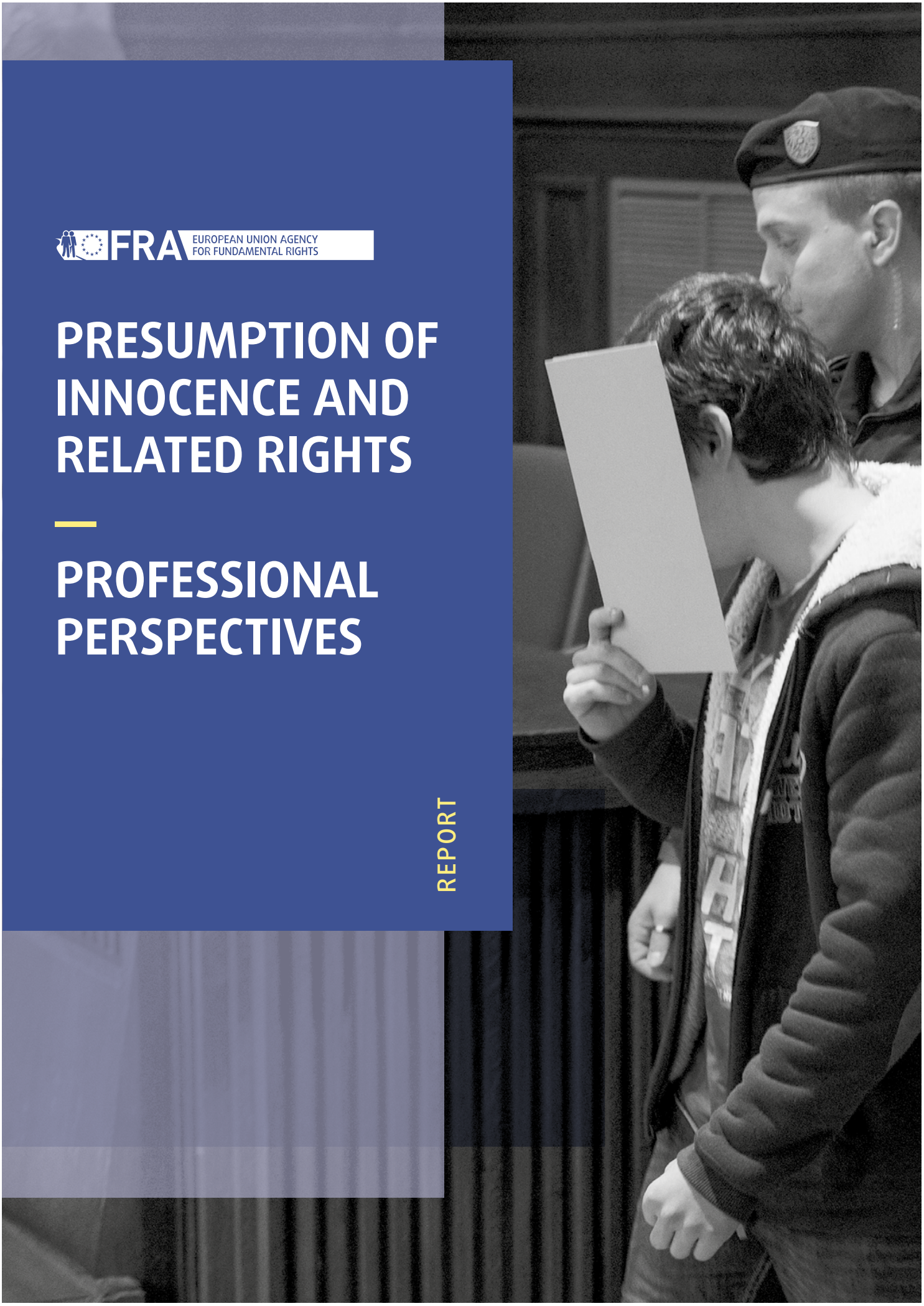
FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

PRESUMPTION OF INNOCENCE AND RELATED RIGHTS

PROFESSIONAL PERSPECTIVES

REPORT



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Foreword

It is a principle so basic that most can recite it with ease: you are presumed innocent until proven guilty in a court. But our research underscores that truly ensuring this and related rights is far from simple.

Article 48 of the EU Charter of Fundamental Rights guarantees the presumption of innocence in criminal proceedings, as well as respect for related defence rights. Directive (EU) 2016/343 – on strengthening certain aspects of the presumption and of the right to be present at trial – spells these out in more detail. This report presents the agency's findings on how select EU Member States implement them in practice.

The report is based on interviews with over 120 defence lawyers, judges, prosecutors, police officers and journalists in nine countries, covering broad ground in terms of both geography and legal traditions. They show that practical implementation varies – and underline that the presumption of innocence can be undermined in myriad ways.

In theory, the presumption indeed applies to all, no matter who they are or where they are from. Yet personal biases can influence even well-meaning criminal justice officials, judges and jurors. Training can promote awareness of potential preconceptions, including subconscious ones. At trial, such heightened sensitivity can help avoid in effect shifting the burden of proof, which rests in principle with the prosecution. Ensuring diversity among all groups involved is crucial, too.

Basic practicalities, such as up-to-date contact details, also play a vital role. After all, protecting the presumption of innocence requires holding a fair trial – and a trial cannot be fair if the accused does not know it is happening. Here common sense is key: sending a summons to someone's home holds little value when that person is being held in custody.

Improved cooperation in criminal matters across the EU is an important achievement. Further strengthening such cooperation requires continued mutual trust – at multiple levels.

Individuals must have faith that their criminal justice systems impose sanctions only in accordance with the rule of law. Similarly, EU Member States will recognise each other's decisions only where confident that these have been handed down with full respect for basic rights.

This makes vital transparency about how fundamental rights are dealt with in practice across the EU. We hope the insights presented help policymakers make that assessment – and, ultimately, encourage both better protection and stronger cooperation.

Michael O'Flaherty
Director

Country codes

AT	Austria	**EL**	Greece	**LT**	Lithuania	**SE**	Sweden
BE	Belgium	**ES**	Spain	**LU**	Luxembourg	**SI**	Slovenia
BG	Bulgaria	**FI**	Finland	**LV**	Latvia	**SK**	Slovakia
CY	Cyprus	**FR**	France	**MT**	Malta		
CZ	Czechia	**HR**	Croatia	**NL**	Netherlands		
DE	Germany	**HU**	Hungary	**PL**	Poland		
DK	Denmark	**IE**	Ireland	**PT**	Portugal		
EE	Estonia	**IT**	Italy	**RO**	Romania		

Contents

Foreword 1

Key findings and FRA opinions 7
ENDNOTES 15

Introduction 17
ENDNOTES 23

1 PRESUMPTION OF INNOCENCE IN GENERAL 25
1.1. LEGAL OVERVIEW 25
ENDNOTES 39

2 PUBLIC REFERENCES TO GUILT 41
2.1. LEGAL OVERVIEW 41
2.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON ISSUING PUBLIC STATEMENTS IN CRIMINAL CASES 43
ENDNOTES 53

3 PHYSICAL PRESENTATION OF SUSPECTS AND ACCUSED PERSONS 55
3.1. LEGAL OVERVIEW 55
3.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON THE PRESENTATION OF DEFENDANTS IN PRACTICE 57
ENDNOTES 64

4 BURDEN OF PROOF 65
4.1. LEGAL OVERVIEW 65
4.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON THE BURDEN OF PROOF IN PRACTICE 66
ENDNOTES 70

5 RIGHTS TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF 71
5.1. LEGAL OVERVIEW 71
5.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON HOW THE RIGHT TO REMAIN SILENT IS RESPECTED IN PRACTICE 73
ENDNOTES 82

6 RIGHT TO BE PRESENT AT TRIAL AND RIGHT TO A NEW TRIAL 83
6.1. LEGAL OVERVIEW 83
6.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON PRESENCE AT TRIAL IN PRACTICE 85
ENDNOTES 95

Conclusions 97

Abbreviations

CJEU	Court of Justice of the European Union (formerly European Court of Justice)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FRA	European Union Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
NPM	National Mechanism for the Prevention of Torture
UN	United Nations
UN HRC	United Nations Human Rights Committee
UN ODC	United Nations Office on Drugs and Crime

Glossary

Accused person	Any natural person who is formally charged by the competent criminal authority (i.e. a prosecutor or an investigative judge or even the police) with having committed a criminal offence. This term commonly refers to persons subject to more advanced stages of pre-trial proceedings and/or persons committed to trial.
Arrest	The act of the police and other law enforcement authorities apprehending persons and placing them into police custody.
Burden of proof	A party's obligation in legal proceedings to establish an assertion or charge, encompassing the burden of production (provision of sufficient evidence) and the burden of persuasion (preponderance of evidence).
Charge	An official notification given to an individual by the competent authority of an allegation that they are suspected or accused of having committed a crime, also referred to as an 'accusation'.
Child	Any natural person under the age of 18 years.
Defendant	Any natural person subject to criminal proceedings initiated by the relevant authority because they are suspected of or have been charged with committing a crime. In the context of this report, this term includes a suspect or an accused person (see definitions of these terms in this glossary).
Deprivation of liberty	Arrest or any type of detention by the authorities, including when the police apprehend a person and question them without a judicial decision or any warrant. That person may be set free after questioning; however, deprivation of liberty applies if, for a certain period of time, they were not allowed to leave police custody.
Journalist	Any person engaged in journalism, especially writers and editors in news media organisations.
Judge	Any public official with the authority and responsibility to preside in a court or sit at the bench as a member of the court and try lawsuits and/or criminal proceedings and deliver legal rulings.
Lawyer	Any person who is authorised to pursue professional legal activities, including advising people about the law and representing them in court and other legal proceedings. More specifically, in the context of this report, it includes defence lawyers, that is, those authorised to advise and represent defendants.
Lay judge	Any appointed lay person assisting a judge in a trial who is not a permanent officer of the court but who has equal status to the presiding judge and to decide on criminal cases. They are used as a guarantee for justice, ensuring the public's influence and transparency. This term usually refers to jurors in mixed or jury courts.

