INSIGHT

Absent Witnesses and EU Law: A Groundbreaking Ruling by the CJEU in Criminal Matters

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Abstract: The *Insight* focuses on case C-348/21 *HYA and Others*, in which the Court of Justice deals with the admissibility at the trial of the statements of an absent witness questioned at the investigative stage. On the basis of art. 8 Directive 2016/343, the EU judges first derived the right to examine witnesses from the right to be present at the trial; then, drawing inspiration from the Strasbourg case-law, the Court of Justice ruled that such statements may be used as evidence, albeit with certain limitations. The stance taken by the Court fully demonstrates the expansive strength of the "Stockholm Directives" but also reveals an uncritical compliance with the positions held by the European Court of Human Rights.

Keywords: absent witness – testimony – trial – witness statements – evidence – Directive 2016/343/EU.

I. Introduction

The admissibility, as evidence, of statements gathered without the defence being present is a classic theme of criminal procedural law. Indeed, the analysis of this topic is traditionally considered a useful parameter to understand whether a procedural system is closer to the civil law or common law heritage.[1]

A famous conflict between the British Supreme Court and the European Court of Human Rights (ECtHR) was a clear demonstration of the sensitivity of this issue.[2] In the well-known case of *Al-Khawaja and Tahery*, in order to defend the English and Welsh hearsay

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[1] See, among others, MR Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1975) UPaLRev 506; JD Jackson and SJ Summer, *The Internationalisation of Criminal Evidence. Beyond the Common Law and Civil Law Traditions* (Cambridge University Press 2012) 30 ff.; JH Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press 2003) 178 ff.

[2] ECtHR *Al-Khawaja and Tahery v the United Kingdom* App n. 26766/05 and 22228/06 [15 December 2011].

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evidence regime, the Supreme Court was ready to deny the binding nature of the Strasbourg judgments, and only the ECtHR's step back prevented the outbreak of a worrying institutional conflict.[3]

It is therefore not surprising that, so far, no EU Directive has ever addressed this topic. Notably, there is no mention of "untested" witness statements even in the "Stockholm Directives", which are primarily devoted to the creation of a common set of procedural safeguards for suspects and accused persons.[4]

Actually, the aforementioned acts set out only a few rules regarding witness statements: for example, art. 12(2) Directive 2013/48[5] and art. 10(2) Directive 2016/343[6] provide that "in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer", "to remain silent", or "not to incriminate oneself", "the rights of the defence and the fairness of the proceedings [should be] respected". Moreover, recital 45 of the Directive 2016/343 requires that "regard should be had to the case-law of the European Court of Human Rights, according to which the admission of statements obtained as a result of torture or of other ill-treatment in breach of Article 3 ECHR as evidence to establish the relevant facts in criminal proceedings would render the proceedings as a whole unfair".

Despite this, it has never been established whether and how the statements of prosecution witnesses made before trial, without cross-examination, could be used to establish guilt.

Against this background, it might be surprising that the Court of Justice has recently addressed this sensitive issue.[7] Starting from art. 8 Directive 2016/343, the Luxembourg Court performed an innovative and, in some respects, groundbreaking interpretation of the EU law.

[3] See C Haguenau-Moizard, 'La Cour suprême britannique et la Cour européenne des droits de l'homme: une nouvelle voix dans le dialogue des juges' (2012) RTDH 503; JR Spencer, *Hearsay Evidence in Criminal Proceedings* (Hart Publishing 2014) 43 ff.

[4] See Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings. As is well-know, this roadmap has been integrated into the "Stockholm Programme" (Communication COM(2009) 262 final from the Commission of 10 June 2009 on an area of freedom, security and justice serving the citizen). On the Roadmap and its origins, see S Allegrezza, 'Toward a European Constitutional Framework for Defence Rights' in S Allegrezza and V Covolo (eds), *Effective Defence Rights in Criminal Proceedings. A European and Comparative Study on Judicial Remedies* (Wolters Kluwer 2018) 3 ff.; M Costas Trascaras, 'The New EU Strategy on Procedural Rights: One Step Forward or Two Backwards' in M Pedrazzi, I Viarengo and A Lang (eds), *Individual Guarantees in the European Judicial Area in Criminal Matters* (Bruylant 2011) 189 ff.

[5] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings.

