned provision only mentions the right to be present at trial. Moreover, there is no other EU piece of legislation that covers such a topic.

Against this background, one could easily find that Article 8(1) of the Directive did not specifically address the right to examine witnesses or any other defence rights. Indeed, analysing the case law that formed around Article 8(1) of the Directive, one can notice that the majority of the cases revolved around specifically the right to be physically present at trial and the legality of proceedings *in absentia*.[30] It stems from both a literal and contextual analysis of the Directive that the right to be present is nothing more than the prerogative to have the opportunity to be physically present at the hearings of that trial.

Nevertheless, the reasoning that the CJEU follows in the case *HYA and Others* is arguably astute and is clearly based on a teleological scrutiny of Article 8(1) of the Directive. To this end, the Court recalls a well-rooted jurisprudence of the ECtHR, which considers the right to be present at trial as the necessary means to fully exercise defence rights.[31]

Interestingly, the ECtHR had previously been asked to rule on a similar, but opposite, issue. Indeed, the Convention is silent about the suspects' or accused persons' right to be present at trial. No reference to this prerogative is explicitly made in Article 6 ECHR. The first instance in which the ECtHR had to cope with this issue was in *Colozza*.[32] On that occasion, the Strasbourg Court affirmed that although it is not expressly mentioned in Article 6 ECHR, the latter's

28. See *infra* § B.
29. ECtHR, *Sakhnovskiy v Russia*, Judgment of 2 November 2010, Application No. 21272/03, para. 94. See also ECtHR, *Hokkeling v the Netherlands*, Judgment of 14 February 2017, Application No. 30749/12, para. 57.
30. See, among others, Case C-688/18 *Spetsializirana prokuratura*, EU:C:2020:94; Case C-416/20 *TR v Generalstaatsanwaltschaft Hamburg*, EU:C:2020:1042; Case C-420/20 *HN*, EU:C:2022:679; C-569/20 *Spetsializirana prokuratura*, EU:C:2022:401.
31. Judgment, para. 41.
32. ECtHR, *Colozza v Italy*, Judgment of 12 February 1985, Application No. 9024/80.

meaning and purpose show that a person charged with a criminal offence is entitled to take part in the hearing.[33] The rationale for such findings was based on the assumption that a person cannot effectively exercise the rights acknowledged in Article 6(3) ECHR if he/she is not present during his/her own trial. Most importantly, the ECtHR has expressly linked the right to be present at trial to the right to effective participation,[34] and, consequently, to other aspects of the right to a fair trial, namely the ones listed in Article 6(3) ECHR.[35]

Furthermore, it is worth mentioning that in the very first case in which the CJEU had to deal with Article 8(1) of the Directive, it affirmed that this provision not only includes the right to be physically present at trial but also encompasses the right to have one's case 'heard' – this is the first essential step for the accused to exercise their defence rights, including (but not limited to) the right to give evidence in their defence, hear the evidence presented against them, and examine and cross-examine witnesses.[36]

Therefore, the CJEU's attempt to trace the right to cross-examination back to Article 8(1) of the Directive does not represent a complete *novum*, nor can it be seen as an unreasonable standpoint. Conversely, it may symbolize a first step towards a more consistent approach between the two European courts for what concerns procedural rights in the context of criminal proceedings.

What is more, the present judgment marks the first instance in which the CJEU has significantly expanded the right enshrined in the Directive.[37] Such an aspect of the ruling should not be underestimated. Indeed, it is true that *HYA and Others* addressed the issue of the right to examine witnesses, which specifically stems from Article 6(3)(d) ECHR. Yet, linking the right to be present with *one* of the rights of the defence in the material case, the Court has acknowledged de facto that Article 8(1) of the Directive covers and safeguards *all defence rights* that require the presence of the suspect or accused at trial.[38] Indeed, the Court explicitly affirms that from the latter provision stems the right to participate effectively at trial and to exercise the rights of the defence.[39] Such a conclusion can be supported by a contextual interpretation of the latter provision. Indeed, Article 9 of the Directive – which guarantees the right to a new trial to suspects and accused persons absent at trial in violation of the conditions set out in Article 8(2) – foresees that suspects and accused persons must be able to participate effectively at the new trial and to exercise the rights of defence. Hence, suspects and accused persons regularly present at the first trial shall be in the condition to participate effectively at such a trial and to exercise the rights of defence.