Presumption of innocence	The presumption of innocence applicable in national criminal proceedings, as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 of the International Covenant on Civil and Political Rights, Article 11 of the Universal Declaration of Human Rights and Directive (EU) 2016/343, and reflected in the case law of the Court of Justice of the European Union and the European Court of Human Rights.
Pre-trial detention	Deprivation of a defendant's liberty before the conclusion of a criminal case imposed in the context of judicial proceedings by a judicial organ (i.e. judge, investigative judge, court). Not to be confused with police detention, that is, detention by the police before bringing a person before a judge.
Prosecutor	A public official representing the state who, among other things, institutes legal proceedings against a defendant in respect of a criminal charge.
Questioning	Any oral interview or oral examination of a person by the police, a prosecutor or a judge during which they are asked questions about their possible involvement in a crime.
Right not to incriminate oneself	The right of defendants – being part of the presumption of innocence – not to be compelled by authorities in the context of criminal proceedings and investigations, when asked to make statements or answer questions, to produce evidence or documents or to provide information relating to the criminal offence that they are suspected or accused of having committed that may lead to self-incrimination.
Suspect	Any natural person suspected of committing a criminal offence, or an alleged criminal offence, including before the competent authorities of a Member State make that person aware, by official notification or otherwise, that they are a suspect. This term commonly relates to the initial stages of criminal investigations/pre-trial proceedings.
Witness	Any natural person who has been summonsed to give testimony. Unlike a suspect, a witness can be compelled to take the oath requested by the law to ensure that any statements made to the judge are truthful. However, a witness can refuse to give a statement as evidence when there is a possibility of self-incrimination.

Key findings and FRA opinions

This report presents the European Union Agency for Fundamental Rights' (FRA's) findings on how the rights to be presumed innocent, to remain silent and to be present at trial in criminal proceedings are applied in practice. It examines specific factors that potentially affect the presumption of innocence in practice, such as the attitudes of criminal justice professionals, public references to defendants' guilt alongside defendants' physical presentation before or during a trial, and rules on the burden of proof. It also looks at aspects of the right to remain silent and not to incriminate oneself, and practices related to the rights to be present at trial and to a new trial when a defendant was not present at the initial trial.

Articles 47 and 48 of the Charter of Fundamental Rights of the European Union guarantee various defence rights in criminal proceedings. These include the right to be presumed innocent until proven guilty. The European Union (EU) roadmap for strengthening procedural rights in criminal proceedings,[1] and more specifically 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[2] – which is the focus of this report – spell out these rights in more detail. As Directive (EU) 2016/343 states in recitals 9 and 10, a common understanding of these rights and their implementation across the EU Member States can strengthen the trust of Member States in each other's criminal justice systems and facilitate the mutual recognition of decisions in criminal matters.

The presumption of innocence is a core right in criminal justice. It guarantees that everyone is presumed innocent until an independent court proves them guilty. The rights to remain silent and to be present at trial are closely connected to this right. The EU codified these rights in Directive (EU) 2016/343. This project investigates how nine EU Member States implement these legal provisions in practice.

The findings presented are based on interviews with 123 defence lawyers, judges, prosecutors, police officers and journalists in the nine EU Member States. They show that the practical implementation of these rights varies across the Member States covered. However, some common trends also emerge. The report brings the findings to the attention of Member States and the EU institutions, and can support their efforts in assessing the implementation of Directive (EU) 2016/343.

Note on coverage

The report summarises findings from the following nine EU Member States, which represent different legal traditions: Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Lithuania, Poland and Portugal. They are all bound by the EU roadmap measures, including Directive (EU) 2016/343, which aim to strengthen procedural rights in criminal proceedings.

FRA chose these Member States because of their geographical spread and the different legal traditions represented, as well as the knowledge gained from its previous projects in the area of criminal procedural rights. The selection also took account of the feasibility of this particular project in the different Member States. It should also be noted that the scope of the project was necessarily limited to a certain number of Member States given the available resources.

The findings should not be considered representative of the views of police officers and criminal justice professionals in the Member States included; they represent the experiences and opinions only of those individuals who were interviewed. The same caveat should be applied to the evidence provided by the journalists who were interviewed for the fieldwork.

What the project does provide is a unique body of rich, qualitative evidence on the application of the presumption of innocence and related rights in practice, as interviewees report within the scope of the project.

Equal application of the presumption of innocence

In line with Article 48 of the EU Charter of Fundamental Rights, Article 3 of Directive (EU) 2016/343 provides for the right of every suspect and accused person to be presumed innocent until proven guilty according to law. In accordance with recital 16 of this directive, public authorities should not refer to a defendant as being guilty or reflect such an opinion as long as that person has not been proved guilty according to law. The recital specifies that acts of the prosecution that aim to prove the guilt of the suspect or accused person – such as the indictment, along with judicial decisions that result in a suspended sentence taking effect – as well as preliminary decisions are allowed, provided that the rights of the defence are respected.

FRA's findings show that criminal justice authorities are careful in their official statements and avoid using language that depicts someone as guilty. However, when conducting investigations, certain assumptions about alleged perpetrators may influence authorities' work on a given case, which in turn may lead to one-sided investigations.

The findings also show that personal prejudices and biases of judicial authorities, lay judges and juries play a role when they perceive certain persons as more likely to commit certain crimes.

Past convictions can in many ways also undermine the presumption of innocence and are a source of potential bias on the part of authorities, either during investigations (i.e. by focusing investigations on particular persons, applying pre-trial detention or prioritising investigations into those with criminal records) or at the trial stage when convicting accused persons.

Moreover, a diverse array of factors affects the application of the presumption of innocence principle and could influence criminal justice officials, lay judges and juries in making statements or judicial decisions. This includes media coverage of cases, the ethnic background or nationality of defendants, the economic and social background of defendants, their gender, the type of crime committed, and even the location where the crime was committed and where the suspect was arrested.

FRA OPINION 1

Member States should ensure that the right to be presumed innocent applies equally to all defendants, irrespective of their personal characteristics or personal history. Member States should put in place effective measures to ensure that criminal justice officials, as well as lay judges and jurors, are not biased or prejudiced against defendants for reasons such as their ethnic or social background and status, gender or other factors. In particular, existing legal provisions and supporting codes of ethics and conduct prohibiting biased or prejudicial behaviour based on such grounds should be fully complied with in practice. Other efforts should focus on ensuring proper, basic and continuous further training for officials to prevent such bias. Formal statistics and indicators to evaluate and address such phenomena should be developed and applied in a systematic manner.

To reduce potential prejudice and bias, Member States should encourage and promote diversity among judges, prosecutors and criminal justice officials so that they are representative of all cultural, social and ethnic backgrounds of a given society, including with respect to gender.

FRA OPINION 2

While respecting freedom of the press, Member States should establish precise rules on public authorities communicating with the media about ongoing criminal cases with respect to the presumption of innocence. In particular, only press officers or case-processing officers should inform the media about ongoing cases. The information should not include any personal data or details about the private lives of defendants. Law enforcement officers, lawyers and other participants in criminal proceedings, such as witnesses and victims, should be subject to strict rules prohibiting information leaks about ongoing investigations. Member States should ensure that breach of these rules results in proportionate and dissuasive sanctions.

Member States should consider developing guidance and materials to sensitise and provide guidelines to the media about the importance of the manner in which a suspect or accused person is presented in the media, highlighting the ways in which different practices can increase or decrease perceptions of guilt. When doing so, Member States should consider engaging with relevant national associations of journalists that have practical experience in reporting on criminal cases.

Public references to guilt

According to Article 4 of Directive (EU) 2016/343, authorities should not issue any public statements suggesting or implying a defendant's guilt before the final judgment. This obligation extends not only to actors directly engaged in a given case but also to other public authorities. While acknowledging and emphasising the importance of the freedom of press and other media, recital 19 specifies that Member States should ensure that public authorities, when informing the media about ongoing cases, "do not refer to suspects or accused persons as being guilty as long as they have not been proved guilty according to law". Defendants should have effective remedies at their disposal if this principle is violated, in accordance with Article 10 of the directive.

The findings from this project show that most criminal justice authorities have formalised procedures in place for issuing public information on ongoing cases to the media. This includes using press officers or public relations departments to either hold press conferences or contact journalists. However, different actors involved in criminal proceedings often provide confidential information relating to ongoing investigations – even before the defence receives this information – affecting the application of the presumption of innocence principle and ongoing investigations. Interviewees from all professional groups, including journalists, attribute such leaks mainly to law enforcement authorities, but also to other participants in proceedings, such as victims and their lawyers. Politicians may also publicly comment on ongoing criminal proceedings, which can influence the presumption of innocence among the general public.

Journalists interviewed for this project had considerably different levels of awareness and knowledge about the presumption of innocence and applicable rules in this context.

Physical presentation of suspects and accused persons

Article 5 of Directive (EU) 343/2016 obliges Member States 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. Recital 20 includes examples of such measures, namely handcuffs, glass boxes, cages and leg irons. However, security concerns can be used to justify such measures. These include to prevent suspects or accused persons from harming themselves or others or from damaging property, or to prevent them from absconding or from having contact with third persons, such as witnesses or victims. Recital 21 further adds that, where feasible, the competent authorities should not present suspects or accused persons in court or in public wearing prison clothes, to avoid giving the impression that they are guilty. In accordance with Article 10 of the directive, Member States have to provide effective remedies where this principle is violated.

FRA's findings show that all nine Member States studied have specific rules in place on the use of restraint measures during the transport and presentation of defendants deprived of liberty. None of these Member States obliges defendants to wear prison clothes in court. Defendants are routinely transported in handcuffs or otherwise restrained, often without individual risk assessments being carried out, and the restraints are removed in front of the court. Photographs taken during the transport of defendants when they are still handcuffed, typically when they are getting into or out of a vehicle, do emerge in the public domain. In addition, the police often publish photographs from their operations showing defendants in handcuffs. The findings also show that defendants are free to cover their faces during transport, and sometimes they do; however, this aspect seems to be unregulated.

During hearings, defendants sometimes sit in physically separated spaces – such as glass boxes and other special places, for example behind security bars – which creates the impression that they are a security threat. The findings show that such measures do not influence professional judges, but can affect public opinion, and potentially also lay judges and juries, with a negative impact on the presumption of innocence.

FRA OPINION 3

Member States should ensure that restraints or other security measures, such as handcuffs and glass boxes in court, are applied to defendants only after an individual assessment of security risks. The least strict measures that are effective and appropriate should be applied.

In this context, Member States should ensure that judicial authorities discourage the public presentation of defendants under restraining measures and discourage the taking of photographs of restrained persons, while allowing photographs to be taken when defendants are not restrained, to respect the freedom of the press. Moreover, law enforcement authorities should refrain from publishing footage of their operations containing photographs of restrained defendants. The application of these safeguards should be ensured with effective and persuasive sanctions, which authorities should rigidly enforce to ensure the right to the presumption of innocence. Member States should also explore opportunities for raising awareness among law enforcement officers, through training or other means, about the damaging effects of such images.

Member States should examine the possibility of allowing restrained defendants to use side entrances to courtrooms and separate waiting rooms to protect them from public view.

Defendants should be allowed to have their faces covered while being transported into and out of court. Prison or police regulations should be reviewed and, if needed, revised by relevant national authorities to include these requirements.

Authorities should make all necessary arrangements to allow defendants to select appropriate clothes when appearing in court. If necessary, authorities should provide defendants with clean and appropriate clothing.

