

**THE PRESUMPTION OF INNOCENCE AND OF THE RIGHT TO BE  
PRESENT AT TRIAL IN CRIMINAL PROCEEDINGS  
IN DIRECTIVE (EU) 2016/343**

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On 9 March 2016, the European Parliament and the Council adopted Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings.

The Directive is the fourth legislative measure that has been passed since the adoption of the Council's Roadmap on procedural rights for suspects and accused persons in 2009.

The presumption of innocence and the right to a fair trial are enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (the Charter), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), Article 14 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights

After the Translation and Interpretation Directive, the Right to Information Directive and the Access to a Lawyer Directive, this new Directive tries to enhance the right to a fair trial through the adoption of common minimum rules on certain points of the presumption of innocence and the right to be present at trial. This should result an increased trust between the Member States (MS) in the field of criminal justice and thereby it facilitate mutual recognition.

The first three measures on the basis of the Roadmap<sup>1</sup> were adopted within a rather short time frame: Directive 2010/64/EU on the right to interpretation and translation (measure A) was adopted on 20 October 2010; Directive 2012/13/EU on the right to information (measure B) was adopted on 22 May 2012; and Directive 2013/48/EU on the right of access to a lawyer (measure C1+D) was adopted on 22 October 2013.

The European Commission has been examining the presumption of innocence for a long time. A Green paper on the presumption of innocence<sup>2</sup> from 2006 already indicated that the

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<sup>1</sup> The Stockholm Programme – An open and secure Europe serving and protecting the citizens (17024/09 Brussels, 2 December 2009)

However, during the Swedish Presidency, a programme to strengthen procedural safeguards was resurrected and the Stockholm Programme introduced a Roadmap of Procedural Safeguards which provides a step-by-step programme:

Measure A: Translation and Interpretation,

Measure B: Information on Rights and Information about the Charges,

Measure C: Legal Advice and Legal Aid,

Measure D: Communication with Relatives, Employers and Consular Authorities,

Measure E: Special Safeguards for Suspected or Accused Persons who are Vulnerable,

Measure F: A Green Paper on the Right to Review of the Grounds for Pre-Trial Detention.

<sup>2</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD).

Commission was willing to include the presumption of innocence in a legislative instrument, if there was a need to do so. Although the presumption of innocence was not one of the measures covered by the 2009 Roadmap.<sup>3</sup> Point 2 of this Roadmap made clear that proposals on other topics could be launched. Therefore in November 2013, the Commission presented a package of three further measures to complete the rollout of the Roadmap, as integrated in the Stockholm programme: a proposal for a Directive on provisional legal aid (measure C2-), a proposal for a Directive on procedural safeguards for children (measure E-), and a proposal for a Directive on the presumption of innocence (the “example” of the Stockholm programme). Article 6(3) of the Treaty on European Union (“TEU”) provides that fundamental rights, as guaranteed by the European Convention of Human Rights and Fundamental Freedoms (“the ECHR”) and as they result from the constitutional traditions common to the Member States, constitute general principles of EU law.

### **1. Description of the Main Contents of the directive**

The approach of the new Directive is rather broad as it addresses not only the presumption of innocence and the connected rights such as the right to remain silent, but it equally addresses the right to be present at one’s trial. The new rules apply to all people suspected or accused in criminal proceedings.

#### ***Article 1: Subject***

Article 1 confirms that the Directive is intended to lay down minimum rules on “certain aspects of the right to the presumption of innocence in criminal proceeding” and the right to be present at the trial in criminal proceedings. The Directive is not intended, therefore, to be an exhaustive study of the principle and the ECHR will still be the main guide to those aspects which are not included in the text.

#### ***Article 2: Scope***

The Directive applies to suspects or accused persons in criminal proceedings from the very start of the criminal proceedings, even before the time when the suspects are made aware by the competent authorities of the fact that they are suspected or accused of having committed a criminal offence. It applies until the conclusion of such proceedings, until the final judgement is delivered. The right to be presumed innocent encompasses different needs and degrees of protection regarding natural persons and legal persons, as recognised in the case law of the Court of Justice on the right not to incriminate one-self. This Directive takes into account these differences and therefore only applies to natural persons.<sup>4</sup>

#### ***Article 3: Presumption of innocence***

Article 3 basically repeats Article 6(2) ECHR and Article 48(1) of the EU-Charter: suspects and accused persons should be presumed innocent until proven guilty according to law.

Article 3 is a simple restatement of the principle. It sets out that “Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty

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<sup>3</sup> Roadmap for strengthening procedural rights of suspected or accused persons in criminal Proceedings, RESOLUTION OF THE COUNCIL, of 30 November 2009, (2009/C 295/01).

<sup>4</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceeding Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD).

according to law”. There is no attempt to articulate the nature of the provision further or set out the core aspects of the presumption for the purposes of the Directive.

**Article 4: Public references to guilt**

The ECtHR established as one of the basic aspects of the principle of presumption of innocence the fact that a court or public official may not publicly present the suspects or accused persons as if they were guilty of an offence if they have not been tried and convicted of it by a final judgment.<sup>5</sup> According to the case law of the ECtHR this principle should furthermore apply to all public authorities.<sup>6</sup>

Article 4(3) explained a general exception: the obligation not to refer to suspects or accused persons as being guilty should not prevent public authorities from publicly disseminating information on the criminal proceedings, if this is strictly necessary for reasons relating to the criminal investigation. This could be the case, for example, when video material is released and the public is asked to help in identifying the alleged perpetrator of the criminal offence.<sup>7</sup>

**Article 5: Presentation of suspects and accused persons**

According to this article, “Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.”

It means that the competent authorities should also abstain from presenting suspects or accused persons in court or in public while wearing prison clothes, so they are required to avoid giving the impression that those persons are guilty.