33. Ibid., para. 27.
34. ECtHR, *Stanford v. UK*, Judgment of 23 January 1994, Application No. 16757/90, para. 26. See, in this regard, A. Owusu-Bempah, *The Interpretation and Application of the Right to Effective Participation*, 22 *IJEP* (2018).
35. S.J. Summers, *Fair Trials: The European Criminal Procedural Tradition and the European Court of Human Rights* (Bloomsbury, 2007), p. 116; ECtHR, *Barberà, Messegué and Jabardo v. Spain*, Judgment of 6 December 1988, Application No. 10590/83, para. 78.
36. Case C-688/18 Spetsializirana prokuratura, para. 36.
37. See V. Mitsilegas, 'The European Union and the Rights of Individuals in Criminal Proceedings', in D.K. Brown, J.I. Turner and B. Weisser (eds.), *The Oxford Handbook of Criminal Process* (Oxford University Press, 2019), p. 128. The Author points out that the Directive only encompasses the right to be present at one's trial and deals with the obligation for Member States to ensure such a right. It also covers the exceptions to this obligation that are laid down in Article 8(2) therein.
38. L. Cecchetti, 'How to Enforce the Right to Cross-Examination of Witnesses under Article 6 ECHR in the Union via Directive 2016/343: HYA and Others', *EULawLive* (2023), https://eulawlive.com/op-ed-how-to-enforce-the-right-to-cross-examination-witnesses-under-article-6-echr-in-the-union-via-directive-2016-343-hya-and-others-by-lorenzo-cecchetti/#.
39. Judgment, para. 44.

In doing so, the CJEU has based its standpoint mostly on European provisions – namely Articles 47 and 48 of the Charter – with little, if any, reference to the jurisprudence of the ECtHR. In other words, the Court is including other defence rights within the scope of Article 8(1) of the Directive, based on the fact that the latter's provisions respond directly to the requirements of the above-mentioned provisions of the Charter,[40] which are the sole legal basis in EU law for the protection of defence rights that are not expressly recognized in secondary legislation.

B. Reasserting the importance of the 'sole or decisive rule' within the EU legal framework?

Besides the 'Charter-based' approach in assessing the extent to which the right to be present at trial may embody, in EU law, the right of suspects and accused persons to examine and have examined witnesses,[41] it is apparent that the essence of *HYA and Others* can be summarized into two seemingly straightforward questions. Firstly, may someone be convicted solely on the basis of decisive witnesses who have not been subject to cross-examination before the judge at trial? Secondly, should that answer be positive, does this comply with the right to a fair trial, as enshrined in Articles 47 and 48 of the Charter, read in the light of Article 6 ECHR?

Against this background, it is worth recalling that the CJEU set forth that Article 8(1) of the Directive prevents a domestic court from basing its ruling on the reading of a witness statement given at the pre-trial stage of the proceedings without the accused person having had an opportunity to cross-examine that witness, *unless*: (i) there is a serious ground for the non-appearance of the witness *à charge*; (ii) such witness *does not* constitute the 'sole or decisive' ground for the conviction; and (iii) there were sufficient counterbalancing factors which may compensate the handicaps suffered by the accused person and his/her lawyer as a result of the admission of that witness at trial.[42] Whereas it is not expressly laid down, the Court suggested that the analysis of the aforementioned grounds will be carried out chronologically, from the first to the third situation mentioned therein.[43] As is apparent from the wording, however, every circumstance holds an autonomous characterization – should one be lacking, the domestic court cannot base its decision on the untested witness.

