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## MEMO

dated 14 October 2011

from the French *Contrôleur général des lieux de privation de liberté*<sup>1</sup>

relating to the use of videoconferencing involving persons held in custody

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**1** - Respect for the rights of the defence, during a trial, in disciplinary proceedings or in any formality involving the exercising of a human right, is a cardinal principle of a fair trial, derived from Article 16 of the 1789 Declaration of the Rights of Man. In particular, in criminal cases, it means that anyone whose “case must be heard” shall have the right to argue their case, have access to the file, be defended by a barrister, and be entitled to appeal against the judgment handed down. This translates into “the existence of fair and equitable proceedings, guaranteeing that the parties and their rights and will be treated evenly”, according to the phrase constantly repeated by the Constitutional Council. Since 2000, these words have formed part of the preliminary article of the French Code of Criminal Procedure: “Criminal proceedings must be fair, must involve the representation of both parties and maintain a balance between the rights of the parties”.

Maintaining an even-handed treatment of the respective parties involved a criminal trial is indeed one aspect of the rights of the defence. According to the European Court of Human Rights, this involves guaranteeing that “each party [is granted] a reasonable opportunity to present its case... in circumstances that do not place it at a net disadvantage compared to its adversary” (ECtHR, 27 October 1993, *Dombo Beheer B.V. v. Netherlands*, series A, no. 274).

It also involves allowing the accused to properly take part in the proceedings; in the context of a trial, the accused must firstly be able to attend the hearing, and secondly be able to understand what is happening.

**2** - However, these principles do not carry absolute force. Other considerations, such as security or the proper authorities of justice, are also substantive.

**3** - Consequently, international agreements provide for the option of using videoconferencing: the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters provides for the possibility of hearing a witness or expert witness, from one State to another, using this technique. For its part, the European Court of Human Rights has accepted recourse to the latter where necessitated by “legitimate aims under the Convention”: the protection of public order, the prevention of crime, protection of the right to life, freedom and security of witnesses and victims of offences, and compliance with the “reasonable time” requirement in judicial proceedings” (ECtHR, 5 January 2007, *Marcello Viola v. Italy*, no. 45106/04, § 72).

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<sup>1</sup> Translator’s note: Inspector general of custodial establishments

4 - France uses videoconferencing in a number of scenarios: these now involve firstly custodial establishments for foreigners, secondly psychiatric hospitals and finally criminal proceedings, including serving of sentences.

As far as custodial establishments for foreigners are concerned, it is stipulated that the intervention of the ordinary courts, both in order to extend the stay in a waiting zone of a foreigner who lacks the documents necessary to enter France, and to extend the administrative detention of a person who is subject to administrative expulsion, may take the form of discussions conducted via audiovisual telecommunication means. Articles L.222-5 (for the waiting zone) and L.155-12 (for administrative detention) of the Code on the entry and stay of aliens and the right to asylum subject this process to three conditions: an application must have been made by the administrative authority (the prefect) for this purpose; the foreigner, being properly informed, must not object; and the transmission must be confidential.

In the case of care without consent giving rise to hospitalisation, the termination or extension of which is subject to examination by the magistrate for custody and release, the latter is entitled to hold a hearing in a specially equipped room of the hospital, or to have the patient placed there and to communicate with him/her using audiovisual telecommunication means. Article L.3211-12-2 of the Public Health Code imposes two pre-conditions on the use of such means: a medical opinion establishing that the process is compatible with the person's state of health; and the consent of the person concerned.

The same applies to many scenarios arising in criminal proceedings, and especially (Articles 706-71, 712-6, 712-13 of the Code of Criminal Procedure) at the hearing or examination of a person (especially a person being held by an examining magistrate) or when bringing several such persons face to face; at the debate prior to remanding in custody a person who is already being held in connection with another case; for the extension of detention on remand; for the examination of a person before the police court or the local jurisdiction, when they are already being held in connection with another case; for hearings involving representation of both parties held by the judge responsible for the execution of sentences and the court overseeing the execution of sentences and appeals submitted to the division overseeing the execution of sentences. Unlike in the previous scenarios, virtually no pre-conditions apply to choosing the option of videoconferencing. The code states that this may intervene "where the needs of the investigation and the examination warrant it", which equates to giving extensive powers of discretion to the investigator or the legal authority; however, the law remains silent regarding any conditions applicable to the other uses that it authorises. The only protection it provides for is that of guaranteeing the confidentiality of the interview between the person and their barrister, if they have one and that the latter is not present on the spot.