[6] Directive 2016/343/EU 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 the trial in criminal proceedings.

[7] Case C-348/21 *HYA and Others* ECLI:EU:C:2022:965 para. 54 ff.

First, the right to examine or have witnesses examined was derived from the right to be present at the trial and a specific rule of evidence was then set out drawing inspiration from the case-law of the ECtHR, which has already ruled on the subject on several occasions.

After outlining the preliminary question, this *Insight* analyses the advances and shortcomings of the stance taken by the Court. Section IV examines the CJEU's arguments on art. 6 Directive 2016/343, also mentioned by the referring judge, concluding that perhaps a reference to the former art. 3 would have been more effective. The following sections illustrate how the Court used art. 8 Directive n. 343 and the principle of proportionality enshrined in art. 52 Charter of Fundamental Rights of the European Union to elaborate on a limitation to the admissibility as evidence of the "untested" witness statements. Regrettably, this last passage of the judgment raises some doubts: in particular, the judgment features a lack of in-depth analysis of the elements that constitute the proportionality principle and a hasty acceptance of the indications stemming from the ECtHR, which instead would have deserved a more critical assessment.

II. The Facts and the Preliminary Question

The question originates from a criminal proceeding related to illegal immigration crimes; some of the accused persons are agents of the Bulgarian border police.

At the investigative stage, the prosecutor examined several persons, whose illegal entry into Bulgarian territory was allegedly facilitated by the suspects. As a precaution, some of the witnesses were also heard before a judge, as provided by art. 223 NPK (the Bulgarian Code of Criminal Procedure), for cases in which "there is a risk that the witness will be unable to appear before the court on account of a serious illness, a prolonged period of absence from the country or other reasons that make his or her appearance at trial impossible".

At the end of the investigation, the prosecutor brought an action before the "Spetsializiran nakazatelen sad", a specialised criminal court, against the suspects.

The judge summoned the witnesses who had been questioned at the previous stage, in order to examine them in the presence of the accused persons and their lawyers, but this attempt was unsuccessful because of several reasons: the witnesses' place of residence was unknown, or they had been removed from Bulgaria or voluntarily had left the country. According to art. 281(1) NPK, the prosecutor requested the witnesses' statements to be read out, in order to become part of the file. This provision states that "witness testimony given in the same case before a judge in the pretrial proceedings or before a different composition of the court shall be read, where the witness cannot be found in order to be summoned, or has passed away".

Then, the judge decided to submit a preliminary reference to the CJEU, justifying this choice also on the grounds that the guarantees set out in art. 281(1) NPK are often "circumvented in practice": "it is sufficient, at the pre-trial stage of criminal proceedings, for

the witness examination to be conducted before a judge within the 24-hour period between the suspect's arrest and the formal bringing of charges, for the suspect, in so far as he or she has not yet been formally charged, and the suspect's lawyer not to have the right to participate".

Since this bad practice also occurred in the present case, the CJEU was asked whether a national law allowing the use at the trial of witness statements gathered in such a dubious context is compatible with the rights and the rules under arts 8(1) and 6(1) Directive 2016/343.

III. The Ruling of the Court

The CJEU partially rephrased and simplified the question submitted by the Bulgarian judge, wondering "whether Article 6(1) and Article 8(1) of Directive 2016/343, read in conjunction with the second paragraph of Article 47 and Article 48(2) of the Charter, must be interpreted as precluding the application of national legislation which allows a national court, where it is not possible to examine a prosecution witness during the judicial stage of criminal proceedings, to base its decision on the guilt or innocence of the accused person on the testimony of that witness obtained during a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer".

After these preliminary clarifications, art. 6(1) Directive 2016/343 was immediately deprived of any relevance: this provision places the burden of proof on the prosecution, but "does not prescribe the manner in which the prosecution must establish the guilt of an accused person or the manner in which that person must [...] be able to challenge the evidence adduced by the prosecution".

In contrast, the analysis of art. 8 of the same Directive is much more detailed. The first question was whether, "in addition to the right to appear in person at hearings held in the context of the trial", the right for the accused persons to be present, enshrined in art. 8(1) Directive 2016/343, also includes a more active role, and in particular "the right to examine or have examined witnesses".

