EUROPEAN
COMMISSION

Brussels, 31.3.2021
COM(2021) 144 final

REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive (EU) 2016/343 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

1. INTRODUCTION

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[1] ('the Charter') and Article 6 of the European Convention on Human Rights (ECHR).

Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[2] ('the Directive') aims to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial.

The Directive is the fourth instrument adopted under Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU)[3], which provides the legal basis to adopt minimum rules on 'the rights of individuals in criminal procedure'. The Directive applies in 25 Member States[4].

The EU has adopted six directives in this field: besides Directive 2016/343, there are directives on the right to interpretation and translation[5], on the right to information[6], on the right of access to a lawyer and communication with third persons while being deprived of liberty[7], on procedural safeguards for children[8] and on legal aid[9]. The European Commission has already produced implementation reports on the first three directives[10]. The directives help enhance mutual trust and thereby strengthen the principle of mutual recognition of judgments and other judicial decisions.

Article 12 of the Directive requires the Commission to submit a report to the European Parliament and to the Council on the implementation of the Directive.

This report is primarily based on information that the Member States provided to the Commission through the notification of national measures transposing the Directive. It also

[1] OJ C 326, 26.10.2012, p. 392.
[2] OJ L 65, 11.3.2016, p. 1.
[3] OJ C 326, 26.10.2012, p. 47.
[4] In accordance with Protocol No 21 and Protocol No 22, respectively, Ireland and Denmark are not bound by the Directive and are therefore not considered in this assessment.
[5] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1.
[6] Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.
[7] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1.
[8] Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1.
[9] Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; corrigendum OJ L 91, 5.4.2017, p. 40.
[10] COM(2018) 857 final, COM(2018) 858 final and COM(2019) 560 final.

draws on publicly available information from the European Union Agency for Fundamental Rights[11] and from Commission-funded studies by external stakeholders[12].

While Article 11 of the Directive requires Member States to send the Commission available data showing how the rights laid down in the Directive have been implemented, by 1 April 2020 and every 3 years thereafter, only Austria has fulfilled this obligation to date[13]. This absence of information from Member States impedes the full assessment of the Directive's practical implementation.

The report therefore focuses on the measures Member States have taken so far to transpose the Directive[14]. It assesses whether Member States have transposed the Directive and whether national legislation achieves the Directive's objectives and fulfils its requirements.

The Court of Justice of the European Union has to date interpreted Directive (EU) 2016/343 on several occasions, and such interpretation has been taken into account in this report[15].

2. GENERAL ASSESSMENT

According to Article 14, Member States had to transpose the Directive into national law by 1 April 2018. On this date, 11 Member States – Bulgaria, Cyprus, Greece, Croatia, Latvia, Luxembourg, Malta, Austria, Romania, Slovakia and Sweden – had not communicated all the necessary measures to the Commission. As a result, in May 2018 the Commission launched infringement proceedings under Article 258 TFEU against those Member States for non-communication or partial communication of transposing measures. Most of them have since complied with the obligation, and the infringement proceedings have been discontinued. However, following completeness checks, four infringement proceedings are still ongoing in cases where some provisions of the Directive have yet to be transposed. In addition, three new infringement proceedings for partial communication were launched in February 2021.

[11] Study done by the European Union Agency for Fundamental Rights (FRA), *Presumption of innocence and related rights – Professional perspectives*. Available at https://fra.europa.eu/en/publication/2021/presumption-of-innocence.

[12] See e.g. the project coordinated by the Hungarian Helsinki Committee, *The Importance of Appearances: How Suspects and Accused Persons are Presented in the Courtroom, in Public and in the Media*, and notably Fair Trials' report *Innocent until proven guilty? The presentation of suspects in criminal proceedings*, available at https://www.fairtrials.org/publication/importance-appearances.

[13] In relation to the remedies linked to trials *in absentia* and procedures in writing under national law, as provided for by Article 8 of the Directive.

[14] The Commission has organised two experts' meetings with representatives of the Member States in May and November 2017, to discuss and facilitate Member States' work on the transposition and application of the Directive.

[15] See in particular judgments of 27 October 2016, *Milev*, C-439/16 PPU; 19 September 2018, *Milev*, C-310/18 PPU; 5 September 2019, *AH*, C-377/18; 19 September 2019, *Rayonna Procuratura Lom*, C-467/18; 28 November 2019, *Spetsializirana Prokuratura*, C-653/19 PPU; 13 February 2020, *Spetsializirana Prokuratura*, C-688/18; 17 December 2020, *Generalstaatsanwaltschaft Hamburg*, C-416/20 PPU; and Orders of 12 February 2019, *RH*, C-8/19 PPU; 24 September 2019, *Spetsializirana Prokuratura*, C-467/19 PPU; 28 May 2020, *UL and VM*, C-709/18.