Lastly, two further observations should be added.

One provision of the legal organisation code allows the president of any formation of the court, in all cases other than those mentioned above, to order that the hearing be held simultaneously in several courtrooms, interlinked by audiovisual telecommunication means. No further conditions apply, other than the consent of all parties, on the one hand, and the presence of the public in all courtrooms opened for this purpose, on the other.

Videoconferencing is used for asylum applications submitted by foreigners who are subject to administrative detention measures. The asylum application procedure provides for a right for the applicant to be heard by the French Office for the Protection of Refugees and Stateless Persons (OFPRA), other than in special cases (Article L.723-3 of the Code on the entry and stay of aliens and the right to asylum). If the foreigner does not fall into any of these special categories, he or she must be heard. Videoconferencing is used for this purpose, where the detention centre is appropriately equipped, though at present, there are no laws governing this practice.

**5** - Several circumstances suggest that videoconferencing might develop on a very substantial scale in the future.

Firstly, various ministerial directives have recommended its development, based primarily on the advantage to be gained by avoiding having to undertake “extractions” (transfers) of persons held in custody.

Secondly, it is true that these extractions usually require the services of a number of security staff, and are time-consuming. Seeking to economise on the use of such personnel, in the context of a general review of public policies, will of course mean attempts to reduce the number of extractions.

Thirdly, in the case of persons being held in custody, recent judgments have entrusted the responsibility for legally-sanctioned extractions to prison service staff. It is to be expected that the experiments in progress will highlight the benefit of increased use of videoconferencing techniques, rather than carrying out extractions using limited staff resources.

Fourthly, in the case of psychiatric care without consent, the recent law of 5 July 2011 has opened up a new field of intervention for the courts, which is expected to be substantial in scope (there were around eighty thousand hospitalisations without consent per annum prior to the reform). Given that the legal system is already overloaded, efforts will have to be made to improve productivity. Recourse to videoconferencing is one possible way to achieve this goal.

Fifthly, the same reform, that of police custody, and the increased number and expanding volume of court proceedings, mean that the caseloads of barristers, especially those providing legal assistance, are becoming excessive. At the bars of courts with limited numbers of staff and resources, these barristers cannot materially discharge all of the court hearings expected of them, in places that are sometimes remote from the main cities. Here too, time needs to be saved, and videoconferencing is one way to do this.

As a result, for a number of seemingly irresistible reasons, mainly resulting from practical necessities, videoconferencing is set to develop.

**6** – However, the ill-considered development of such a technique carries the risk of infringing the rights of the defence.

In some cases, videoconferencing may facilitate these rights. In point of fact, in cases where it may appear be difficult for someone to appear in court, the use of this technique may prevent the judge from adjourning the case (thus increasing the length of time involved) or even from deciding to pronounce judgment without hearing the person who is due to appear. In such circumstances, it is a positive development.

In many other cases however, videoconferencing may undermine the rights of the defence insofar as the person appearing is no longer physically present in court (this is also a means of expression, especially given that many remand prisoners have great difficulties in expressing themselves orally). It assumes an ease of expression in front of a camera or a desk, and an equality in this sense among people, whereas this is far from being the case, especially among persons suffering from mental illness. In cases where the person has the benefit of a barrister, the latter is obliged to choose between staying close to the court (which happens in the majority of cases) or remaining with his client: as a result, the links with one or other are less comfortable and the legal adviser’s task is made harder. The difficulties involved may also be accentuated by technical problems (e.g. showing a document, disputing the presentation of an object, etc.).