On the basis of recital 33 Directive 2016/343, that links directly "the right of suspects and accused persons to be present at the trial" and "the right to a fair trial", the Luxembourg Court decided to focus its attention on the "level of protection" of these rights guaranteed by art. 6 ECHR, "as interpreted by the European Court of Human Rights".[8]

In particular, according to ECtHR, "in view of the rights of the defence being guaranteed, inter alia, by Article 6(3)(d) ECHR, the right of the accused person to take part in the hearing implies the right of that person to participate effectively in their trial".[9] This is the reason why – as reminded by the Court of Justice – the right to be present at the trial

[8] *HYA and Others* cit. para. 40.

[9] For an analysis of this case-law, see section V.

ultimately "is not limited to ensuring the mere presence of the accused person"; the latter should "be able to participate effectively in that trial and to exercise, to that end, the rights of the defence, which include the right to examine or have examined prosecution witnesses at that judicial stage".[10]

After having reached this conclusion, it was necessary to establish the compatibility with art. 8 Directive n. 343, as interpreted above, of a domestic provision which allows for the reading at the trial of witness statements made during the investigative stage, even though "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".

The answer has been based on art. 52(1) Charter.

In light of this provision, the CJEU first established that the statements of an absent witness may be admitted only if such a possibility is "provided for by the relevant national legal framework"; furthermore, those statements "can be taken into account only in limited circumstances, for legitimate reasons and with due regard for the fairness of the criminal proceedings as a whole".[11]

Finally, with respect to the principle of proportionality, the solution has been once again inspired by the ECtHR case-law and in particular by the well-known case of *Schatschaschwili*:[12] it is for the referring judge to evaluate "whether there is a good reason warranting the non-appearance of the witness and whether, in so far as the testimony of the witness could constitute the sole or decisive basis for a possible conviction of the accused person, there are counterbalancing factors, including strong procedural safeguards, sufficient to compensate for the handicaps faced by that accused person and their lawyer".[13]

Good reasons for the absence, at the trial, of a prosecution witness were identified as "death, health grounds, a fear of giving evidence or the impossibility of that witness being located". The untested statements must be considered decisive if they are "of such significance that it is likely to be determinative of the outcome of the case". Counterbalancing factors, suitable for preserving fairness, could be for example "the production of corroborating evidence" or other "procedural measures taken to compensate for the fact that the witness could not be directly cross-examined during the judicial stage".[14]

On the basis of all the above considerations, the CJEU concluded that art. 8(1) Directive 2016/343 must be interpreted as precluding the application of national legislation which allows the admissibility as evidence of prosecution witness statements gathered before the trial, without the defence being present, "unless there is a good reason war-

[10] *HYA and Others* cit. para. 44.
[11] *Ibid.* para. 52.
[12] ECtHR *Schatschaschwili v Germany* App n. 9154/10 [15 December 2015] in particular paras 100-131.
[13] *HYA and Others* cit. para. 50.
[14] *HYA and Others* cit. paras 56-68.

ranting the non-appearance of the witness at the judicial stage of the criminal proceedings, the testimony given by that witness does not constitute the sole or decisive basis for the conviction of the accused person, and there are sufficient counterbalancing factors to compensate for the handicaps faced by the accused person and their lawyer".[15]

The reasoning of the Court can therefore be summarised in three points: the irrelevance of art. 6(1) Directive 2016/343; the inclusion of the right to examine or have witnesses examined under art. 8 of the same Directive; the subjection of any limitation to such right to the conditions laid down in art. 52(1) of the Charter.

Each of these aspects will be analysed in the following sections.

IV. Burden of Proof, Presumption of Innocence and Compliance with Evidentiary Rules

First of all, the Court of Justice assumed, contrary to the referring judge, that the allocation of the burden of proof to the prosecutor does not imply any requirement as to the quality of the evidence suitable for proving the guilt; in essence, art. 6(1) Directive 2016/343 merely establishes who should prove what, without explaining how this task should be accomplished.

This interpretation is fully understandable: the rule according to which "Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution" does not contain any specific indications as to the means by which this burden is to be met.

Perhaps, the Bulgarian judge could have in fact focused the attention on another provision. Art. 3, by stating that "Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law", does not merely establish the length of the presumption. Something more is provided for: the guilt must be proved "according to law".[16]

In short, it seems possible to argue that a piece of evidence able to overturn the presumption of innocence can only be the one gathered and used in accordance with the law. Indeed, a proof of guilt based on unlawful evidence clearly cannot be considered "according to law".[17]

[15] *HYA and Others* cit. para. 63.