The approach to transposing the Directive varies between Member States. Some Member States introduced specific measures explicitly transposing the rights under the Directive alongside legal or practical implementation measures. In others, existing measures were considered to be already broadly in line with the Directive's requirements, and no specific measures to transpose it were adopted. While the absence of express transposing provisions is sometimes remedied to at least some extent through practical implementation measures and case-law, this is not always the case.

This results in the national provisions often being insufficient to fully comply with certain key provisions of the Directive. This is particularly the case where the scope of the national measures is narrower than as set out in Article 2 of the Directive. The assessment has also disclosed other shortcomings in several Member States, in particular in relation to public references to guilt and the right not to incriminate oneself.

Such failure to comply with all the provisions of the Directive negatively affects the effectiveness of the rights provided for by it. The Commission will take every appropriate measure to remedy it, including infringement proceedings pursuant to Article 258 TFEU.

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Scope (Chapter 1 - Article 2)

Article 2 sets out the scope of application of the Directive's requirements. It applies to natural persons who are suspects or accused in criminal proceedings and at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

While some Member States did not expressly transpose Article 2, the scope of national measures giving effect to the Directive's rights is nevertheless mostly in line with the Directive. However, in one Member State the transposing measures only apply to persons who have been detained or charged, but not to *de facto* suspects[16], significantly hindering compliance with the Directive. In a few Member States compliance issues arise as a result of the more limited temporal scope of the national measures. These limitations on temporal scope could affect the personal scope too, where they have an impact on the way in which proceedings are initiated or the point at which a person is considered a suspect.

These compliance issues are essential as they may also affect the scope of the presumption of innocence and limit the coverage of national provisions implementing specific rights under the Directive.

[16] *De facto* suspects are persons who are suspected of having committed a criminal offence, but have not been notified of their status of suspect by the competent authorities of a Member State.

3.2. Presumption of innocence (Chapter 2)

Chapter 2 of the Directive deals with the principle of presumption of innocence. Article 3 requires Member States to ensure that suspects and accused persons are presumed innocent until proved guilty according to law. In one Member State, the principle is ensured for defendants and detainees, but not for suspects who are not detained.

3.2.1. Public references to guilt — Article 4

The legislation of only six Member States is fully compliant with **Article 4(1)** requiring Member States to take the necessary measures to ensure that for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty. This is without prejudice to acts of the prosecution which aim to prove the guilt of the suspect or accused person, and to preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence. On this basis, and in line with Recital 16, the Court of Justice has ruled that the Directive 'does not govern the circumstances in which decisions on pre-trial detention may be adopted' [17].

In a few Member States, while the transposition of Article 4(1) is not explicit, the Directive's requirement is given effect by general provisions on the presumption of innocence or limiting the dissemination of information, and by case-law.

However, compliance issues were noted in 19 Member States, making this the provision with the highest number of issues.

In some Member States these issues result mainly from the absence of transposition and in 13 Member States mainly from the more limited reach of national provisions that do not cover all public authorities or stages of the proceedings, or do not cover judicial decisions, as required by the Directive.

In some cases, the compliance issues identified have less impact in practice because in a national context, the prohibition on public references to guilt can be considered an essential dimension of the principle of presumption of innocence. Additionally, provisions on defamation and publication of information in the media, data protection rules or non-legally binding guidelines or other practical implementation measures already ensure partial compliance with the Directive's requirement in practice.

In other Member States, practical implementation appears to be problematic. For example, practice shows that while judges and prosecutors usually comply with Article 4(1), other bodies, such as Ministers or Members of Parliament, sometimes refer to the defendant as guilty.

[17] CJEU, 19 September 2018, *Milev*, C-310/18 PPU.

The national law of 12 Member States is not fully compliant with **Article 4(2)**, which requires Member States to ensure that appropriate measures are available in the event of a breach of the obligation laid down in Article 4(1).

In four Member States this results from limitations in the scope of national measures transposing Article 4(1), for example when the transposition is limited to judicial decisions but there are no measures in place for public authorities.

According to **Article 4(3)**, the obligation laid down in Article 4(1) not to refer to suspects or accused persons as being guilty does not prevent public authorities from publicly disseminating information on the criminal proceedings where strictly necessary for reasons relating to the criminal investigation or the public interest. The national law of some Member States is not fully compliant with this, for one or more of the following reasons. Not all public authorities or types of information are covered by the relevant national measures, absence of the 'where strictly necessary' requirement, or absence of clear conditions limiting the dissemination of information. In some cases, compliance issues have less impact in practice, as non-legally binding guidelines are also relevant, such as press guidelines for contact with journalists and provision of information to them.

3.2.2. Presentation of suspects and accused persons — Article 5

Article 5(1) requires Member States to 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. Many Member States failed to adopt specific rules to transpose this provision.