**Article 6: Burden of proof**

Article 6 deals with the burden of proof. It requires Member States to “ensure that the burden of proof in establishing the guilt of suspects and accused persons is on the prosecution”. This is an important issue. The burden of proof refers to the fact that it is the prosecution who must prove the case against the accused. The initial draft of Article 6 initially contained an article permitting the burden of proof to be shifted to the defence. The European Parliament’s Civil Liberties Committee successfully proposed an amendment deleting this provision on the shift of the burden of proof. This Article reflects the ECtHR principle<sup>8</sup> which is considered as a correct balance between the public interest (the needs of prosecution) and the right of the defence.

**Article 7: Right to remain silent and right not to incriminate oneself**

Article 7 provides that the suspect has the right to remain silent “in relation to the offence that they are suspected or accused of having committed”. This should surely have been extended to the right to silence in relation to the commission of any offence. The right to remain silent and the right not to incriminate oneself are not specifically mentioned in the

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<sup>5</sup> See *Minelli v. Switzerland*.

<sup>6</sup> See *Allenet de Ribemont v. France*.

<sup>7</sup> CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 29.

<sup>8</sup> See, *inter alia*, ECtHR cases *Salabiaku v. France* (judgment of 7. 10. 1988, application 10519/83), *Barberà, Messegué and Jabardo v. Spain*, *Telfner v. Austria* (judgment of 20. 3. 2001, application 33501/96).

ECHR, but the ECtHR has derived these rights from the right to a fair procedure under Article 6 of ECHR.<sup>9</sup> The Commission defined the right to remain silent and the right not to incriminate oneself as absolute rights, which means that they can be exercised without any conditions or qualifications and that there are no negative consequences attached to the exercise of these rights.<sup>10</sup> Suspects or accused persons should be promptly informed of their right to remain silent according to Directive 2012/13/EU. Such information should also refer to the content of the right to remain silent and of the consequences of renouncing to it and of invoking it.<sup>11</sup> Article 7(3) notes that “the exercise of the right to remain silent and of the right not to incriminate oneself shall not be used against a suspect or accused person and shall not be considered as evidence that the person concerned has committed the offence which he or she is suspected or accused of having committed”. This has to be welcomed and appears to go further than the ECtHR which has found that an accused’s decision to remain silent throughout criminal proceedings may carry consequences, such as ‘adverse inferences’ being drawn from the silence.

***Article 8 and 9: Relating to the right to be present at the trial and the right to a new trial***

The provisions regarding trials in absentia, which the Commission had proposed in paragraphs 2 and 3 of Article 8, were more problematic. Here, the Commission had almost copy-pasted provisions from Framework Decision 2009/299/JHA on trials in absentia. The ECtHR has confirmed that this is implicit in the right to a fair trial by way of a public hearing (*Jacobsson v. Sweden*, No. 16970/90, 19. 2. 98) and that it is difficult to see how anyone can exercise their defence rights without being present at their own trial (*Colozza v. Italy*, No. 9024/80, 12. 2. 85).<sup>12</sup> The Directive has brought clarity on an important point. In fact, in the Framework Decision it was not clear whether in respect of suspects or accused persons whose location is unknown a trial in absentia could be held and whether the resulting decision, including a custodial sentence, could be enforced immediately, in particular if the person concerned has been apprehended. However important conditions have to be applied. Firstly, Member States may only use the possibility to hold a trial in absentia if they have undertaken “reasonable efforts” to locate the suspects or accused persons. Secondly, the Member States must inform those persons, in particular upon being apprehended, of the decision taken in absentia as well as of the possibility to challenge this decision and the right to a new trial or other legal remedy.<sup>13</sup> Article 9 establishes a remedy (established by the ECtHR) in cases where the right to be present at trial has not been observed. In this case it is an obligation to provide for a re-trial.<sup>14</sup>

<sup>9</sup> See, e.g., ECtHR *Funke v. France*, 25 February 1993 (Appl. No. 10828/84), para. 44.

<sup>10</sup> CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 31.

<sup>11</sup> Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings Brussels, 27. 11. 2013 COM (2013) 821 final 2013/0407 (COD) 35. point.

<sup>12</sup> SAYERS, Debbie: *The new Directive on the presumption of innocence: protecting the ‘golden thread’*. <http://eulawanalysis.blogspot.de/2015/11/the-new-directive-on-presumption-of.html>

<sup>13</sup> CRAS, Steven–ERBEZNIK, Anze: The Directive on the Presumption of Innocence and the Right to be Present at Trial. *Eucrim*, 2016/1, 33.

<sup>14</sup> *Colozza v. Italy*.

**Article 10: Remedies**

The right to an effective remedy is set out in Article 13 ECHR and Article 47 EU-Charter. The primary requirement is that the remedy should be “effective in practice as well as in law”.<sup>15</sup> The ECtHR has consistently held that the most appropriate form of redress for a violation of the right to a fair trial in Article 6(2) ECHR would be to ensure that suspects or accused persons, as far as possible, are put in the position in which they would have been had their rights not been disregarded.<sup>16</sup>

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<sup>15</sup> SAYERS, Debbie: *The new Directive on the presumption of innocence: protecting the ‘golden thread’*. <http://eulawanalysis.blogspot.de/2015/11/the-new-directive-on-presumption-of.html>

<sup>16</sup> See *Teteriny v. Russia* (judgment of 30. 6. 2005, application 11931/03, paragraph 56), *Jeličić v. Bosnia and Herzegovina* (judgment of 31. 10. 2006, application 41183/02, paragraph 53), and *Mehmet and Suna Yiğit v. Turkey* (judgment of 17. 7. 2007, application 52658/99, paragraph 47), *Salduz v Turkey*, paragraph 72.