Defendants are generally allowed to choose their clothing when appearing in court and are not obliged to wear prison clothes. Nevertheless, various practicalities can result in them either wearing prison clothes or appearing before the courts dressed inappropriately. These include the requirement for defendants to take part in proceedings shortly after having been arrested; their detention far from their home and family; or their inability to buy clothes.

Burden of proof

Article 6 of Directive (EU) 2016/343 confirms the legal principle that the burden of proof for establishing the guilt of suspects and accused persons during a trial rests with the prosecution. The defence has the right to present exculpatory evidence, that is, evidence favourable to the defendant. Furthermore, the same provision specifies that any doubt as to the question of guilt should benefit the defendant.

Recitals 22 and 23 explain that the presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice to any *ex officio* fact-finding powers of the court, to the independence of the judiciary when assessing the guilt of the suspect or accused person, and to the use of presumptions of fact or law concerning the criminal liability of a suspect or accused person. The recitals also stress that 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. Moreover, the means employed should be reasonably proportionate to the legitimate aim pursued. Finally, the text of the preamble stresses that such presumptions should be rebuttable and, in any event, should be used only where the rights of the defence are respected.

The findings show that, in all the Member States studied, the burden of proof for a crime lies with the prosecuting and investigating authorities, without prejudice to the courts' powers to request further evidence and decide on the guilt of defendants. The findings also show that permitted presumptions of law or facts exist in practice for certain types of crimes – for example the possession of drugs or weapons, which means that defendants are expected to present evidence proving their innocence.

In addition, the findings confirm that, in practice, prosecuting and investigating authorities enjoy wider powers than the defence to search for evidence. Therefore, there is an imbalance between the two. Occasionally, some courts put more emphasis on the evidence adduced or further requested by the prosecution and investigating authorities than on the evidence adduced or requested by the defence.

FRA OPINION 4

Member States should ensure that, during trial proceedings, with due respect for each Member State's procedural autonomy and traditions, both defence and prosecution essentially have the same rights with regard to their procedural powers to examine, question, adduce and request evidence.

In view of the inherent inequality between the capacity of defendants, on the one hand, and that of the prosecuting and investigating authorities, on the other, to seek and acquire evidence during pre-trial criminal proceedings, Member States should ensure that the defence can request investigating and prosecuting authorities, when justified, to investigate specific circumstances and search for crucial evidence on its behalf. Such requests may be justified, in particular, when it is not feasible for the defence to acquire such evidence.

Member States should ensure that legitimate presumptions of law or facts that reverse the burden of proof are limited to the extent necessary to ensure the effectiveness of criminal proceedings, and are always possible to rebut.

Rights to remain silent and not to incriminate oneself

Article 7 of Directive (EU) 2016/343 guarantees the rights to remain silent and not to incriminate oneself. The exercise of these rights cannot be used against defendants and cannot be considered evidence that they have committed an alleged offence. As specified in recitals 24–29, defendants should not be forced to make statements or answer questions (relating to the criminal offence that they are suspected or accused of having committed), produce evidence or documents or provide information that may lead to self-incrimination. However, the competent authorities are allowed to gather evidence that may be lawfully obtained from a defendant through the use of legal powers of compulsion and that has an existence independent of the will of the suspect or accused person. This includes material acquired pursuant to a warrant and material in respect of which there is a legal obligation of retention and production upon request, such as breath, blood and urine samples, and bodily tissue for the purpose of DNA testing.

The findings show that the rights to remain silent and not to incriminate oneself appear to be well regulated and formalised in the criminal procedures of the Member States studied.

These rights can be compromised at an early stage of proceedings when defendants either are not yet properly informed about them or are encouraged to speak 'off the record', before any formal questioning. This can occur when defendants are interrogated without the presence of a lawyer. FRA's findings show that memos summarising such statements made before the formal questioning of suspects are sometimes included in case files.

Moreover, the findings show that defendants are sometimes encouraged to confess under the promise that this will improve their situation and shorten the proceedings. In addition, defendants are often warned that remaining silent gives a bad impression and may result in negative consequences, such as a more severe sentence. The professionals interviewed added that, in the absence of any explanation from a defendant and the provision of evidence supporting their innocence, it may seem reasonable for the court to adopt the prosecution's version of events.

Overall, defendants are not obliged to provide evidence that might incriminate them, such as data contained in electronic devices. This also means that they are not obliged to provide computer and email passwords or personal identification numbers (PINs) for SIM cards and mobile phones, as these make it possible to access such data. Nevertheless, the findings show that the police often employ indirect coercion, such as the promise of shorter proceedings or milder treatment, to acquire such information.

FRA OPINION 5

FRA reiterates its opinion from the report **Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings** that Member States should ensure that suspects are not treated as witnesses and any questioning of suspects or accused persons by the police is carried out only after they have been properly informed of their right to remain silent and to not incriminate themselves.

The examination of defendants and the provision of information about their rights should be recorded and any confessions or other testimony they make outside the strict procedural framework should be excluded from evidence. Hearsay testimony from police officers on what a defendant said or confessed to them before their formal questioning should be excluded from evidence. When in doubt about whether or not defendants were properly informed of their rights before incriminating themselves, their testimony should be excluded from evidence.

The police should operate according to strict guidelines on how to examine suspects and accused persons without infringing their right to remain silent and not incriminate themselves. Oversight and judicial authorities should reinforce their efforts to assess systematically how the police examine suspects and accused persons.

Indirect methods used to pressure defendants to provide incriminating evidence – such as the promise of milder treatment, reduced sentences or shorter proceedings – should never be used. Member States should provide systematic guidance and training to ensure that police officers always explain to defendants their rights, including the consequences of remaining silent, of a confession or of providing evidence or information that incriminates them. In sum, defendants should not be pressured by being told that exercising their right to remain silent could have negative consequences.

FRA OPINION 6

Member States should ensure that courts make reasonable efforts to locate defendants whose whereabouts are unknown. They should respect data protection and protection from arbitrary surveillance when doing so, but also use all available means provided by law, especially electronic databases from private and public entities.

Systems that presume that defendants have been notified by a summons served at their address should take additional steps to ensure that the right of defendants to be present at trial is respected. In particular, these systems should be promptly updated to take account of circumstances in which defendants are in state custody rather than at their last known address.

Rights to be present at trial and to a new trial

Articles 8 and 9 of Directive (EU) 2016/343 deal with the rights to be present at trial and to have a new trial when a defendant's absence was justified. Accordingly, Member States have to ensure that defendants are properly notified of their upcoming trial and make reasonable efforts to locate them. If certain conditions are met, however, trials *in absentia* are allowed. Recitals 36 and 37 specify that a decision on the guilt or innocence of a suspect or accused person can be handed down even if they are not present at the trial.

This may be the case when the suspect or accused person has been informed of the trial, with sufficient notice, and of the consequences of non-appearance and does not appear. Informing a suspect or an accused person of the trial means that they have been summonsed in person or provided with official information about the date and place of the trial in a manner that enables them to become aware of the trial. Informing a suspect or an accused person of the consequences of non-appearance should, in particular, be understood to mean informing them that a decision might be handed down if they do not appear at the trial.

In addition, a trial can go ahead *in absentia* when a suspect or an accused person has been informed of the trial and is represented by a lawyer. However, if these conditions are not met, defendants have the right to a new trial or a fresh determination of the merits of the case.

Interviewees from the nine Member States studied confirm that the right to be present at trial and the right to a new trial are generally respected and applied both in law and in practice. Defendants are usually informed of trial proceedings and the consequences of their absence and are entitled to a fresh determination of their case when tried *in absentia* through no fault of their own.

In five Member States studied, presence at the trial is both a right and an obligation. The other Member States treat the presence of the accused more as a right and exceptionally as an obligation. In Italy, the defendant has the right and not the obligation to be present at trial.

Trials *in absentia* can be held in eight out of the nine Member States studied, provided that notification procedures are complied with. In some Member States, trials *in absentia* are possible only for certain crimes or under stricter conditions that are more favourable to defendants, for example when defendants have appeared at pre-trial proceedings and been notified of the charges. In practice, courts are reluctant to try defendants *in absentia* and usually prefer to adjourn hearings, the findings also indicate.

Some Member States' procedural systems rely on defendants providing their addresses and informing authorities of any changes. Summons served to declared addresses are presumed to have been delivered and defendants are presumed to have been notified. The procedure is reportedly the same even if defendants remain in state custody. Such systems increase the chances of trials unjustifiably being held *in absentia* and violating defendants' rights.

Endnotes

1 Council of the European Union (2009), **Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings**, OJ 2009 C 295, Brussels, 4 December 2009.

2 **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 the right to be present at trial in criminal proceedings**, OJ 2016 L 65, Brussels, 11 March 2016.

Introduction

"I always assume that the people I defend are innocent, since I am defending them against an accusation. That is, so to speak, the starting point of my daily work. If I did not have that, then I would not have any work at all. So that is what I wake up with every day and go back to bed with: the principle of the presumption of innocence."
(Lawyer, Germany)

"I am sure that I have acquitted a lot of guilty people, but I am fully satisfied that no innocent person is serving a sentence having been convicted by me. This is something that comforts me, it is something that puts my mind at rest. The presumption of innocence has a lot to do with this. I have this very internalised."
(Judge, Portugal)

WHY THIS REPORT?

The presumption of innocence is a guiding principle of criminal justice and a cardinal right of defence. Historically rooted in ancient Roman law of evidence,[1] it has since found its place in the European legal tradition. Jean Lemoine[2] originally expressed the concept. It was later linked with the concept of *in dubio pro reo*, meaning that the defendant may not be convicted when doubts about their guilt remain, and is now established as a principle of law.

The presumption of innocence requires that a person is presumed innocent until a court proves them guilty, hence ensuring the overall fairness of proceedings. Its crucial elements, such as the rights not to be publicly referred to as guilty, not to be presented as guilty, not to have to prove one's own innocence and not to have to present self-incriminating evidence, impose certain requirements on public authorities.

The presumption of innocence requires a fair trial. This must meet the requirements of related criminal procedural rights, such as the right to remain silent, the right to a professional defence and the right to present exculpatory evidence. These legal requirements must be applied in practice so that a defendant has the right to take part fully in the trial.

Persons suspected and accused of crimes have a number of procedural rights in the course of judicial proceedings. These rights should be defined similarly and apply in similar ways across all EU Member States, not only to ensure the same level of safeguards for each defendant, but also to reinforce mutual trust between Member States' justice systems. To bring the criminal justice systems of EU Member States closer together and, in turn, contribute to the strengthening of mutual trust, the EU adopted a roadmap for strengthening procedural rights in criminal proceedings[3] and measures aimed at codifying, at the EU level, existing procedural rights stemming from the European Convention on Human Rights (ECHR).