According to **Article 5(2)**, Article 5(1) does not prevent Member States from applying measures of physical restraint that are required for case-specific reasons, relating to security or to the prevention of suspects or accused persons from absconding or from having contact with third persons. Issues concerning the absence of a guarantee that an individual assessment is carried out were identified in two Member States.

In addition, in some Member States compliance with Article 5 also appears to be problematic in practice. In a few, for example, handcuffs are used regardless of why the accused is in custody. While being transported to the courtroom, the accused in handcuffs can be seen by the public and the press, and pictures of the accused can be taken. In other Member States, there is a widespread use of glass boxes in courtrooms.

3.2.3. Burden of proof — Article 6

Article 6(1) requires Member States to ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This is without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law.

Recital 22 of the Directive specifies that the presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence. This is without prejudice to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. In those Member States where these presumptions exist, they comply with the conditions set out in Recital 22, i.e. they are rebuttable and respect the rights of the defence, and are limited and proportionate to the legitimate aim pursued. It seems that such presumptions are used to a limited extent and with respect to specific cases such as road traffic offences, defamation, commercial fraud and drug-related offences. The legislation of two Member States is not fully compliant with Article 6(1), because their national law shifts the burden of proof away from the prosecution without clear limits in certain cases. In one of those, the role of the prosecutor is taken over by the judge, who then takes on the burden of proof.

Article 6(2) requires Member States to ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted. In some Member States, while there is no express transposition of this principle, it is a general principle recognised by case-law. Only one Member State is not fully compliant with Article 6(2), because when the prosecution or the defence lawyer chooses not to cross-examine a witness, the judge has discretion to conclude that the defence lawyer and the client accept the position of that witness, hence compromising the presumption of innocence.

3.2.4. Right to remain silent and right not to incriminate oneself — Article 7

Article 7(1) requires Member States to ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed. However, in a few Member States, transposition is not fully compliant with the Directive, due to the more limited scope of national measures.

This issue also affects compliance with **Article 7(2)**, which requires Member States to ensure that suspects and accused persons have the right not to incriminate themselves. In addition, other Member States did not expressly transpose Article 7(2). In one of them, this right has nonetheless been recognised on several occasions by the supreme courts, while in two Member States there is no explicit guarantee of the right not to incriminate oneself in national law or in the case-law of the supreme courts.

Other compliance issues identified in two Member States are considered to be particularly important, because they appear to be in direct conflict with the right not to incriminate oneself through measures that could penalise the exercise of this right, or coerce suspects or accused persons to point to circumstances excluding criminal liability.

All Member States transposed **Article 7(3)** whereby the exercise of the right not to incriminate oneself does not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion.

Article 7(4), whereby Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons, has not been expressly transposed by the Member States. Nevertheless, none of the Member States prohibit this, and it is typically possible under general criminal procedural rules to take what may be considered as cooperative behaviour into account when sentencing.

In accordance with **Article 7(5)**, the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself must not be used against them and must not be considered to be evidence that they have committed the criminal offence concerned. In 14 Member States there are no national provisions explicitly prohibiting negative inferences from being drawn. However, it is not considered to affect conformity in some of these Member States, because conformity is either inferable from the general provisions on the admissibility of evidence, or the case-law shows that this rule is constantly followed in practice. An example of this is when constitutional courts consider the prohibition on drawing negative inferences to be an integral part of the rights to remain silent and not to incriminate oneself. In the other Member States, the gap is considered to also affect conformity since the general provisions are not sufficient or are not broad enough in scope. In one Member State, despite Article 7(5) having been transposed, conformity is only partial because although courts are sensitive not to allow negative conclusions to be drawn from the defendant's silence or refusal to give self-incriminating evidence, this protection does not extend to *de facto* suspects.

3.3. Right to be present at the trial (Chapter 3)

Chapter 3 of the Directive consists of two articles: Article 8 concerns the right to be present at the trial, and Article 9 lays down the right to a new trial as in the event of a breach of Article 8.

3.3.1. Right to be present at the trial — Article 8

The national law of all 25 Member States covered by the Directive complies with **Article 8(1)** requiring Member States to ensure that suspects and accused persons have the right to be present at their trial.

Article 8(2) grants Member States the option to provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that:

(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.

As regards Article 8(2)(a), Recital 36 of the Directive clarifies that informing suspects or accused persons of the trial should be understood to mean summoning them in person or, by other means, providing them with official information about the date and place of the trial in

a manner that enables them to become aware of the trial. Information on the consequences of non-appearance should, in particular, be understood to mean informing suspects or accused persons that a decision might be handed down if they do not appear at the trial.

Recital 37 of the Directive refers to the requirement that the person must have been informed of the trial and given a mandate to a lawyer who was appointed by that person or by the State as provided for in Article 8(2)(b).