While the use of videoconferencing is sometimes an inevitable stopgap measure, it cannot be regarded as a convenience with no drawbacks whatsoever. Consequently, for the purpose of protecting everyone’s human right to defend themselves, recourse to this technique, in respect of persons held in custody, must be accompanied by conditions that are entirely clear and consistent in

the situations that detainees may have to face, the principles of which, as set out below, should constitute an initial approach.

**7** - There can be no videoconferencing without a law to establish it and to lay down the conditions governing its use. In particular, even if the asylum application procedure is not a judicial one, it still constitutes the exercising of a human right, even in the case of a foreigner held in administrative detention,. It is therefore desirable that legislative provision should oversee recourse to audiovisual telecommunication means in this area, which at the moment is purely discretionary. The intervention of such a law is all the more necessary in that questions of pure fact are prevalent in this field.

**8** - Videoconferencing cannot be used in legal proceedings without the informed consent of any claimant or defendant involved in such proceedings. This is particularly the case in matters relating to foreigners entering and staying in France, to psychiatric care without consent, in the areas listed in subparagraph four of Article 706-71 of the Code of Criminal Procedure and in proceedings relating to the adjustment of sentences.

If the person concerned is unable to give their consent, such agreement must be obtained from a responsible third party, who, in the case of persons held in custody, should be someone unrelated to the authorities responsible for them. In the case of foreigners who do not speak the French language, an interpreter must be provided before their consent is obtained.

In cases where the person has been able to choose a barrister (excluding those providing legal assistance), the latter may take the place of his client in giving the prior agreement required.

**9** – Even though the person’s agreement has been obtained, the legal authority or the police must have the option of deciding not to use videoconferencing, even during the course of legal proceedings, either at their own initiative or at the request of the person concerned or their legal adviser, if it emerges that, for reasons associated with the facts of the case or due to any circumstances likely to prejudice their judgment, that an examination of the case calls for a debate in the presence of the interested party; or if a technical difficulty arises; or if the confidentiality of the transmission means is suspect.

**10** - Where the proceedings are held in public, the courtrooms necessary for audiovisual telecommunication purposes must be open to the public, without exception. Where they are not, then conversely, confidentiality must be guaranteed. In particular, an official record of the proceedings, signed by both parties and drafted by a person authorised for this purpose by the party pronouncing judgment, must note retrospectively that the public were able to gain entry or, on the other hand, that the staff responsible for guarding the person held in custody did not intervene in the debate in any way; the general conditions under which the operation was carried out must be recorded.

**11** - In all cases, the presence of a barrister (or of any third party if the latter is authorised to conduct the defence) must be guaranteed, and if the latter is not present on the spot, then they must be able to interview the person in question at any time, under conditions of guaranteed confidentiality. The official report mentioned above must establish this.

**12** - In matters to be ruled on, where questions of fact (and especially proof) take precedence over questions relating purely to law, or where the personality of the interested party or his/her explanations are a decisive factor in the judgment to be made.

On the other hand, videoconferencing should usually be possible for hearings purely of form or purely of law.

Regardless of the circumstances, there cannot be an obligation to use videoconferencing, except in the following three (alternative) circumstances, which should be

established by legislation: if a barrister is otherwise unable to assist the person concerned; if a debate in his/her presence is likely to pose a serious and comprehensive threat to law and order, and in particular the physical security of the person appearing, or of any third parties, victims or witnesses; and lastly, if it represents the only way of completing the proceedings within the reasonable period of time required.

**13** - The savings made on prisoner extraction costs or the difficulties associated with procuring the necessary escorts, do not, in principle, constitute sufficient grounds in themselves for the use of videoconferencing.

**14** - Whatever the scenarios involved, any decision to use videoconferencing must be made on a case-by-case basis, and solely by the authority responsible for the proceedings and for the judgment to be made. As provided for in the Public Health Code in the case of psychiatric care without consent, it must be considered in relation to the option open to the court, where it proves impossible to transfer the person appearing, of resorting to an extra-territorial hearing. Although the latter may be better than videoconferencing, it must be regarded as an alternative to a hearing at court where the situation makes it impossible to transfer the accused here.

These then, are the factors that should influence a policy that is yet to be defined, and should not be based on immediate needs.

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