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Directive (EU) 2016/343 on strengthening certain aspects of the presumption of innocence

1. The scope and content of the Directive

The Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings was adopted on 9 March 2016, with a transposition date of 1 April 2018. The United Kingdom and Ireland have not opted in to this Directive and, for the reasons noted earlier, it does not apply to Denmark. The Impact Assessment (IA) carried out by the Commission stated that in some Member States the law failed to comply with ECHR standards, whilst in others, whilst the law was compliant practice was not. One cause is that in the ECHR, and in the EU Charter of Fundamental Rights, the rights covered in the Directive are set out only in general terms.

1.1 Scope of the Directive

The Directive applies to natural persons, but not to legal persons. It was felt to be 'premature' to legislate at the EU level with regard to legal persons, but without prejudice to the application of the ECHR to legal persons (Recital 14).

The Directive applies at all stages of criminal proceedings, 'from the moment when a person is suspected or accused of having committed a criminal offence... until the final determination of whether that person has committed the criminal offence concerned has become definitive (Art 2 and Recitals 11-15). Therefore, unlike some of the other Directives such as the Directive on interpretation and translation, it is not confined to circumstances where a person is officially informed that they are suspected or accused of a criminal offence. Legal remedies that only apply once a decision has become definitive (for example, and application to the ECtHR) are not covered by the Directive (Recital 12).

1.2 The presumption of innocence

Suspects and accused persons are presumed innocent until proved guilty according to law (Art 3). This is substantially in the same terms as the ECHR Art 6(2). This is a general statement of principle, which is to be interpreted by reference to Article 4 (the prohibition on public references to guilt), Article 5 (measures regarding the public presentation of suspects and accused persons, Article 6 (the burden of proof), and Article 7 (the right to silence and the right not to incriminate oneself). The IA found that the presumption of innocence was protected by law at national level in all Member States even though it was not laid down in the legislation of some of them.

1.3 Public references to guilt

Member States must take necessary measures to ensure that public statements made by public authorities, and judicial decisions other than on guilt, do not refer to a person as guilty where they have not been proved guilty according to law. This is without prejudice to prosecution acts directed at proving guilt, and to preliminary procedural decisions taken by judicial or other competent authorities. The Article does not prevent public authorities from publicly disseminating information on the proceedings where strictly necessary for reasons relating to the investigation or to the public interests (Art 4 and Recitals 16-19).

Public statements are understood to be any statement which refers to a criminal offence emanating from an authority involved in the proceedings concerned, such as judicial authorities, police and law enforcement officials, government ministers and public officials (Recital 17).

An example of a prosecution act would be preparing or serving an indictment, and of procedural decisions would be decisions on pre-trial detention – provided that they do not refer to the person as guilty (Recital 16).

An example of the permitted dissemination of information would be the release of video footage asking the public to help identify the perpetrator, or where information is released to the inhabitants of an area affected by environmental crimes, or by public disturbances. However, such disclosure must be reasonable and proportionate, and must not create the impression that the person is guilty (Recital 18). For an example from ECtHR case-law, see *Garlicki v Poland* 14 September 2011 No 36921/07.

1.4 Presentation of suspects and accused persons

Appropriate measures must be taken to ensure that suspects and accused persons are not presented as being guilty, in court or in public, by the use of physical restraint measures. This does not prevent the use of physical restraint where this is necessary for case-specific reasons relating to security, preventing absconding, or preventing contact with a third party (Art 5 and Recitals 20 and 21). Thus, the *routine* use of physical restraint measures in court, such as handcuffs, glass boxes or cages, or leg-iron, would be contrary to this provision (Recital 20).

1.5 Burden of proof

The burden of proving guilt must be on the prosecution, and any doubt as to the question of guilt must be to the benefit of the suspect or accused person. This is without prejudice to any obligation of the judge or court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with national law (Art 6 and Recital 22).

The provision does not prevent the operation of presumptions of fact or law, but such presumptions should be confined within reasonable limits, taking into account the importance of what is at stake and maintaining the rights of the defence, and the means employed should be reasonably proportionate to the legitimate aim pursued. Further, such presumptions should be rebuttable and, in any event, should only be used where the rights of the defence are respected (Recital 22). An example of a legitimate presumption might be a presumption that a person accused of a driving offence does not have a licence unless they can produce it.

1.6 Right to silence and the right not to incriminate oneself

Suspects and accused persons must have a right to silence in relation to the offence of which they are suspected or accused, and they must have the right not to incriminate themselves. This does not prevent the gathering of evidence by compulsion where that evidence has an existence independent of the will of the suspect or accused person (for example, a DNA sample, or specimen of breath). The exercise of these rights by a suspect or accused person must not be used against them and must not be treated as evidence that they have committed the offence concerned (Art 7 and Recitals 26-32).