At the European Commission's request, the European Union Agency for Fundamental Rights (FRA) conducted research to assess how selected Member States implement these procedural rights in practice. The results will contribute to the Commission's report[4] on the implementation of Directive (EU) 2016/343 on the presumption of innocence and the right to be present at a trial in criminal proceedings.[5] The opinions deriving from the research aim to help improve the implementation of these rights at the national level.

SCOPE AND PURPOSE

The main objective of the project was to examine how national authorities involved in criminal justice procedures – such as the police, prosecutors' offices and courts – fulfil, in practice, their EU law obligations regarding the presumption of innocence in the context of criminal proceedings.

The report focuses on the criminal procedural rights enshrined in Directive (EU) 2016/343 and on the practical application of the presumption of innocence, its integral aspects and the related rights, including the right to be present at trial, based on a series of interviews with practitioners who have extensive experience in this area.

FRA's research on procedural rights

This project is the latest contribution to FRA's research on procedural rights. The following reports present the results of past research efforts in this area:

- **Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings** (2019) – This report presents the views of criminal-justice professionals and defendants on how the right to access a lawyer is safeguarded in practice.
- **Victims' rights as standards of criminal justice** (2019) – Part I of the *Justice for victims of violent crime* series, which outlines the development of victims' rights in Europe and sets out the applicable human rights standards.
- **Proceedings that do justice** (2019) – Part II of the *Justice for victims of violent crime* series, which focuses on procedural justice and on whether or not criminal proceedings are effective, including in terms of giving a voice to victims of violent crime.
- **Sanctions that do justice** (2019) – Part III of the *Justice for victims of violent crime* series, which focuses on sanctions and scrutinises whether or not the outcomes of proceedings deliver on the promise of justice for victims of violent crime.
- **Women as victims of partner violence** (2019) – Part IV of the *Justice for victims of violent crime* series, which focuses on the experiences of a particular group of victims, namely women who endure partner violence.
- **Children's rights and justice – Minimum age requirements in the EU** (2018) – This report outlines Member States' approaches to age requirements and limits regarding child participation in judicial proceedings, procedural safeguards and the rights of children involved in criminal proceedings, as well as issues related to depriving children of their liberty.
- **Child-friendly justice** (2017) – This project was based on interviews with justice professionals and the police and with several hundred children who had been involved, as victims or witnesses, in criminal judicial proceedings.
- **Criminal detention and alternatives: Fundamental rights aspects in EU cross-border transfers** (2016) – This report provides an overview of Member States' legal regulations in respect of framework decisions on transferring prison sentences, probation measures, alternative sanctions and pre-trial supervision measures to other Member States.
- **Rights of suspected and accused persons across the EU: Translation, interpretation and information** (2016) – This report reviews Member States' legal frameworks, policies and practices regarding the right to information, translation and interpretation in criminal proceedings.
- **Handbook on European law relating to access to justice** (2016) – This handbook summarises the key European legal principles in the area of access to justice, focusing on civil and criminal law.

This report mainly addresses EU institutions and Member State authorities, including, in particular, the police and criminal-justice authorities at Member State level. It sets out to assist the European Commission in assessing the practical application of the rights included in Directive (EU) 2016/343. It also aims to produce evidence that can assist Member States in their efforts to enhance their legal and institutional responses to the fundamental defence rights of persons subject to national criminal proceedings in line with the directive. (For more details regarding the Member States included in this report, see the relevant FRANET **country studies**.)

The report is based on the findings from a combination of desk and qualitative fieldwork research involving interviews with experts and practitioners. It does not focus on legal provisions that Member States adopted as a result of implementing the directive; the Commission's implementation report will explore these in depth.[6] However, each thematic chapter presents a very general outline of national laws, in the nine Member States covered, that relate to the aspects of the presumption of innocence and other fair trial rights under discussion. Given the qualitative nature of this research, its findings are not representative of the situation in each Member State studied.

This report builds on FRA's 2016 reports on the rights of suspected and accused persons to translation, interpretation and information in criminal proceedings[7] and on criminal detention and alternatives in EU cross-border transfers,[8] and its 2019 report on access to a lawyer and other procedural rights in criminal proceedings.[9] While the 2016 reports analyse differences in legislation and policies, the 2019 report and this report focus on the actual application of these policies in practice.

The report follows the structure of Directive (EU) 2016/343, to facilitate reading the relevant findings.

Chapter 1 introduces the presumption of innocence and its different components, points to the relevant legal standards, and reflects the views and experiences of the professionals interviewed on how the right is applied in practice. Subsequent chapters analyse the findings on the different components of this right.

Chapter 2 addresses public references to guilt, considering relevant legal standards and professionals' opinions on the impact of public statements, including media reports, on the presumption of innocence. **Chapter 3** deals with the physical presentation of suspects and accused persons, and its potential impact on the presumption of innocence. **Chapter 4** discusses the burden of proof, its different elements and the associated formal or actual exceptions.

Chapter 5 presents the rights to remain silent and not to incriminate oneself, the applicable legal standards, and the opinions and experiences of the professionals interviewed of how these rights are applied in practice. **Chapter 6** discusses the rights to be present at trial and to a new trial in criminal proceedings, outlining relevant standards and their practical application.

METHODOLOGY AND CHALLENGES

This report is based on data collected through desk research and interviews conducted from February to September 2020 in Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Lithuania, Poland and Portugal. It covers the practical application of specific rights enshrined in Directive (EU) 2016/343 during this period.

These Member States were selected to cover the main European legal traditions (common and civil law systems), cultures and geographical regions (north, south, east and west), and the different population sizes (from small to large states). This is consistent with FRA's established practice in past projects, such as the project described in the 2019 report ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***. The available resources also necessarily limited the research to selected Member States.

While designing the scope of the research, in particular questions for professionals, FRA consulted practitioners associated with the Council of Bars and Law Societies of Europe (**CCBE**) and the European Criminal Bar Association (**ECBE**) and welcomed their help in identifying possible gaps in the practical implementation of the presumption of innocence principle.

Overall, 123 respondents were interviewed: 108 criminal justice professionals (judges, prosecutors, police officers and lawyers) and 15 journalists from selected Member States (see Table 1).

TABLE 1: NUMBER OF INTERVIEWEES PER MEMBER STATE AND TARGET GROUP

Member State	Police officers	Lawyers	Prosecutors	Judges	Journalists	Total number of interviewees
AT	4	4	2	2	3	15
BE	2	4	3	3	1	13
BG	4	4	2	2	0	12
CY	4	4	4	0	2	14
DE	4	4	2	2	2	14
IT	2	6	2	2	2	14
LT	4	4	2	2	2	14
PL	4	4	2	2	2	14
PT	4	4	2	2	1	13
Total	32	38	21	17	15	123

Source: FRA, 2020

Interviews with criminal justice professionals were carried out to gain insights into the implementation and practical application of the rights enshrined in Directive (EU) 2016/343 in national criminal proceedings.

In addition, FRA staff interviewed journalists in eight of the Member States to understand how the media deal with the presumption of innocence. The interviews were conducted online in the second quarter of 2020. No Bulgarian journalists were interviewed, as those contacted by FRA did not respond.

Except for the interviews with journalists, FRA's multidisciplinary research network, FRANET, conducted the fieldwork and the desk research.[10] Interviews took place from February to September 2020. Due to the outbreak of the coronavirus (COVID-19) pandemic, interviews were mostly done online.

The interviewers used a predefined questionnaire covering defence rights as reflected in primary and secondary EU law. They did not share the questionnaire with the respondents in advance. The interviewers could ask follow-up questions or request clarifications and encouraged respondents to speak freely and draw on their personal experiences.

Interviews were audio recorded and documented using an interview reporting template. The criminal justice professionals – police officers, defence lawyers, judges and prosecutors – were asked about the implementation and practical application of the rights enshrined in Directive (EU) 2016/343 in their national criminal proceedings. Journalists, on the other hand, were asked for their views on current professional media reporting on criminal cases and about potential impacts of media statements on the presumption of innocence.

The desk research concerned the legal provisions transposing Directive (EU) 2016/343 into domestic law, and case studies of criminal cases that have attracted particular media attention.

Endnotes

1 See *Digesta seu Pandectae*, **22.3.2**.: **"**Ei incumbit probatio qui dicit, non qui negat" ("Proof lies on him who asserts, not on him who denies"); and **50.17.125**.: "Favorabiliores rei potius quam actores habentur" ("The condition of the defendant is to be favoured rather than that of the plaintiff").
2 French cardinal and canonical jurist Jean Lemoine (1250–1313) originally phrased the presumption of innocence using the words "item quilbet presumitur, innocens nisi probetur nocens" (meaning that a person is presumed innocent until proven guilty), referring, however, not to the burden of proof resting on the prosecution but to the protection a defendant should enjoy.
3 Council of the European Union (2009), **Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings**, OJ 2009 C 295, Brussels, 4 December 2009.
4 European Commission (2021), ***Implementation report on the directive on presumption of innocence and the right to be present at the trial in criminal proceedings***.
5 **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 the right to be present at trial in criminal proceedings**, OJ 2016 L 65, Brussels, 11 March 2016.
6 European Commission (2021), ***Implementation report on the directive on presumption of innocence and the right to be present at the trial in criminal proceedings***.
7 FRA (2016), ***Rights of suspected and accused persons across the EU: Translation, interpretation and information***, Luxembourg, Publications Office of the European Union (Publications Office).
8 FRA (2016), ***Criminal detention and alternatives: Fundamental rights aspects in EU cross-border transfers***, Luxembourg, Publications Office.
9 FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***, Luxembourg, Publications Office.
10 For more information, see **FRA's webpage on FRANET**.

1

PRESUMPTION OF INNOCENCE IN GENERAL

Article 48 (1) of the EU Charter of Fundamental Rights and Article 6 (2) of the ECHR enshrine the 'presumption of innocence', stipulating that anyone who has been charged with a criminal offence must be presumed innocent until proven guilty according to law. Directive (EU) 2016/343 aims to strengthen this legal concept.

This chapter introduces the concept of the presumption of innocence and its practical application in criminal proceedings. It provides a brief legal overview. This is followed by the views and experiences of the legal professionals and journalists interviewed on how they apply the presumption of innocence in practice and possible factors affecting it.

1.1. LEGAL OVERVIEW

Article 3 of Directive (EU) 2016/343 obliges Member States to ensure that suspects and accused persons are presumed innocent until proven guilty according to law.[1] Article 3 does not preclude the adoption of preliminary decisions of a procedural nature, such as a judicial authority's decision on whether or not pre-trial detention should continue, provided these decisions do not refer to the person in custody as being guilty.[2] Article 2 and recital 12 of the directive prescribe that the presumption of innocence applies to all suspected or accused persons throughout criminal proceedings, that is, from the moment a person is 'suspected' or 'accused' of having committed a criminal offence until the final decision on whether or not that person has committed the criminal offence concerned is definitive.[3]

The European Court of Human Rights (ECtHR) understands the application of the presumption of innocence as conditional on the existence of a criminal 'charge'.[4] Recital 12 of Directive (EU) 2016/343 goes beyond that, extending the temporal scope of application to the first moment of suspicion that a person has committed a criminal offence. This means that the presumption of innocence applies even before the competent authorities make that person aware, by official notification or otherwise, that they are a suspect or an accused person.