Not surprisingly, the Luxembourg Court carved these *caveats* out of the relevant ECtHR's case law on the right to cross-examination and identified several useful principles to answer the Bulgarian court. This aspect of *HYA and Others* is to be welcomed, since it depicts, once again, that the judicial dialogue between the two European courts can play a pivotal role in enhancing the effectiveness of fundamental rights, especially in the context of criminal proceedings.[44]

Nevertheless, a deeper look into the ECHR legal framework reveals that, with the present judgment, the CJEU proved to render itself independent from the ECtHR, increasing procedural

40. A Lefebvre, 'CJUE : la recevabilité d'un témoignage en l'absence du défendeur est soumis à conditions', *Dalloz Actualité* (2023), https://www.dalloz-actualite.fr/flash/cjue-recevabilite-d-un-temoignage-en-l-absence-du-defendeur-est-soumis-conditions#.ZAjYnXbMKUk.
41. See section 4.A above.
42. Judgment, para. 62 *in fine*, emphasis added.
43. See ibid., para. 56 ('*tout d'abord*'), 57 ('*ensuite*') and 58 ('*enfin*') of the judgment.
44. A-I. Kargopoulos, 'ECHR and the CJEU Competing, Overlapping, or Supplementary Competences?', 3 *EUCRIM* (2015), p. 96. See also M. Fahlbusch, 'Le rôle du dialogue des juges dans la formation de standards de protection de droits de l'homme', in M. Disant, G. Lewkowicz and P. Türk (eds.), *Vers des standards constitutionnels mondiaux* (Bruylant, 2017), p. 299.

guarantees vis-à-vis suspects and accused persons and, finally, as will be explained, avoiding the possibility of convicting individuals on the basis of sole or decisive untested evidence. Essentially, while the CJEU seemingly aimed at following the ECtHR's case law on the right to cross-examination, the philosophy standing behind *HYA and Others* is given best expression by an exhortation coming from AG Pikamäe in a different case, and which is worth quoting at some length:

> It is apparent therefore that the Court of Justice has power to interpret the provisions of the Charter *autonomously*, and that it is those provisions alone that apply in the sphere of EU law. The Court can therefore leave aside the case law of the European Court of Human Rights and examine the questions referred in the light of the Charter, provided its interpretation of the rights it contains that are similar in content to those in the ECHR leads to a higher level of protection than that guaranteed by the ECHR.[45]

As will be argued, this evolutive approach is probably the most appropriate perspective to be backed on the right to cross-examination. But how broad was the misalignment between the EU and ECHR legal orders on the issue? And to what extent did the CJEU manage to develop its own 'test' in this field?

From a theoretical level, within the Strasbourg's legal framework, all evidence is supposed to be produced before the judge, in the context of a public hearing and in the presence of the accused.[46] This might be deemed the *minimum* content of the right to cross-examination enshrined in Article 6(3)(d) ECHR and, in turn, the minimum content of the same prerogative as per Article 48(2) of the Charter.[47] Still, the ECtHR has repeatedly stated that the right to confrontation is not absolute, with some circumstances being capable of reliving domestic authorities to provide the accused person with that guarantee.[48] Nonetheless, in these conditions, 'the rights of the defence' shall be complied with.[49]

In other words, Article 6(3)(d) ECHR does not preclude *per se* the fact that a defendant might be convicted on the basis of an untested witness' statement if there are compelling reasons for the latter's absence. Trials can still be fair, provided that the individual concerned had an effective occasion to challenge and question the witness *à charge*, even 'at a later stage of the proceedings'.[50] Should this opportunity not be ensured, the ECtHR made it clear that, in any case, according to the 'sole or decisive rule',[51] a conviction cannot be based 'solely' or 'to a decisive degree' on untested witnesses' statements, which the accused person had not the opportunity to challenge at any stage of the proceedings.[52] Conversely, where the testimony at stake does not hold a decisive character per se, it can also be employed without a previous cross-examination. Such a line of

45. Opinion of Advocate General Pikamäe in Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others* EU:C:2020:367, para. 159.
46. ECtHR, *Dimitrov and Momin v Bulgaria*, Judgment of 7 June 2018, Application No. 35132/08, para. 52.
47. See Article 52(3) of the Charter.
48. There might be some good reasons preventing the witness from appearing before the judge, e.g. his/her death or the fear of retaliation (see the case law cited in ECtHR, *Gani v Spain*, Judgment of 19 February 2013, Application No. 61800/08, para. 40).
49. ECtHR, *Lucà v Italy*, Judgment of 27 February 2001, Application No. 33354/96, para. 39.
50. ECtHR, *Karpenko v Russia*, Judgment of 13 March 2012, Application No. 5605/04, para. 62.
51. See, among others, O. Michiels, 'Le principe de la preuve unique ou déterminante', 91 *RTDH* (2012), p. 693; M. Redmayne, 'Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber', 75 *MLR* (2012), p. 865.