[16] Regarding art. 3 Directive 2016/343 meanings, see S Cras and A Erbežnik, 'The Directive on the Presumption of Innocence and the Right to Be Present at Trial. Genesis and Description of the New EU-Measure' (2016) eucrim 35, available at www.eucrim.eu; J Della Torre, 'Il paradosso della direttiva sul rafforzamento della presunzione di innocenza e del diritto di presenziare al processo: un passo indietro rispetto alle garanzie convenzionali?' (2016) Rivista italiana di diritto e procedura penale 1850 ff.; ML Villamarín López, 'The Presumption of Innocence in Directive 2016/343/EU of 9 March 2016' (2017) 18 ERA Forum 335.

[17] For a similar perspective, see M Chiavario, *La Convenzione europea dei diritti dell'uomo nel sistema delle fonti normative in materia penale* (Giuffrè 1969) 375-376; G Ubertis, *Principi di procedura penale europea. Le regole del giusto processo* (Raffaello Cortina Editore 2009) 125 ff.

Perhaps, the referring court's claim concerning the circumvention of art. 281(1) NPK would have been more effective, had it also mentioned art. 3 Directive 2016/343. However, it is hard to predict if, this being the case, the outcome by the CJEU would have been different.

It is worth remembering that a similar question has already been addressed by the ECtHR, given that art. 6(2) ECHR[18] and art. 3 Directive n. 343 have identical wording. In *Schenk v Switzerland*,[19] wiretaps obtained in breach of the national law were, nevertheless, admitted as evidence. The applicant alleged that, "owing to the use of the unlawfully obtained recording, he had not been proved guilty according to law", but this assumption was rejected with a narrow reasoning: nothing suggested that the applicant had been treated as guilty before conviction and, in any case, "the mere inclusion of the cassette in the evidence cannot suffice to support the applicant's allegation".

Moreover, the Strasbourg Court has repeatedly stressed that it is not its role "to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair".[20] Compliance with national rules of evidence is therefore not considered a key factor by the Strasbourg Court, and the Court of Justice took the same approach in the present judgment.

As said above, the preliminary question submitted by the Bulgarian court was partially rephrased by the EU judges. The original version of it was focused on the misapplication of the national law, resulting in the impossibility, for the defence, to participate in the witnesses' hearing; the CJEU instead was much more neutral, referring to "a hearing before a judge during the pre-trial stage of those proceedings, but without the participation of the accused person or their lawyer".[21]

The disregard for the requirement to comply with national rules of evidence also arises from the analysis of art. 52(1) Charter. This provision states that limitations on the rights guaranteed by the Charter should be "provided for by law"; however, the CJEU did

[18] "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

[19] ECtHR *Schenk v Switzerland* App. n. 10862/84 [12 July 1988] paras 50-51. See S Nash, 'Secretly Recorded Conversations and the European Convention on Human Rights: Khan v UK' (1996) The International Journal of Evidence and Proof 268.

[20] Recently, ECtHR *Pirtskhalava and Tsaadze v Georgia* App n. 29714/18 [23 March 2023] para. 52. See A Ashworth, 'The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism Before Principle in the Strasbourg Jurisprudence' in P Roberts and J Hunter (eds), *Criminal Evidence and Human Rights. Reimagining Common Law Procedural Traditions* (Hart Publishing 2012) 154 ff.; JD Jackson and SJ Summer, *The Internationalisation of Criminal Evidence* cit. 151 ff.; F Pinar Ölçer, 'The European Court of Human Rights: The Fair Trial Analysis Under Article 6 of the European Convention of Human Rights' in SC Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013) 371 ff.; S Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for a European Legal Discussion* (Springer 2020) 74 ff.

[21] *HYA and Others* cit. para. 30.

not consider the circumstances outlined by the referring court and merely said that "the possibility of taking into account statements by absent witnesses" seems to be provided by the "relevant national legal framework".

A similar rationale is to be found in the passage of the judgment where the counterbalancing factors are listed. The "possibility for defendants and their defence to examine witnesses during the pre-trial phase" is simply included in the list without any express reference to the breach of procedural rules that caused its failure in the present case.