International law

Today's main international human rights documents recognise the presumption of innocence as a right of a defendant in criminal proceedings.[5] These instruments conceptualise the presumption of innocence as a specific aspect of a defendant's right to a fair trial.

The ECtHR holds that the presumption of innocence under Article 6 (2) of the ECHR is a constituent element of the notion of a fair trial in criminal proceedings and is also closely connected to equality of arms.[6]

The presumption of innocence has two aspects: internal and external. The internal aspect relates to how the actors directly engaged in the criminal proceedings, such as judges, prosecutors, police officers and lawyers, perceive the defendant and how this affects their daily work. The external aspect deals with the public image of the defendant, which, to a large extent, the media shape, including social media. However, the distinction between these two aspects can, at times, be blurred, as media coverage can also affect those engaged in the proceedings.

Role of the media

Directive (EU) 2016/343 recognises the significant role that the media play when reporting on criminal justice, while also emphasising the importance of the principle of the freedom of the press. Article 4 (3) and recitals 18 and 19 of the directive explicitly address this role by emphasising the safeguards that the Member States need to ensure while informing the media, provided public authorities respect the presumption of innocence when sharing information. This is in line with the jurisprudence of the ECtHR, which has repeatedly stated that the press and internet bloggers play an essential role in democratic society as 'watchdogs', ensuring the accountability of public authorities; Member States therefore have only a limited margin of appreciation to interfere with the freedom of the press for 'pressing social needs'.[7]

However, the ECtHR has also found that, in certain situations, a hostile media campaign can adversely affect the fairness of a trial and in such cases the state may be held responsible for violating the presumption of innocence.[8] Therefore, the state and its courts, being the guarantors of the presumption of innocence, need to secure the fairness of a trial with regard to both the defendants and public opinion, irrespective of any media coverage. For example, a well-reasoned judgment on the facts of a case delivered by a court comprising professional judges would suffice to refute any allegations that a prejudicial press campaign had adversely influenced the presumption of innocence.[9]

1.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON THE PRESUMPTION OF INNOCENCE IN PRACTICE

Six of the nine Member States covered in the research – Bulgaria, Cyprus, Italy, Lithuania, Poland and Portugal – include the principle of the presumption of innocence in their constitutions.[10] It should be noted, however, that in Bulgaria and Poland an official charge is needed to trigger its application.[11] The other three countries – Austria, Belgium and Germany – recognise it as an established legal principle and include it in their criminal codes.[12]

Professionals from all nine Member States state that the presumption of innocence applies throughout criminal proceedings. However, interviewees point to differences in how it is applied in practice during the two stages of criminal proceedings: the pre-trial phase and the trial phase. The pre-trial stage, when evidence is collected, is usually confidential and concludes with a decision on whether or not a case is to be sent to court. The trial phase is usually public and concludes with a conviction or acquittal. At any stage, criminal proceedings can be discontinued for reasons prescribed by law, without guilt being established.

Presumption of innocence during the pre-trial phase

Articles 2 and 3 and recital 12 of Directive (EU) 2016/343[13] require Member States to ensure that natural persons suspected or accused of a crime are presumed innocent until proven guilty. This applies from the moment they

become a suspect or an accused person and throughout all stages of criminal proceedings, including the pre-trial phase.

The police officers, prosecutors and judges interviewed refer to several aspects that manifest the presumption of innocence during the pre-trial phase, namely the personal attitudes of investigators, the process of collecting evidence, the application of remand measures, the wording of case files and press releases and, finally, the decision whether or not to forward a case to court. Defence lawyers emphasise that the investigation is the most important phase for safeguarding the presumption of innocence. The vast majority of evidence collection and analysis is during this stage. Given this, respect for the presumption of innocence during this phase has a great impact on the defence of a suspect.

All of the police officers, prosecutors and judges state that, during pre-trial investigations, they always treat suspects and potential suspects as innocent people who may or may not have committed a crime. Two police officers from Lithuania explain that they remain 'neutral' and 'polite' towards suspects, while police officers from Belgium and Portugal talk about keeping an open mind about potential alternative explanations. An interviewee from Belgium explains that their approach evolves from 'maybe' to 'probably' as more evidence of a suspect's potential guilt is gathered. This attitude is manifested in practice by impartially investigating "in all directions", because, as a police officer from Bulgaria states, there is always a chance that, "however guilty they might look", a person might not be guilty after all. The police have to be prepared for sudden developments in investigations; thus, evidence should be collected in its entirety, both that in favour and that against a defendant.

"Each person is treated without any prejudice [...] at any point evidence may lead in an entirely different direction, so each person is perceived as totally innocent and evidence collected [...] may lead to charging them or someone else."
(Police officer, Bulgaria)

Guilt is not something that is inherently presumed as soon as a defendant is identified, but rather something that has to be proved with evidence. It is the task of the police to provide this evidence during the investigation; as a police officer from Austria comments, it is not the duty of defendants to prove their innocence.

Police officers and prosecutors also emphasise the importance of the wording used in case files. As best practice, a file should always be written in a conditional manner, for example 'XY is under suspicion of [...]' or 'XY is accused of [...]'. This type of language should be used even if a defendant confesses or even if they have been caught in the act of committing a crime, as police officers from Austria and Lithuania observe.

"Previously, 20 or even 10 years ago, the categorical wording was used, e.g. investigation found that somebody committed one or another crime, and now all the wording has changed, e.g. in the pre-trial investigation the officers avoid statements assigning guilt."
(Prosecutor, Lithuania)

A prosecutor from Lithuania notes a move towards more careful use of wording and information over the past decades.

A prosecutor from Bulgaria also points to the importance of using neutral wording in press releases.

For most prosecutors, the presumption of innocence is a guiding principle when deciding whether or not to forward a case to trial. Three prosecutors from Belgium, two from Poland and one from Portugal explain how, in some cases, they will not refer a case if the evidence does not meet a certain threshold, even if they are convinced of a person's guilt. A prosecutor from Portugal adds that the presumption of innocence guides the probability assessment of whether or not a conviction is likely, based on the evidence at hand.

"The principle of the presumption of innocence guides the investigation through a prognostic judgment on whether the conviction of the defendant at trial is likely or not, based on the evidence we have. If a conviction is not probable, if there are flaws or omissions of relevant evidence, then the case is dismissed."
(Prosecutor, Portugal)

However, prosecutors from Cyprus view the presumption of innocence as a set of defence rights that they must overcome to prove their case and secure a conviction. One prosecutor describes the presumption of innocence as a procedural safeguard against abuse to ensure that there is evidence against someone before they are convicted. This acts as a barrier and puts a burden on the prosecution.

Lawyers in several Member States tend to believe that the police often focus on collecting evidence against a suspect, ignoring evidence that may be in their favour. Some lawyers describe how, during the investigation phase, law enforcement officers often decide on a given hypothesis and further investigate on this basis only, and it is very difficult to change their opinions. For example, one lawyer from Belgium reports that, during interrogations, the police only ask questions that fit their hypotheses, while another lawyer states that it is difficult to get law enforcement officials 'out of that tunnel'. A lawyer from Italy holds a similar view with respect to public prosecutors.

In addition, a number of defence lawyers highlight the importance of their own attitudes. A lawyer from Italy stresses that the presumption of innocence is 'sacred' to criminal lawyers. When taking a case, lawyers should never ask themselves if a defendant is guilty or innocent; instead, they should focus on the available evidence and documents and their possible use in proceedings. As a lawyer from Belgium explains, the client should be given the benefit of the doubt. It is important to believe the client, especially at the beginning of a case; otherwise, it is much more difficult to convince the judge. A lawyer from Germany supports this approach.

Pre-trial detention and presumption of innocence

It appears from the interviews that representatives of the criminal justice system consider, among other factors, the presumption of innocence when making decisions on pre-trial detention. In this respect, all professionals interviewed agree that they need to be very careful when restricting a defendant's liberty.

"In our daily work, we use it to prove the criminal responsibility of each defendant; our work has to do with overturning the presumption of innocence to prove that someone is guilty. The burden of proof lies with the prosecution to prove beyond reasonable doubt before the criminal court. The presumption of innocence puts an extra burden on the prosecution to prove its case."
(Prosecutor, Cyprus)

"[T]he phase of preliminary investigations compromises the principle of the presumption of innocence because public prosecutors [...] are supposed to look for evidence charging the defendant but also discharging them. This is something that – in 16 years of professional experience – I have seen very rarely."
(Lawyer, Italy)

"[P]resumption of innocence plays a major role when applying pre-trial detention, because that is the strongest intervention we can make [...] we imprison innocent people where we have a strong suspicion of a crime and also have grounds for imprisonment, but that does not change anything – at the end of the day, pre-trial detention is carried out on someone who is innocent according to the law. That is where the principle of reasonableness and the speeding up of detention is particularly important. So we have to be particularly quick."
(Prosecutor, Austria)

"My practice shows that the courts don't care about the presumption of innocence while ruling on pre-trial detention. Sure, the courts use the presumption of innocence as a buzzword and some sort of justification for their decisions. You can see this in how they phrase detention orders: 'This court does not decide on the defendant's guilt as it fully adheres to the presumption of innocence, but [...]'."
(Lawyer, Poland)

All of the lawyers interviewed agree that the presumption of innocence should play a key role in the assessment of the proportionality of pre-trial detention. One lawyer from Poland, however, claims never to have encountered a situation in which the court dismissed a pre-trial detention request and applied alternatives to detention by invoking the presumption of innocence. Another lawyer states that the courts are generally unwilling to reject prosecutors' pre-trial detention requests.

"We see it very clearly, detention measures are currently applied universally, people are being detained on grounds never used before [...]. If the logic of criminal repression [...] with the modernisation of society [...] moves towards less but more effective repression, in our country we see the opposite – punishments are raised, more and more people are in imposed detention for absurd reasons and that is not okay."
(Lawyer, Bulgaria)

A lawyer from Bulgaria also believes that courts impose pre-trial detention too often, which is difficult to reconcile with the presumption of innocence.

Presumption of innocence during the trial phase

When explaining their understanding of the presumption of innocence, most judges from all Member States studied talked about the need to be impartial and independent. A judge from Belgium says that "a judge should start with a blank sheet when listening to the different opinions of the parties and not make an assessment before the case is heard". A judge from Portugal elaborates further that all evidence must be presented during the trial and that a judge cannot be influenced by what happened during the investigations.