reasoning, albeit questionable from a literal standpoint,[53] could be interpreted as a compromise, since the ECtHR appears to have accepted that only procedural violations that significantly affect the defendant's ability to obtain a fair trial do not comply with Article 6 of the ECHR.[54]

The concise – although outdated – portrait depicted above reveals certain similarities with the findings of the CJEU in the present case. Indeed, the latter similarly excluded the use of 'sole or decisive' untested evidence in criminal proceedings.[55] Additionally, the Court of Luxembourg stressed the importance of establishing serious grounds for the non-appearance of the witness. Failure to do so shall prevent national authorities from admitting and employing the evidence concerned, in light of Articles 47(2) and 48(2) of the Charter, since now, one cannot but see a *fil rouge* between the two European courts' approaches.

Still, as anticipated, the ECtHR 'overruled' its own approach in the landmark *Al-Khawaja* judgment.[56] As for what is relevant here, the 'sole or decisive rule', which already was an exception to the (minimum) right to cross-examination, lost its absolute characterization. Remarkably, the ECtHR allowed for a derogation of that rule – crucial untested witnesses may form the basis for a conviction, provided that the defendant is offered 'counterbalancing factors' (including the existence of 'strong procedural safeguards') and the proceedings are subjected to the 'most searching scrutiny'.[57] This reasoning was developed by advocating for a thorough evaluation of the relevant proceedings 'as a whole'.

Whereas some scholars have struggled to find a rationale in this U-turn,[58] it has been rightly maintained that the 'overall examination' criterion is deeply entrenched in the Court's holistic approach, a stance it has embraced since the commencement of its activity.[59] Among other areas, this approach has been widely followed in cases concerning the right to legal assistance,[60] starting with the 'dramatic shift'[61] inaugurated with the landmark *Ibrahim and Others* judgment,[62] which marked a notable departure from the settled jurisprudence.[63]

52. ECtHR, *Al-Khawaja and Tahery v the United Kingdom*, Judgment of 15 December 2011, Application Nos. 26766/05 and 22228/06, para. 119.
53. The fact that untested witnesses can be employed as basis for a conviction (or, similarly, together with other evidence) blatantly runs counter the content of Article 6(3)(d) ECHR, whose wording does not leave any room to interpret it otherwise. In this regard, see R.E. Kostoris, 'Per una "grammatica" minima del giudizio di equità processuale', 63 *Riv It Dir & Proc Pen* (2020), p. 1675, who highlights that the right to confrontation is to be guaranteed 'without exceptions' as per Article 6(3)(d) ECHR.
54. M. Biral, 'The Right to Examine or Have Examined Witnesses as a *Minimum* Right to a Fair Trial', 22 *EurJCrimeCrLCrJ* (2014), p. 331–6.
55. Reference is to be made to the second leg of the test elaborated in the present judgment.
56. ECtHR, *Al-Khawaja and Tahery*.
57. Ibid., para. 147. The ECtHR shall analyse whether the proceedings 'as a whole' were fair. See A. Samartzis, 'Weighing Overall Fairness: A Critique of Balancing under the Criminal Limb of Article 6 of the European Convention on Human Rights', 21 *HRLRev* (2021), p. 409.
58. See e.g. E. Widder, 'The Right to Challenge Witnesses – An Application of Strasbourg's Flexible 'Sole and Decisive' Rule to Other Human Rights', 3 *CJICL* (2014), p. 1094.
59. M. Caianiello, 'You Can't Always Counterbalance What You Want', 25 *EurJCrimeCrLCrJ* (2017), p. 289.
60. A. Pivaty, 'The Right to Custodial Legal Assistance in Europe: In Search For the Rationales', 26 *EurJCrimeCrLCrJ* (2018), p. 62–98.
61. A. Soo, 'Divergence of European Union and Strasbourg Standards on Defence Rights in Criminal Proceedings?', 25 *EurJCrimeCrLCrJ* (2017), p. 334.
62. ECtHR, *Ibrahim and Others v the United Kingdom*, Judgment of 13 September 2016, Application Nos. 50541/08, 50571/08, 50573/08 and 40351/09.