In short, compliance with domestic rules of evidence did not have any particular relevance in the reasoning of the Court of Justice, as for the ECtHR. Such self-restraint of the European Courts is probably due to the concern not to interfere with the national courts' decisions on an issue so sensitive.

For this reason, a question based on art. 3 Directive n. 343, rather than on art. 6, would probably have had the same result, but, for the future, this profile deserves to be further elaborated in a preliminary ruling.

V. From the Right to Be Present to the Right to Confront Witnesses

The second crucial point of the judgment lies in the interpretation given to the "right to be present at the trial". By relying on the "equivalence clause" set out in art. 52(3) Charter as well as on the symmetry between arts 47-48 of the same Charter and art. 6 ECHR, the CJEU created a direct link between the EU law and the ECtHR case-law.

Such an interpretation paved the way for two important judgments of the Strasbourg Court, whose words have been rephrased to broaden the meaning of art. 8 Directive n. 343.[22]

The first is the decision in the case of Marcello Viola v Italy, in which the defendant's participation by videoconference was debated. In that case, the Court stated that, "*quoique non mentionnée en termes exprès au paragraphe 1 de l'article 6, la faculté pour l'accusé de prendre part à l'audience découle de l'objet et du but de l'ensemble de l'article*"; to confirm this interpretation it would be enough to recall art. 6(3)(b)(c)(d) ECHR which ensure "*à 'tout accusé' le droit à 'se défendre lui-même', 'interroger ou faire interroger les témoins' et 'se faire assister gratuitement d'un interprète, [...]' ce qui ne se conçoit guère sans sa présence*". In short, "*l'article 6, lu comme un tout, reconnaît donc à l'accusé le droit de participer réellement à son procès*".[23]

The second case mentioned is the even more famous *Al-Khawaja and Tahery v the United Kingdom*. Dealing directly with the right to examine or have witnesses examined and the admissibility of "untested hearsay evidence", the Grand Chamber reminded that

[22] See also Case C-347/21 *DD* ECLI:EU:C:2022:692 para. 32, where the Court reached the same solution but referred to other ECtHR judgments.

[23] ECtHR *Marcello Viola v Italy* App n. 45106/04 [5 October 2006] paras 52-53.

"trial proceedings must ensure that a defendant's Article 6 rights are not unacceptably restricted and that he or she remains able to participate effectively in the proceedings".[24]

The right to be present, to participate, and to defend oneself by questioning the witnesses therefore seem to be specific aspects of a wider right, globally summarised by the guarantee of a fair trial.[25] On the basis of this, the Court was able to exploit the right explicitly guaranteed by art. 8 Directive n. 343 to deduce another, implicitly contained therein.

On closer inspection, a similar process was also carried out by the ECtHR, albeit in the reverse: the CJEU derived the right to confront witnesses from the right to be present, explicitly recognised by EU law; the Strasbourg Court did the opposite, deriving the right to be present, not directly provided by art. 6 ECHR, from the right to confront witnesses explicitly set out in art. 6(3)(d) ECHR.[26]

It is finally worth mentioning that the right to participate is actually also mentioned in the Directive 2016/343: not in art. 8, but in the following one, devoted to the "right to a new trial". Within the new trial that may take place, accused persons should have the right not only "to be present", but also "to participate effectively, in accordance with the procedures under national law, and to exercise the rights of the defense". In other words, if the effective participation is to be ensured in the eventual retrial under art. 9, of course this possibility must already be guaranteed earlier, in the first trial.

Anyway, this remark does not affect the reasoning carried out by the EU judges, but, on the contrary, confirms its validity; art. 9 had not been mentioned by the referring judge and, in principle, CJEU's reasonings are only based on the provisions that are the subject of the judicial request.

VI. Rights of the Defense and the Principle of Proportionality

After having drawn from art. 8 Directive 2016/343 the right to examine or have witnesses examined, the judgment gets to the heart of the matter, wondering if an untested testimony, which cannot be gathered again during the trial, may be admitted into evidence. This third step is perhaps the least convincing.

[24] *Al-Khawaja and Tahery* cit. para. 142.

[25] See also ECtHR *Jussila v Finland* App n. 73053/01 [23 November 2006] para. 40.