"One of my main tasks is, before each hearing, to remind the lay judges that the presumption of innocence is unquestionable, it applies until the verdict is pronounced, and my requirements for them concern particularly the non-verbal approach. I tell them that it is like they are on TV, i.e. everyone is watching their reactions and emotions, and even the slightest facial expression or gesture can somehow suggest that this person, who is part of a panel with equal rights as mine, is prejudiced."
(Judge, Bulgaria)

A judge from Bulgaria notes that lay judges should maintain the same neutral position.

"As one of the teachers during my judge training used to say: 'it's better to acquit one hundred guilty men than sentence one innocent man'."
(Judge, Poland)

Some judges from Belgium, Poland and Portugal underline the importance of the presumption of innocence in the assessment of evidence and establishing the facts beyond any reasonable doubt. If there are doubts, a decision of not guilty should be made in favour of the defendant.

Some lawyers focus on the *in dubio pro reo* principle, meaning that the defendant may not be convicted when doubts about their guilt remain, as a fundamental dimension of the presumption of innocence. They argue that it is their duty to make sure that the court understands that, when in doubt, the ruling must be made in the defendant's favour. A lawyer from Poland explains that the lawyer's role is to provide the court with a different view of a case and highlight the circumstances that were not proved and are favourable to the defendant's case. Furthermore, according to a lawyer from Portugal, this principle has an impact on legal interpretation: whenever there is more than one understanding of a given law, the one that is most favourable to the defendant should be adopted (see Chapter 4 for further information).

Equality of the application of the presumption of innocence

Article 3 of Directive (EU) 2016/343 obliges Member States to apply the presumption of innocence in criminal proceedings equally to any person suspected or accused of a crime, as its wording makes no distinction between the two.

When asked about the equal application of the presumption of innocence, the professionals interviewed provide various responses, from statements that nothing can influence the presumption of innocence to statements that there is no such thing as the equal application of the presumption of innocence, as some people are always perceived as more guilty then others.

About half of the interviewees in all Member States initially state that the presumption of innocence applies equally to all defendants. However, during the interviews, the majority of the professionals identify factors that have an impact on the presumption of innocence. In general, the interviewees agree that investigators and judges do not function in a vacuum and are always bound to have their own beliefs.

The most common factors that interviewees identify as having an impact on the presumption of innocence are previous convictions, nationality or ethnic background, type of crime, gender and social status. The personal prejudices of law enforcement officers and the judiciary make these elements more or less significant. In addition, the external aspect of the presumption of innocence, namely the public image of defendants, is reflected in the way the media report on these factors, which can shape public opinion and, in turn, may also affect the judicial authorities. This is indicated as a possible concern during the interviews.

Media coverage

The vast majority of interviewees – legal professionals and journalists – agree that media coverage can have an impact on the presumption of innocence.

When speaking about the effects of media coverage on the presumption of innocence, many of the legal professionals from the Member States covered highlight the freedom of the press and the unique role of the media as a public watchdog that prevents the police and judiciary from taking arbitrary decisions and actions. Media coverage can have benefits for the overall fairness of proceedings and public scrutiny of the justice system. Legal professionals from Belgium, Bulgaria, Italy, Lithuania and Portugal mention the following examples of such benefits: media coverage can show that the judicial system is effective in the sense that innocent persons are acquitted while criminals are convicted; it ensures accountability of police work and guarantees that sentencing is transparent; and it encourages judges to express themselves clearly and explain complex cases. Journalists in Austria, Belgium and Poland also describe the importance of the media's role in exercising public scrutiny.

For some journalists and legal professionals in Portugal, media coverage can contribute to the impartiality and objectivity of courts and push the judicial system to perform better. An Italian journalist understands media attention as a way of ensuring equity and safeguarding the presumption of innocence until the court makes a final decision. However, several interviewees disagree; for example, one Portuguese prosecutor states that the media put pressure on the courts and often influence public opinion without having complete knowledge of criminal cases.

"In every social, cultural, economic and institutional context, there is always a group that has been objectively and subjectively exposed to prejudices and stereotypes [...]. These are the results of a culture aimed at maintaining hierarchies and power imbalances, and those who are more exposed generally belong to minorities, with the exception of women, who constitute half of mankind [...] in these cases, if the judge is culturally equipped to prevent this prejudice that shapes the social and cultural context, then there is no problem. If, on the other hand, the judge is not aware of the context where the prejudice is active, they risk being a victim of the prejudice themselves."
(Judge, Italy)

"[T]he media take on the role of the public, namely to inform about proceedings and to ensure that a fair trial is respected. [...] The purpose of reporting is, on the one hand, to educate and warn the public and, on the other hand, to have a deterrent effect."
(Journalist, Austria)

"The media has a watchdog role to ensure that the police and judiciary properly follow criminal procedures. If not, the media's task is to bring those issues to light and possibly even cause implications on a policy level."
(Journalist, Belgium)

In addition, interviewees indicate that identifying unknown suspects and preventing possible future crimes are positive effects of media coverage. In Austria, two police officers state that they directly cooperate with the media to help find unknown offenders or identify witnesses. Another police officer, from Bulgaria, believes that media exposure can encourage the criminal justice system to pay more attention to certain crimes, such as domestic violence. A judge from Poland identifies the importance of media coverage for victims, as it creates the feeling that public opinion is sympathetic to them.

"When a high-profile case reaches the front pages of the newspapers, my feeling is that the courts are influenced. By satisfying public opinion judges are not upholding the law, the basic human right called the presumption of innocence. No, the presumption of innocence does not apply as it should."
(Lawyer, Cyprus)

Many interviewees also argue that public exposure affects the conduct of criminal proceedings. A lawyer from Cyprus expresses the view that judges are prone to outside pressure, particularly from the media.

"Media shape public opinion, they impact politicians, prosecutors and judges as well. Maybe in lower instance courts even more. Judges change their behaviour when media are present – they start acting like in a theatre. Everybody there is then busy with creating their own image and not investigating the truth."
(Journalist, Poland)

Similarly, a journalist from Poland observes that media presence affects the dynamics in a courtroom.

"I believe that this noise in the public space affects the presumption of innocence, not only in the community in general, but also among judicial actors. I believe so."
(Judge, Portugal)

A judge from Portugal acknowledges that, in cases covered by the media, judges must try not to be influenced by public pressure. Judges should assess the facts and take special care to explain the reasons for decisions that do not meet public expectations, which media coverage often create.

Journalists agree that their publications have an impact on public opinion and the conduct of proceedings.

"We understand well the general principle of presumption of innocence. However, the competition in the media world forces us to make everything more attractive. Media will use every opportunity to label suspects as, for example, 'a murderer behind the wheel' – if someone was driving under the influence – or 'a monster/a vampire from [...]' – to appeal to our readers' emotions."
(Journalist, Poland)

"The role of media for me is the alpha to omega. It is not the fourth power; it is the first power. Therefore, in order for the journalist to respect the presumption of innocence, it is his duty not to criticise and not to lead the public opinion to conclusions before the court decides. [...] Otherwise, the fair trial may be lost before the commencement of the trial."
(Journalist, Cyprus)

Legal professionals and journalists from Belgium, Bulgaria, Germany, Italy, Lithuania and Portugal also refer to this lasting stigma. A Belgian lawyer explains that "it is impossible to reverse the very negative reporting in the media; even if in the end the client is acquitted it is difficult to remove any remaining stigma". Journalists from Italy and Portugal echo this view.

"Once the suspect is identified [in the media], the presumption of innocence is somehow already violated. Even if the accusations are subsequently refuted, it is difficult to rectify in the media."
(Journalist, Italy)

"An individual who is arrested on suspicion of paedophilia and his face is shown, even after he is acquitted, it is clear that it will be very difficult to get rid of that suspicion."
(Journalist, Portugal)

Several legal professionals and journalists from Bulgaria, Cyprus, Germany, Italy and Poland also note that media attention often does not continue into the trial phase; the media tend to report on the early stages of criminal proceedings and then interest fades. This means that a person's acquittal may not receive the same amount of media coverage as the pre-trial phase.

"From the media's point of view, the proceedings are extremely important. However, in Italy, it is often forgotten and hardly all the steps of the proceedings are followed with the same attention. Indeed, there is a strong focus at the beginning and then the rest is forgotten."
(Journalist, Italy)

An Austrian journalist believes that authorities should do more in this regard, by providing clear information, arguing that, at least in some cases, the media will then report the final outcome of a trial.

"The judiciary should make the course of the trial more accessible to readers and shed light on what actually happened to the defendants. In case of an extreme plot twist, the final verdict will be reported in any case, for example if the accused is surprisingly acquitted."
(Journalist, Austria)

While many interviewees believe that media coverage does not have an impact on the internal aspect of the presumption of innocence, and that judges can and do remain impartial despite the extensive media coverage of their cases, some, including judges themselves, admit that judges can be influenced. A judge from Belgium mentions that, for this reason, they avoid media coverage of cases they are handling or may handle: "Now when I know that a case will be heard by us, I try on purpose to keep a distance." Two lawyers from Germany also believe that media coverage can influence judges, while a lawyer from Bulgaria has heard judges unofficially mention that they would decide on a case one way or another based on media coverage because otherwise the "media will eat me up". In Italy, a lawyer also claims that, if a case attracts public interest and the media report on it, the prosecutor and the judge may feel under pressure to behave in a specific way or to adopt a specific decision, such as a pre-trial detention order. In Poland, prosecutors admit that media interest may influence the presumption of innocence in active investigations. In high-profile cases, prosecutors must deal with media pressure and pressure from their supervisors.

However, all interviewees agree that media coverage has a much bigger effect on the public's perception of a defendant than the judiciary's, reflecting the external or 'public' aspect of the presumption of innocence outside the setting of formal legal proceedings.

Nationality and ethnic background

The ethnic background or nationality of defendants can potentially compromise the presumption of innocence, interviewees mention. This is connected to the way that the media report on these elements and to possible prejudices of criminal justice professionals.

"Some media always mention the nationality. And in my opinion, this is also used to stir up prejudice."
(Judge, Germany)

"In my opinion, a link [between nationality and crime] can really only be drawn if there really are scientifically valid findings on this subject. That there is very clear evidence that this is, so to speak, typical for an ethnic group [...] for instance in case of the subject of honour killings. [...] But apart from that, I would not consider that to be appropriate, because it opens the door again for hypotheses, for conspiracy theories and generalisations."
(Police officer, Germany)

Interviewees from all professional groups in many of the Member States covered (e.g. Austria, Germany, Italy and Portugal) point out that the nationality or ethnicity of defendants is reported differently across the media. They claim that some media outlets tend to report in a negative manner when a defendant is a member of a minority group or an asylum seeker, while media outlets with higher standards report in a more neutral manner.