Hence, the line of reasoning developed in *Al-Khawaja* ought not to be interpreted as an unforeseen overruling of prior case law; instead, it should be construed as a manifestation of the ECtHR's deferential stance towards national judiciaries and domestic legal traditions.[64] Arguably, this underscores the rationale behind the increasing application of the overall examination criterion, a practice that nevertheless raises apprehensions concerning its potential adverse repercussions. These concerns extend not only to the procedural rights of the individuals implicated in the case under consideration but also pertain to the construction of a European criminal justice framework. In fact, the more fragmented the ECtHR's case law becomes, the less coherent the European criminal justice system is likely to be, given that EU law extensively draws inspiration from ECtHR case law in shaping the scope and meaning of procedural rights.

In *Al-Khawaja* these concerns are rather evident, as it may be questionable whether such a blurred approach to the right to cross-examination might be justified even when the untried evidence can lead, autonomously, to a conviction. What is more, in follow-up judgments,[65] the ECtHR strengthened this position, going beyond a pure formalistic perspective, stressing that: (i) the lack of good reasons for the non-attendance of a witness *does not* lead, as such, to a breach of Article 6 ECHR; (ii) the existence of sufficient counterbalancing factors shall be assessed *even* when the evidence at stake might not be decisive, or there is uncertainty about its cruciality in the material case.[66]

Against this background, 'everything is now negotiable', as was critically observed by Judge Pinto de Albuquerque, and 'even evidence banned in the Middle Ages, such as the statement of a dying person, can still be used'.[67]

Still, if our reading is correct, *HYA and Others* took a diverse pathway. In a nutshell, albeit not lucidly explained in the motivation, the CJEU proves to welcome the stance of those who argued that the concept of fair trial is inextricably linked to the right to question decisive witnesses and, accordingly, the accused person shall be acquitted, in any case, should the basis of his/her conviction be constituted by a piece of untested decisive evidence.[68] In addition, the viewpoint of the present judgment could be in line with those who stressed that the 'sole or decisive rule' provided a 'bright line', which, after *Al-Khawaja*, has been questionably nuanced, thus hindering the 'standard of precision and reliability expected of legal rule'.[69] Excluding, in any case, sole or decisive untested witnesses from the materials which can form the basis for a conviction, the CJEU turned back the clock of fair trial rights to 2011, before *Al-Khawaja*, where the employment of such evidence was found to restrict the rights of the defence to an extent so as to render that trial incompatible with the guarantees provided by Article 6 ECHR.[70] Indeed, certain scholars had

63. See, in this regard, D. Giannoulopoulos, 'Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries', 16 *HRLRev* (2016), p. 104–106.
64. M. Caianiello, *EurJCrimeCrLCrJ* (2017), p. 291.
65. Reference shall be made to ECtHR, *Schatschaschwili v Germany*, Judgment of 15 December 2015, Application No. 9154/10, para. 111–131.
66. ECtHR, *Al Alo v Slovakia*, para. 43–45.
67. ECtHR, *Murtazaliyeva v Russia*, Judgment of 18 December 2018, Application No. 36658/05, dissenting opinion of judge Pinto de Albuquerque, para. 47.
68. B. de Wilde, 'A Fundamental Review of the ECHR Right to Examine Witnesses in Criminal Cases', 17 *IJEP* (2013), p. 182.
69. ECtHR, *Al-Khawaja and Tahery*, dissenting opinion of judges Sajó and Karakaş.
70. Such assumption was recalled in the Opinion, para. 52. Evidently, the AG referred to the jurisprudence *ante Al-Khawaja*, thus disregarding the subsequent approach advocated by the ECtHR, which, in turn, set aside the 'sole or decisive rule'.

already anticipated (and advocated for) such a development, accurately observing that the pertinent EU legal framework (e.g. the Directive) does not encompass any allusion to the concept of 'overall fairness', nor does it address potential counterbalancing elements that could remedy a violation of fair trial rights.[71] Nonetheless, this perspective is not only correct in a strictly literal sense. Deviating from the ECtHR's case law illustrates the intent of the CJEU to enhance the substance of fair trial rights through a self-sufficient and autonomous construal of the 'sole or decisive rule'. Ultimately, this approach amplifies the safeguards extended to suspects or accused persons. The rationale articulated in *HYA and Others* thus seems to emphasize the proactive capacity of the CJEU to establish elevated benchmarks for the procedural rights of suspects, surpassing those established by the ECtHR.