Article 7 is not straightforward, either in its meaning or application, but Recital 27 explicitly states that the rights should be interpreted by reference to the case-law of the ECtHR.

The exercise of the rights should not be used against a suspect or accused, and should not, by itself, be considered to be evidence of guilt. However, this is without prejudice to national rules concerning the assessment of evidence by courts or judges, provided that the rights of the defence are respected (Recital 28).

The rights do not prevent Member States from deciding that, with regard to minor offences (eg., minor traffic offences) that the proceedings or certain stages of them may take place in writing or without questioning the suspect or accused, provided that this complies with the right to fair trial (Recital 30).

1.6 Right to be present at trial

The accused has a right to be present at their trial, subject to: failure, following timely notice, to appear; or representation by a mandated lawyer appointed by the accused or by the state (Art 8(1) and (2), and Recitals 33-41).

Informing a person of their trial should be understood to mean summoning them in person, or by other means, providing the accused with official information about the date and place of trial in a manner that enables them to become aware of the trial. They should also be informed of the consequences of non-appearance (Recital 36). Particular attention should be paid to the diligence exercised by public authorities in order to inform the person concerned (Recital 38).

The requirement regarding a 'mandated lawyer' means that the accused must have mandated them, even if the lawyer is appointed by the state (Recital 37).

If the conditions for proceedings in the absence of the accused are not complied with because the accused cannot be located despite reasonable efforts to do so, a decision regarding guilt can still be made and enforced. However, in such circumstances, the accused must be informed of the decision, and of their right to challenge the decision and their right to a new trial or other legal remedy (Art 8(4)).

These provisions are without prejudice to the power of a judge or court to temporarily exclude an accused in the interests of securing the proper conduct of the proceedings (eg., the accused is disruptive, or their presence prevents the proper hearing of a witness), provided that the rights of the defence are complied with (Art 8(5) and Recital 40).

The provisions are without prejudice to national rules that provide for proceedings, or certain stages of them, to be conducted in writing, provided that this complies with the right to fair trial (Recital 8(6)).

1.7 Right to a new trial

The accused must have a right to a new trial, or to another appropriate legal remedy, where they were not present at their trial, and the conditions in Article 8(2) were not complied with (Art 9). Therefore, there is no right to new trial (or other remedy) if: (a) the accused failed to appear following timely notice; or (b) the accused was represented at trial by a mandated lawyer.

1.8 Remedies

Suspected and accused persons must have an effective remedy if their rights under the Directive are breached (Art 10(1) and Recitals 44 and 45). Further, appropriate measures must be available if a suspect or accused is referred to as guilty contrary to Article 4(1) (Art 4(2)).

Any remedy should, as far as possible, have the effect of placing the suspect or accused in the position that they would have been in had there been no breach (Recital 44).

1.9 Monitoring and data collection

Member States must supply the Commission with available data every three years, showing how the rights in the Directive have been implemented (Art 11 and Recital 46). Such data could include records

made by law enforcement and judicial authorities as regards remedies applied in the case of breach of an aspect of the presumption of innocence or of the right to be present at trial.

2. Existing information as to implementation of the Directive

The transposition date had not passed during the period that the ERA training events were held.

As at 28 March 2018, only four Member States (Czech Republic, Spain, France and Finland) had notified the Commission of the transposition measures adopted by those States (see <https://tinyurl.com/ybcw6vn4>).

With regard to the position in Member States concerning the matters covered by the Directive prior to transposition, a number of sources of information are available. The most comprehensive, in terms of coverage, is the Impact Assessment that was carried out by Commission staff in preparation for the proposed Directive (available at <https://tinyurl.com/ybojy6h9>). A number of research studies examining some of the matters covered by the Directive in some Member States, and funded by the European Commission, have been conducted in the past decade. These include E Cape, et al, *Effective Criminal Defence in Europe* (Intersentia, 2010), and J Blackstock, et al, *Inside Police Custody: An Empirical Account of Suspects' Rights in Four Jurisdictions* (Intersentia 2014). In addition, the study reported in E Cape and Z Namoradze, *Effective Criminal Defence in Eastern Europe*, examined criminal processes in two further Member States (Bulgaria and Lithuania).

A useful publication has been produced by the NGO Fair Trials, *EU Directive on the Presumption of Innocence: Implementation Toolkit* (available at <https://tinyurl.com/ybpsdfha>). The aim of the toolkit is to help 'identify where current or proposed national law fails to meet the requirements of the Directive (read with other key international standards) so that these can be addressed in the pre-transposition period' (para 11). It makes reference to a large number of ECtHR cases which helps illustrate some of the issues raised by various provisions in the Directive.

3. Developments in Member States

Neither speakers nor delegates were asked to address the state of implementation in their jurisdictions.