However, interviewees in all Member States confirm that a defendant's ethnic or national origin can result in negative media coverage.

Nevertheless, many interviewees believe that negative media stereotyping of foreigners and persons with a minority ethnic background has no impact on the outcomes of criminal proceedings. A judge in Italy notes that Italian newspapers always report the nationality of foreign defendants but they report only a defendant's gender if they are Italian. In contrast, some interviewees in Austria believe that public pressure can indirectly influence judges and prosecutors to impose more severe sentences (e.g. in cases of asylum seekers accused of sexual offences). In Cyprus, all interviewees accept that there is widespread prejudice against migrants and non-nationals in society and that the media play a rather negative role in the dissemination of xenophobic and racist material. However, interviewees disagree on the extent to which this may affect the presumption of innocence and ongoing criminal proceedings.

"I had many Croatian clients and I experienced in practice that they are put much faster in pre-trial detention, because Croatia is much less accepted as an EU Member State than France, for example."
(Lawyer, Germany)

The German lawyers interviewed state that foreign nationality is a factor influencing pre-trial detention.

"Roma identity always has an impact, there is nothing to hide or argue. Gender and social identity are not always accounted for, but Roma identity, especially in case of specific crimes like thefts and robberies, is always a factor, nothing to hide here."
(Lawyer, Bulgaria)

With regard to ethnic background, interviewees from Bulgaria, Italy, Lithuania, Poland and Portugal state that Roma, in particular, suffer from prejudices.

A lawyer from Poland refers to an example of a Roma defendant in pre-trial detention whose correspondence was blocked for being written in an 'obscure' foreign language that could not be easily translated.

Lawyers from Portugal observe that some police officers treat defendants differently if they belong to minority groups.

"As if they are dealing with a second- or third-class human being and, you always get that feeling, in the way they address them, when they start treating the person informally, you can see it immediately [...] why would they treat a person this way just because they are black or Roma? This happens very often."
(Lawyer, Portugal)

Police officers, however, reject such criticism and report that this is often used as an argument to discredit the police. As one police officer puts it, people may take advantage of being from an ethnic minority group to put pressure on the police. This officer argues that public scrutiny of police actions is higher in cases when suspects are Roma or black, so police officers tend to be more careful.

Some of the journalists interviewed condemn the trend of focusing on ethnic background, while others say that this is justified occasionally.

"The unspeakable trend of writing about the origin or skin colour of the suspects. This is really quite bad. I think this is one of the worst developments in recent years, because these details are stuck with the reader."
(Journalist, Germany)

"It [publishing certain personal data] must not appear racist. It would be stigmatising to report on the nationality of a person. [...] I believe that it [personal data such as nationality] belongs to the topic if it is part of the biography. [...] I am more in favour of freedom of information."
(Journalist, Austria)

"Ethnicity is a controversial issue that will only be reported if it is relevant to the case. If it is about a grenade attack in Antwerp, and it has to do with drug mafia, and the drug mafia coming from North Africa, for example, Algeria, Morocco, and people of Moroccan origins, I can imagine that it will be reported."
(Journalist, Belgium)

A lawyer from Italy notes that the risk of specific groups experiencing prejudice has changed over time. This interviewee mentions, for example, that in Italy in the 1990s Albanian immigrants were stereotypically seen as criminals.

"[I]t is clear that being Albanian in that period [the 1990s] was not good. The same happens today with being Arab with a backpack on the shoulders [...] it is not good. [...] And so, judges are asked something that is impossible in my opinion; to be detached from society, it is impossible."
(Lawyer, Italy)

Type of crime

Many interviewees from the nine Member States studied report that the type of crime affects the views of legal professionals and is also a decisive factor influencing media coverage and how suspects are portrayed, sometimes more so than the characteristics of the defendant.

Particularly serious crimes, such as sexual offences, attract more media interest and are regarded as particularly despicable. In Belgium, interviewees frequently refer to terrorism cases as being more serious. One lawyer finds that journalists are not careful enough when reporting such cases. In Poland, according to interviewees, media interest is related to the extent of the violence involved. The gravity of the crime, combined with the victim's characteristics – a factor that one of the Polish judges stresses – may influence the presumption of innocence and the media portrayal of the defendant. Journalists interviewed confirm that there is a particular media interest in serious crimes, as the public find these crimes more interesting.

"There is also the satisfaction of curiosity, there are also such more spicy events – more interesting, exceptional, e.g. cruelty. [...] There are many crimes, you will not write about every single one but only about the most interesting ones."
(Journalist, Lithuania)

Some interviewees note that, aside from the media coverage, the type of crime also affects the way that legal professionals perceive defendants. For example, a lawyer from Italy stresses that the right to be presumed innocent is at risk when cases are connected to the Mafia. Defendants involved in such cases tend to be considered guilty and the presumption of innocence is weakened considerably. A lawyer from Bulgaria and two lawyers from Poland also observe that people accused of the most serious crimes are more often detained in custody, even if they do not have a criminal record.

"I am now walking a bit on thin ice – but I feel the need to say this [...] the worst thing for me is when a child says 'I have been abused' – as bad as it is when it's true – but then everyone runs together, it's a huge whirlwind and nobody wants to question whether that's true. Because when a child says that, then it is true. And that is a view of things that I don't like at all."
(Prosecutor, Austria)

Furthermore, the interviewees note that the presumption of innocence may be compromised in high-profile cases involving politicians.

A prosecutor and a judge from Austria observe that child abuse accusations are associated with stigma, which has consequences for the investigative stage of criminal proceedings. Criminal justice professionals are horrified when a child claims to have been sexually abused and tend to believe the child. Consequently, they neglect the presumption of innocence and any exonerating evidence.

Gender

Among the factors affecting professionals, interviewees mention gender the least; however, there are noticeable differences in media coverage of gender.

A lawyer from Bulgaria states that women may be treated better than men, especially when they are charged with crimes that are usually 'associated' with men. A lawyer from Austria also notes a tendency for the presumption of innocence to be granted more often to female than male defendants.

A police officer from Lithuania adds that in domestic violence cases men are usually considered guilty more often than women. A lawyer in Cyprus asserts that, as a rule, judges are more lenient towards women and are reluctant to convict them or impose a prison sentence. A judge from Italy refers to another aspect of gender-based violence. This judge stresses that women who are victims of gender-based violence – despite being victims – are always affected by prejudices and exposed to secondary victimisation, both outside the courtroom, in their social context, and during the proceedings.

"I think that when it comes to female defendants, this discrepancy between how a woman should be and how she actually is often referred to."
(Lawyer, Germany)

Interviewees across countries claim that a defendant's gender can have an impact on media coverage. Some interviewees believe that the media are more sympathetic towards female suspects. For example, interviewees in Austria believe that the media present female defendants as less harmful than men who are suspected of comparable offences. In Belgium, too, some respondents find that women who commit violent acts may be portrayed more leniently than men; the justification for this is that emotional reasons are said to drive women to commit crimes. In Germany, according to two defence lawyers, the media report cases involving male and female suspects differently, often using sexist clichés.

This interviewee provides an example of a female suspect whom the media portrayed as an 'angel-faced killer with ice-cold eyes'.

A criminal judge from Italy considers that the media generally reinforce gender stereotypes. According to this judge, when a case concerns offences perpetrated by a criminal organisation, female defendants are generally presented as being manipulated by or operating on behalf of the male suspects or the organisation itself; they are not deemed capable of perpetrating serious criminal offences themselves. The judge argues that, when a case concerns gender-based violence, the media generally justify and describe the actions of male defendants as acts of jealousy or as a reaction to the victim's actions or attitude.

In other countries, interviewees see no gender differences, or see differences depending on the crime. A Belgian judge says that the public may be sympathetic if a battered woman kills her husband, whereas a woman may be conceived very negatively if she kills her child. Similarly, interviewees in Bulgaria and Lithuania note that negative media coverage and public opinion is seen particularly when a mother commits a crime against her child.

In Cyprus, most interviewees consider that gender is an important factor that influences media coverage. However, interviewees express different opinions on the extent to which, and how exactly, gender can affect the judicial process. Many interviewees refer to a recent case in this area.

"I think that in cases related to harm against children, when the defendants are the parents of the child, the woman, mother, is condemned more than the man, father. The prevailing attitude in society is that the mother's duty is to her child, while the father is not obliged to be involved in childcare and the mother is always guilty if anything happens."
(Police officer, Lithuania)

Gender of the defendant and public perception – a case from Cyprus

The interviewees refer to a case, reported as ***L.F.***, that was hotly debated in the Cypriot media and received international attention and publicity in 2019 and early 2020. A 19-year-old woman complained to the police about a group of Israeli men gang raping her in a tourist resort after she had consensual sex with one of them in a hotel room. The Israelis disputed her allegations, arguing that the sex was consensual.

Videos circulating on social media allegedly showed her having consensual sex with all of the men. Activists discovered that the videos were fake, as they had been posted on a porn site several years earlier. Local people, including the mayor of the tourist resort, used strong language in the media, arguing that the victim was lying.

The victim was arrested and taken into police custody for several weeks, during which she retracted her allegations of rape and withdrew her complaint, without a lawyer being present. She was charged with making a false complaint and was convicted by the court, which imposed a suspended prison sentence. The Israeli men were never prosecuted and returned to Israel, where they received a hero's welcome.

Two of the three female prosecutors interviewed express their concerns and agree that prejudice against women was a factor in the ***L.F. court decision***. Most of the other interviewees, including the police press officers, consider that the public references to guilt violated the presumption of innocence in this case. One of the prosecutors interviewed believes that there was an infringement of the presumption of innocence of the woman, who was immediately labelled as guilty of false accusations, although several of the other prosecutors interviewed disagree with this view.

Previous convictions

Most of the interviewees from the Member States studied say that previous convictions negatively affect the presumption of innocence. However, the media do not seem to particularly report this factor.

Police officers from Portugal acknowledge that one of their first investigative actions is to check whether or not a suspect or an accused person has any previous convictions.

"If the databases tell us that the possible suspect already has a history of, for example, forgery, it is an investigation worth investing in. If they don't, it may be that an investigation, instead of being a priority, will be carried out later on when we have more time."
(Police officer, Portugal)

"I can't tell you that previous convictions do not have an impact, because they always do, even on a subconscious level. So from here on it is subjectively the task of every officer, depending on their education and conscientiousness, to exercise self-control not to fall into a situation where the evidence gathered has a pre-defined value or, even if it is not very concrete, to just decide that person X is the perpetrator and that is that."
(Police officer, Bulgaria)

A police officer from Bulgaria further explains that previous convictions are very significant because they can influence officers.