In cases where these conditions are met, the Court of Justice has clarified that the Directive does not preclude national legislation which provides that the right to be present at the trial is not infringed where the accused person decided unequivocally not to appear at one of the hearings held in connection with his trial[18].

The law of some Member States is not fully compliant with Article 8(2)(a), because the requirement to inform the accused of the trial in due time or the requirement to inform the accused of the consequences of non-appearance is not met. In practice, it is sometimes difficult for accused persons to prove that they were not aware of the trial, as a result of the notification method (e.g. simple post with proof of deposit). The law of a few Member States is not fully compliant with Article 8(2)(b), as it does not ensure that the lawyer appointed by the State would receive a mandate from the accused person, particularly when mandatory assistance by a lawyer in the absence of the accused person is widespread in practice.

While trials *in absentia* are possible in most Member States, practice shows that in some of them, in the absence of defendants, courts often adjourn the hearings and issue a warrant to appear in court or an arrest warrant.

Article 8(4) provides that where Member States provide for the possibility of holding trials in the absence of suspects or accused persons but it is not possible to comply with the conditions laid down in Article 8(2) because a suspect or accused person cannot be located despite reasonable efforts having been made, Member States may provide that a decision can nevertheless be taken and enforced. Compliance issues were identified in some Member States, because of the broader scope of the national measures allowing trials *in absentia* that do not contain an explicit requirement that 'reasonable' efforts must be made to locate the person.

Where Member States make use of the above option, they must ensure that when suspects or accused persons are informed of the decision, in particular when they are apprehended, they are also informed of the possibility to challenge the decision and of the right to a new trial or to another legal remedy, in accordance with Article 9. Compliance issues were identified in ten Member States as a result of the absence of a relevant provision in national law or a lack of legal clarity.

In accordance with **Article 8(5)**, Article 8 is without prejudice to national rules that provide that the judge or the competent court can exclude a suspect or accused person temporarily from the trial where necessary in the interests of securing the proper conduct of the criminal

[18] CJEU, 13 February 2020, *Spetsializirana Prokuratura*, C-688/18.

proceedings, provided that the rights of the defence are complied with. In a few Member States transposition is not in conformity with the Directive as a result of the more limited scope of the national measures (e.g. when conformity is not guaranteed in the context of trials for misdemeanours and minor offences) or the absence of limits on the temporal scope of the exclusion of suspects or accused persons from the trial, making it possible to exclude them from the entire trial.

3.3.2. Right to a new trial — Article 9

Article 9 requires Member States to ensure that, where suspects or accused persons were not present at their trial and the conditions laid down in Article 8(2) were not met, they have the right to a new trial, or to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed. In that regard, Member States must ensure that those suspects and accused persons have the right to be present, to participate effectively, in accordance with procedures under national law, and to exercise the rights of the defence.

Most Member States comply with these conditions, as a fresh determination of the merits of the case following a conviction *in absentia* is possible through appeal or a specific remedy leading to a new trial. In two Member States, however, the available remedies do not always allow for a fresh determination of the case, affecting conformity.

3.4. Remedies (Chapter 4 – Article 10)

Article 10(1) requires Member States to ensure that suspects and accused persons have an effective remedy if their rights under the Directive are breached.

Some Member States are not fully compliant due to the more limited scope of their national measures, either with respect to the authorities or stages of the proceedings for which remedies are available, or with respect to the rights whose breaches are covered by the available remedies.

In one Member State, the issue relates directly to the potential ineffectiveness of the remedies in practice, because of the strict qualifications set for liability for breaches committed by authorities that set a high threshold of proof and exclude compensation for any breaches that authorities may have committed by omission or while acting in good faith.

Article 10(2) states that without prejudice to national rules and systems on the admissibility of evidence, Member States must ensure that, 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 defence and the fairness of the proceedings are respected.

Compliance issues were identified in a few Member States due to the more limited scope of the national law (no guarantee with respect to *de facto* suspects), the admissibility of illegally obtained evidence under national law, or the absence of provisions that would ensure

effective protection against the use of statements made or evidence obtained in breach of the right to remain silent or the right not to incriminate oneself.

4. CONCLUSION

The Directive was introduced to improve the effective application of the presumption of innocence and of the right to be present at the trial in criminal proceedings. Overall, the Directive has provided EU added value by raising the level of protection of citizens involved in criminal proceedings, especially in some Member States where certain aspects of the presumption of innocence were not enshrined in national legislation.

However, this report highlights that there are still difficulties relating to key provisions of the Directive in some Member States. This is particularly true as regards the scope of the national measures implementing the Directive, and the transposition of the Directive's provisions on the prohibition of public references to guilt and on the right not to incriminate oneself.

The Commission will, as a matter of priority, continue pursuing the infringement cases opened for lack of full transposition of the Directive. The Commission will continue to assess Member States' compliance with the Directive and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.