[26] For further information see A Au-Yong Oliveira, 'In Absentia Trials and Standards relating to the Summoning to Trial of the Accused Person in EU Law, including Reflections on the Conformity of Portuguese Criminal Procedural Law with the Former' (2021) New Journal of European Criminal Law 449; L Bachmaier Winter, 'New Developments in EU Law in the Field of In Absentia National Proceedings. The Directive 2016/343/EU in the Light of the ECtHR Case Law in Personal Participation' in S Quattrocolo and S Ruggeri (eds), *Criminal Proceedings. A Comparative Study of Participatory Safeguards and in absentia Trials in Europe* (Springer 2019) 641; L Bernardini, '"Assente giustificato"? L'imputato assente per "volontaria sottrazione" tra perplessità gnoseologiche e spunti sovranazionali' (2022) Revista Ítalo-Española de Derecho Procesal 119 ff.; K Kamber, 'The Right to a Fair Online Hearing' (2022) HRLRev 1 ff.

In order to justify exceptions to art. 6(3)(d) ECHR, not expressly provided for by the Convention, the ECtHR often evokes the need "to weigh the competing interests of the defense, the victim, the witnesses and the public interest in the effective administration of justice"[27]. Their EU counterparts, on the other hand, only have to apply art. 52(1) Charter.

As noted above, with regard to the compliance with the first condition, i.e., the provision by law, the Court's assessment was basically left to the referring judge, without any particular in-depth analysis. As for the second and third conditions, the ECtHR case-law was essentially confirmed. The "respect for the essence of the right at issue" has been linked to a circumscribed, legitimate and fair use of the statements of the absent witness, reminding that, in fact, ECtHR considers this use compatible with art. 6 of the Convention in principle. Similar considerations apply to the principle of proportionality. The CJEU emphasised the obligations not to exceed "what is appropriate and necessary" and to choose "the least onerous measure", but then did not go any further in its autonomous development of this notion. The three famous steps of ECtHR case-law (the existence of a good reason for the witnesses' absence; the impact of their testimony on the guilty verdict; the existence of counterbalancing factors) are basically retraced without any innovations.

Such a choice is open to criticism.

First, the differences between the essential core of the right at stake and the requirements underlying the principle of proportionality is not clearly shown in the judgment: the legitimacy of the purpose, the respect of the rights of the defence, as well as, more generally, the respect of the fairness have been considered relevant for both these aspects. An opportunity has thus been wasted to delve more specifically into the content of art. 52(1) and identify its components in detail.

Second, the CJEU conformed uncritically to the position of the Strasbourg Court, which has been responsible for a rather questionable shift in recent years. As is well known, two Grand Chamber rulings turned the exception into the rule:[28] everything is ultimately based on the presence of counterbalancing factors, it being abstractly possible for the overall fairness to be respected even if there were no good reasons for the witness' absence at the trial and his or her prior statements were decisive for the conviction.[29] A more critical or at least a more thoughtful approach to the Strasbourg case-law would probably have been appropriate.

It should be stressed that a certain ambiguity in the reasoning makes it difficult to understand whether the ECtHR case-law was applied in its entirety, or the CJEU chose to distinguish its position at least partially.

[27] *Al-Khawaja and Tahery* cit. para. 146.

[28] See again *Al-Khawaja and Tahery* cit.; *Schatschaschwili v Germany* cit.

[29] See, among others, A Cabiale, *I limiti alla prova nella procedura penale europea* (Wolters Kluwer 2019) 116 ff.; JR Spencer, *Hearsay Evidence* cit. 55 ff.; D Harris and others, *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (Oxford University Press 2023) 491.

Indeed, in the case of *Schatschaschwili*, the European Court not only reaffirmed that "where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1"; it was further ruled that "the absence of good reason for the non-attendance of a witness could not, of itself, be conclusive of the lack of fairness of a trial".[30]

On this second point, the Court of Justice did not clarify its position. The EU judges recalled that the statements of an absent witness may be the sole or decisive evidence, as long as sufficient countervailing factors are deployed;[31] nowhere, on the other hand, has the principle of proportionality been said to allow for the lack of serious reasons behind the witness' absence at trial.