5. Concluding remarks

The present judgment was unprecedented for three main reasons.

Firstly, this judgment enabled the CJEU to broaden the scope of Article 8(1) of the Directive by incorporating the right to examine witnesses, thereby substantiating and enriching the right to be present at trial. This interpretive approach suggests a consequential outcome, implying that all other defence rights associated with the presence of the accused at trial – as outlined in Article 6(3) of the ECHR – may now find recognition within EU law under the framework of Article 8(1) of the Directive. Beyond this, the Court of Luxembourg asserts that the right to be present at trial serves as a pivotal gateway, facilitating the effective participation of the suspect or accused individual during the trial. It is the initial stride toward establishing an adversarial trial system and ensuring the robust exercise of defence rights.[72]

Secondly, whereas not wholly coherent,[73] the efforts put by the Court in bringing consistency between the ECHR and the Charter in the field of criminal procedural rights is not a minor aspect of *HYA and Others* and should be welcomed as one of the most shareable standpoints ever followed by the CJEU *in parte qua*. Nevertheless, it is important to note that the Court does not endeavour to achieve complete and unyielding conformity between the two European legal frameworks at any expense.[74] Besides the hermeticism of its wording in the final part, *HYA and Others* provides higher standards than those ensured by the ECHR, in that Article 8(1) of the Directive prevents domestic judges from employing sole or decisive witnesses as material that can be used in reaching a final conviction decision. Such an approach is not only favourable from a human rights-based perspective. The *de facto* re-employment of the 'sole or decisive rule' will provide Member States with clear standards, despite their existing domestic divergences. Furthermore, this stance will also comply with the rule of law, in that it draws a plain line between what is admissible in criminal proceedings and what is (and will) not.

71. A. Pivaty, *EurJCrimeCrLCrJ* (2018), p. 89.
72. A. Owusu-Bempah, *IJEP* (2018), p. 323. The Author, in her attempt to define the 'right to effective' participation, affirms that the right of the accused to participate effectively in a criminal trial is implicit in the very notion of an adversarial procedure.
73. About the questionable employment of arts 52(1) and 52(3) of the Charter in the present judgment, see the critical position taken by L. Cecchetti, *EULawLive* (2023).
74. A. Pivaty, *EurJCrimeCrLCrJ* (2018), p. 69. The Author argues that the 'object and purpose' of the EU Directives on procedural rights was to pursue higher and broader protection of such rights compared to the ECHR and the interpretation offered by the ECtHR. Moreover, the Author suggest that the CJEU appears to be keen in following such an approach, specifically in *Covaci* (Case C-216/14 *Covaci*, EU:C:2015:686). In *HYA and Others*, the CJEU seems to follow the same path.

Lastly, *HYA and Others* shows how important the CJEU's role is in protecting fair trial rights within the European legal framework. Notably, this judicial landmark underscores the Court's potential to evolve into a pivotal guarantor of fundamental human rights. Although suspects or accused persons cannot directly seize the CJEU, its prerogative to render preliminary decisions on alleged violations of fair trial rights presents a potent mechanism for proactive safeguarding. By wielding its authority while national proceedings are pending, the CJEU effectively assumes a catalytic role in preventing potential miscarriages of justice.[75] This dynamic intervention mechanism, intertwined with its commitment to upholding the principles enshrined in the Charter, reflects a proactive stance to put the Court itself and EU law as leading guardians of fair trial rights in the European legal framework.

Contributorship

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75. A. Klip, *European Criminal Law* (4th edition, Intersentia, 2021), p. 183.