



Training of Lawyers on EU Instruments on procedural rights in Criminal proceedings (CRIMILAW)

**Directive (EU) 2016/343 on the presumption of innocence and the right
to be present at trial**

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The project is co-financed with the support of the European Union's Justice programme

PRESUMPTION OF INNOCENCE AND RIGHT TO BE PRESENT AT TRIAL

DIRECTIVE 2016/343, 9TH DECEMBER 2021

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ORIGINS OF THE DIRECTIVE

- Mutual recognition-mutual trust.
 - Work plan for strengthening procedural guarantees for suspects and defendants (Justice and Home Affairs Council, 30 November 2009).
 - Stockholm Program (European Council, 10 and 11 December 2009) for the creation of a secure Europe that serves and protects the citizen.
- Directive 2016/343 wasn't included in the first package of Directives.
 - Some MS proposed a community action regarding the presumption of innocence.
- Very complex negotiations that had effects in the final outcome.

GENERAL ISSUES

- Content of the Directive (article 1)
 - Presumption of innocence.
 - First time that some of its configuration elements are codified.
 - There is no aim to exhaustiveness ("certain aspects").
 - Two dimensions of the presumption are regulated:
 - Procedural.
 - Extra-procedural.
 - Right to be present at the court.
 - Related to the Melloni Case (STJUE, February 26, 2013, Case C-399-11).
- Four chapter, Sixteen articles, Fifty one recitals.
- The Directive follows almost entirely the ECtHR Jurisprudence.

SCOPE (art. 2)

- *Ratione personae* (article 2).
 - Individuals - not legal entities.
- *Ratione materiae* (article 2)
 - Only to criminal proceedings, according with ECJ jurisprudence and taking in account ECtHR jurisprudence.
 - Engel v Netherlands (1976), criteria to identify “*criminal process*”.
 - Applicable to all stages of the criminal process.
 - Since someone is suspected or accused of having committed a criminal offense until the final decision is final.

EXTRA-PROCEDURAL DIMENSION (ECHR Case-Law)

- Parallel proceedings. Those carried out simultaneous to the criminal process but related to it). For example, extradition processes (*Eshonkulov v. Russia*, p. 74-75), administrative sanctioning processes (*Kemal CosKum v. Turkey*, p. 44) or investigation processes in parliamentary houses (*Rywin v. Poland*, p. 208).
- Subsequent proceedings. Those following the criminal process in which the accused has been acquitted. *Allen v. United Kingdom*, p. 94.
- Extra-procedural statements made by public authorities. (*Ismoilov and others v. Russia*, p.160; *Mikolajová v. Slovakia*, p. 42-48; *Garycki v. Poland*, p. 67; *Butkevicius v. Lithuania*, p. 53).
- Information offered by the media (*Bédât v. Switzerland*, p. 51, or *Rupa v. Romania*, p. 232).
- Statements made by the jurisdictional bodies (*Minelli v. Switzerland*, p. 37; *Nerattini v. Greece*, p. 23; *Nesták v. Slovakia*, p. 88)

EXTRA-PROCEDURAL DIMENSION

(Directive, art. 4)

- As long as guilt is not proven according to the law (art. 4):
 - Public authorities cannot refer to the person as guilty.
 - This does not prevent the disclosure of information about the criminal case when it is strictly necessary for the investigation or the public interest.
 - Judicial orders / resolutions that are not condemning as well.
 - Except preliminary procedural decisions based on evidence or evidence of prosecution.
 - When it is strictly necessary, it is possible to disclose information about the criminal process to the public.

EXTRA-PROCEDURAL DIMENSION

(Directive, art. 5)

- Suspects or accused persons cannot be presented to the public as guilty, through the use of physical means of coercion.
 - Handcuffs, fish tanks.
- Exception: when necessary, to prevent suspects or defendants from escaping or contacting third parties.

PROCEDURAL DIMENSION

(art. 6 and 7)

- ECHR case law (case of Barbera, Messegue y Jabardo vs España, 1988; Salabiaku vs. Francia, 1988; Allenet de Ribemont vs France, 1995; Saunders vs UK, 1996; Telfner vs. Austria, 2001; G.C.P. Vs Rumania, 2011):
 - Burden of proof (6.1). It is up to the prosecution to prove guilt (both the normative element and the subjective element of the type).
 - could the burden of proof be shifted to the defence?
 - *In dubio pro reo* (6.2).
 - It is related to the "*beyond reasonable doubt*" standard of proof.
 - Right to remain silent and not to incriminate one-self (7).
- Evidence rule: silence and the option not to testify against yourself will not be used against the suspect or accused nor will they be considered evidence of having committed the criminal offense (an overruling of Murray's doctrine - ECHR decision 8 February 1996?)

RIGHT TO BE PRESENT AT TRIAL

(art. 8 and 9)

- Suspects and accused persons have the right to be present at their trial (8.1).
- Trial can be held in his or her absence, provided that (8.2):
 - (a) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance; or
 - (b) the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State.
- Even these conditions were not be met, the MS may trial and convict an accused person, who will have the right to a new trial or to another legal remedy, when he or she were apprehended (8.4).
 - The new trial or the remedy must allow a fresh determination of the merits of the case, including examination of new evidence, and it may lead to the original decision being reversed (9).
 - Those suspects and accused persons have the right to be present at the new trial, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defense (9).

GENERAL AND FINAL PROVISIONS

- Suspects and accused persons have an effective remedy if their rights under this Directive are breached (10.1).
- In the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defense and the fairness of the proceedings are respected (10.2).
- Non-regression clause (13).
- Transposition (14): 1 de abril de 2018.
- Entry in force (15): 3 de abril de 2016.

OFFICIAL UE REPORTS ABOUT PRESUMPTION OF INNOCENCE

- Report on implementation of Directive 343/2016, by the Commission (March, 2021).

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:144:FIN#footnoteref1>

- “Presumption of innocence and related right”, by FRA (April, 2021).

<https://fra.europa.eu/en/publication/2021/presumption-of-innocence#:~:text=FRA%20opinion%201%20%2D%20Equal%20application,personal%20characteristics%20or%20personal%20history>