It is true that the *Schatschaschwili* judgment is constantly mentioned and cited; however, the silence on this specific point leaves room for some doubts, especially in view of the different treatment reserved for the so-called "sole or decisive" rule.

Finally, it is interesting to point out a peculiarity of the operative part of the judgment. The CJEU explicitly refers only to the "judge" as the body before whom the witness statements subsequently admissible at the trial could be made. This probably stems from the fact that, in the present case, the subject of the request was statements gathered by a "judge"; however, according to the text of the operative part, one must ask the question whether the established principle can equally be applied to the prosecutor and the police. Otherwise, the position of the Court of Justice would differ not only from that of the Strasbourg Court, but also from some national systems, such as the Italian one.

VII. Conclusions

What indications are ultimately offered by this judgment?

In relation to the Bulgarian criminal proceedings at issue, the solution depends on the circumstances of the case. As explained above, the prosecutor's circumventing conduct has not been thoroughly examined. It will therefore be for the domestic court to assess its possible impact on the first condition set out in art. 52(1) Charter.

The absence of the prosecution witnesses at the trial, on the other hand, seems to be more easily supported by a good explanation, as the Court of Justice itself said:[32] serious efforts were made to locate them, but due to their particular situation they were effectively untraceable.

As for the two further tests, borrowed from the Strasbourg case-law, much will essentially depend on the quality of the other available evidence: the presence of strong

[30] *Schatschaschwili v Germany* cit. para. 113.

[31] *HYA and Others* cit. paras 55 and 60.

[32] *HYA and Others* cit. para. 59. See also Case C-348/21 *HYA and Others* ECLI:EU:C:2022:965, opinion of AM Collins, para. 57.

corroborating evidence against the accused persons might be enough to ensure the overall fairness of the proceedings.[33]

More generally, regardless of the concrete case, this ruling has a very significant impact. The topic, as mentioned at the beginning, is particularly challenging and was not explicitly regulated in any of the "Stockholm Directives". However, thanks to the intervention of the Bulgarian judge, the Court of Justice was able to derive, starting from art. 8 Directive 2016/343, an EU rule concerning the fair use of absent witnesses' statements.[34] This judgment thus demonstrates the expansive nature of the Directives on procedural safeguards, the scope of which may extend even to matters that they at first glance appear to ignore.

Secondly, the results achievable through the dialogue between courts are once again evident: it is obvious that if art. 6 ECHR did not deal with the right to examine witnesses and the European Court had declared itself extraneous to the topic of absent witnesses' statements, these issues would not have been dealt with by the CJEU either. The interaction between the EU and ECHR systems allows for a mutual exchange of procedural guarantees.

However, some critical points need to be highlighted.

The first problem is the risk of a downgrading of the guarantees. The dialogue between courts should trigger a positive cycle, aiming for a constant increase in the protection afforded to procedural guarantees. In this case, unfortunately, this mechanism failed and the Court of Justice seems to be at least partially settled on the rather weak protection drawn up by the ECtHR. A deeper dogmatic elaboration of art. 52(1) Charter could, however, lead to a different outcome in the future.

Secondly, ambiguities and misinterpretations should be prevented as much as possible. On the contrary, in this case, some points were left in doubt: it is not completely clear whether the ECtHR's approach has been adopted in its entirety, or if some distinctions were made; the operative part of the judgment summarises the issue in more restrictive terms than the previous reasoning in which at least the "sole or decisive" rule is not considered mandatory; finally, again in the operative part, the term "judge" raises questions about the role of the prosecutor and the police. In other words, such a specific and technical issue alongside the need to address such a wide and varied audience of States, systems and legal practitioners would always require a clarity and a terminological accuracy that are partly lacking in this judgment.

[33] See again *HYA and Others*, opinion of AM Collins, cit. para. 59, stating that however "the information before the Court tends to disclose that there are insufficient counterbalancing factors".

[34] The CJEU has cited two other judgments in which topics concerning testimony were addressed. However, the issues dealt with were quite different. Case C-38/18 *Gambino e Hyka* ECLI:EU:C:2019:628 concerned the possible need, in the event of a change of the judge, for a new hearing of witnesses already heard at the trail, at the presence of the defence. *DD* cit. directly connected the right to be present at the trial and the right to examine or have examined witnesses, but the witnesses, although heard a first time in the absence of the defence, were still available for a second hearing.