The interviewees emphasise the need to distinguish the role of previous convictions in sentencing and during the pre-trial and trial stages. In sentencing, once guilt is proven, previous convictions can legally be taken into account and can result in a more severe sentence. However, during the pre-trial and trial phases, only the facts of the case should be considered. Nevertheless, if a defendant is presented as someone who is inclined to commit crimes, previous convictions can influence the course of criminal proceedings.

"This really is the triumph of the violation of the presumption of innocence principle. I once dealt with a very peculiar case of a defendant with such a huge criminal record that it had to be book-bound! [...] it was a real war! Because as the judge told me: 'Lawyer, a man that is able to range so easily among the criminal code's dispositions, cannot be anything else but guilty'. Well, this is exactly the denial of this principle."
(Lawyer, Italy)

"Even if they are sentenced only once before, when they are in the courtroom again, they are considered guilty and, when deciding on the remand measure, their previous conviction is taken into account, which is somehow equal to presuming that they are guilty."
(Lawyer, Bulgaria)

Police officers from Lithuania point out that criminal records also matter when remand measures are considered. First-time suspects are looked on more favourably. A lawyer from Bulgaria observes the same practice.

Social background

Interviewees mention that the financial and social situations of defendants can sometimes compromise the presumption of innocence and the general outcome of criminal proceedings.

One lawyer from Bulgaria points out that defendants who are homeless often experience inequalities in the application of the presumption of innocence. A prosecutor from Lithuania also notes that social support from the state is often associated with alcohol addiction, unemployment and criminal activities.

"The police appears to believe that well-to-do people are above suspicion whilst poorer people are always suspected. In some cases, the innocence of a suspect was taken for granted because the suspect was a member of a disciplinary committee. The opposite applies for people who look poor and for migrants."
(Prosecutor, Cyprus)

"I have seen very tough lawyers appointed to low-income defendants, sometimes because they are young or because they get intensely involved in the defence. I have seen very competent defences from appointed lawyers. But, of course, it makes a big difference having a good lawyer or an average or weak lawyer."
(Prosecutor, Portugal)

Prosecutors from Poland and Italy suggest that the police treat defendants who can afford legal representation differently from those who are not represented by a lawyer during investigations. However, a prosecutor from Portugal argues that good lawyers may still represent low-income defendants.

In contrast, a judge from Austria says that their past experiences make them more critical when assessing the testimonies of persons with a higher social status.

Other factors

The interviewees also mention other factors that influence the presumption of innocence. For example, finding oneself in the wrong place at the wrong time may have a prejudicial effect. A judge from Italy says that judicial authorities are inclined to consider a person guilty if they are arrested in an area where drug dealing often takes place, especially when the person has previous convictions for the same offence. A lawyer from Germany shares very similar reflections.

"If you have someone who is arrested at [places known for drug trafficking], then there is no presumption of innocence in the proceedings. Then you can repeat as often as you like that twenty metres' distance at night is not a good observation situation, and that there were several people who looked just like the suspect, so that it is completely unclear whether the client is the perpetrator – they will not listen to you."
(Lawyer, Germany)

Safeguards: how to ensure that all defendants are equally presumed innocent

When asked about how they ensure that all defendants are treated equally with regard to the presumption of innocence, interviewees refer to the personal ability of individual judges and institutional safeguards. Some professionals mention self-control and self-awareness. A judge from Italy says that a judge's decision must be rational, evidence based and sound enough to be confirmed by a second-instance court; this is a way of limiting the influence of the judicial authorities' personal opinions on the outcome of judicial proceedings and on the presumption of innocence.

"It is clear that the judge has their own ideas. I don't believe that judges are robots: they have their ideas and prejudices. As all the other people, we are influenced by our own experiences and these have an impact on the way we carry out our job. The great deal for us is that during the proceeding we are able to overcome our prejudices!"
(Judge, Italy)

With regard to institutional guarantees, interviewees mention that consulting with colleagues is important.

"Even if I reach a decision alone, this will not lead to very negative consequences, because nobody works alone, there is always a team, other colleagues, with whom you discuss, consult, and seek the truth."
(Police officer, Bulgaria)

Another judge from Italy stresses that greater gender diversity among criminal judges may reduce the impact of personal bias and prejudices on the presumption of innocence of defendants. According to this interviewee, the judiciary is more gender balanced than in the past, when judges were mostly men, who were more inclined to identify with male defendants. The interviewee reports that, in the past, gender-based violence and domestic violence cases often did not come to court and, when they did, defendants were generally found not guilty. There is also an issue with ethnic diversity: the interviewee stresses that all judges in Italy are white, which may have an impact on the presumption of innocence of a black defendant.

Endnotes

1 **Directive (EU) 2016/343**, Art. 3.
2 Court of Justice of the European Union (CJEU), C-310/18 PPU, ***Milev***, 19 September 2018.
3 **Directive (EU) 2016/343**, Art. 2 and recitals 11 and 12.
4 The term 'charge', as used in the ECtHR jurisprudence, is a narrower term corresponding to any official notification given to an individual by the competent authority of an allegation that they are suspected or formally accused of having committed a criminal offence. Therefore, the term 'charged' under the ECHR does not correspond to the scope of and, in particular, the terms 'suspect' and 'accused person' used by Directive (EU) 2016/343, as the former commonly refers to persons subject to a more advanced stage of criminal proceedings, while the latter also includes persons engaged in earlier stages of an investigation. For further information, see, for example, Council of Europe/ECtHR, ***Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (criminal limb)***, updated 31 August 2020, p. 9–11.
5 United Nations (UN), General Assembly, **Universal Declaration of Human Rights** (UDHR), Resolution 217A, Paris, 10 December 1948, Art. 11; Council of Europe, **European Convention on Human Rights** (ECHR), Rome, 4 November 1950, Art. 6 (2); UN, **International Covenant on Civil and Political Rights** (ICCPR), 16 December 1966, Art. 14 (2); Inter-American Commission on Human Rights (IACHR), **American Convention on Human Rights** (ACHR), San Jose, Costa Rica, 22 November 1969, Art. 8 (2); African Union (AU), **African Charter of Human and Peoples' Rights** (ACHPR), Nairobi, Kenya, 1 June 1981, Art. 7 (1) (b.); EU, **Charter of Fundamental Rights of the European Union**, OJ 2012 C 326, Art. 48.
6 ECtHR, ***Deweer v. Belgium***, No. 6903/75, 27 February 1980, para. 56.
7 For more details on jurisprudence regarding the freedom of the press, see ECtHR, ***Guide on Article 10 of the European Convention on Human Rights***, 31 March 2020, p. 50.
8 See, for example, ECtHR, ***Natsvlishvili and Togonidze v. Georgia***, No. 9043/05, 29 April 2014, para. 105; see also Council of Europe/ECtHR, ***Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb)***, updated 31 August 2020, p. 66, para. 352.
9 ECtHR, ***Paulikas v. Lithuania***, No. 57435/09, 24 January 2017, paras. 58–63.
10 Bulgaria, **Constitution of the Republic of Bulgaria** (*Конституция на Република България*), Art. 31 (3); Cyprus, Constitution of the Republic of Cyprus (***Σύνταγμα της Κυπριακής Δημοκρατίας***), Art. 12 (5); Italy, **Constitution of the Italian Republic** (*Constituzione della Repubblica Italiana*), Art. 27.2; Lithuania, **Constitution of the Republic of Lithuania** (*Lietuvos Respublikos Konstitucija*), Art. 31 (1); Poland, **Constitution of the Republic of Poland** (*Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*), Art. 42 (3); Portugal, **Constitution of the Portuguese Republic** (*Constituição da República Portuguesa*), Art. 32 (2).
11 Bulgaria, Criminal Procedure Code (***Наказателно-процесуален кодекс***), 28 October 2005, Art. 16; Poland, Code of Criminal Procedure (***Kodeks postępowania karnego***), 6 June 1997, Art. 5.
12 Austria, Criminal Procedure Code (***Strafprozessordnung 1975, StPO***), Federal Law Gazette No. 631/1975, Section 8; Belgium, Code of Criminal Procedure (***Code d'instruction criminelle***, *Wetboek van strafvordering*), Arts. 21*bis* and 28quinquies, Chapter III*bis*, Book I, publication in the Belgian Official Gazette 31 January 2013, entered into force 12 February 2013; Art. 61ter, Chapter VI, Book I, publication in the Belgian Official Gazette 12 March 1998, entered into force 2 October 1998; Germany, Criminal Procedure Code (**Strafprozessordnung, StPO**), Federal Law Gazette of 7. April 1987 (BGBl. I S. 1074, 1319), last amended on 21. December 2020 (BGBl. I S. 3096).
13 **Directive (EU) 2016/343**, Arts. 2 and 3 and recital 12.

2
PUBLIC REFERENCES TO GUILT

This chapter focuses on how both criminal justice officials and other public officials refer to defendants publicly. It presents the legal standards concerning public references to guilt, followed by the professionals' opinions on the impact of public statements, including media reports, on the presumption of innocence.

2.1. LEGAL OVERVIEW

In a society governed by the rule of law, a defendant's guilt can legitimately be established only in a trial conducted by an independent court. No other state actor is allowed to refer publicly in any way to a defendant's guilt or innocence.

Article 4 of Directive (EU) 2016/343 requires Member States to ensure that public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to defendants as guilty unless they have been proven guilty according to the law.[1] Recitals 16 and 17 specify that both criminal authorities and public officials and ministers of state are bound by this principle.[2] Recital 19 specifies that Member States should ensure that public authorities respect the presumption of innocence when providing information to the media. However, respecting the freedom of the press and other media, the directive does not include any references to how the media should report on criminal cases. Furthermore, when addressing Member States' authorities, the directive does not attempt to regulate the conduct of journalists.

International law

The ECtHR holds that any judicial decision or statement by a public official reflecting an opinion that a person subject to criminal proceedings and charged with or suspected of having committed a crime is guilty before their guilt has been proven violates the presumption of innocence if it encourages the public to believe that the suspect is guilty or prejudges the competent judicial authority's assessment of the facts.[3] The principle of the presumption of innocence does not prevent authorities from informing the public about criminal investigations in progress; however, it requires that they do so with all the discretion and circumspection necessary to respect the presumption of innocence.[4] These standards are reflected in the case law of the ECtHR.[5] Similarly, the International Covenant on Civil and Political Rights (ICCPR) requires all public authorities to "refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused".[6]

According to the case law of the ECtHR, actors bound by the presumption of innocence include judicial authorities, the police and other law enforcement authorities and state representatives outside that system, including ministers and government officials.[7] If a public official's conduct is likely to be interpreted

as indicating that they assume a defendant to be guilty before a court's binding guilty verdict, it violates the presumption of innocence.[8] It appears from the jurisprudence that the rationale behind this external dimension of the presumption is twofold.[9] First, state actors should not influence public opinion in a way that may have an impact on those involved in criminal justice proceedings. Second, state actors should not create the impression that a defendant's guilt has been decided before a binding court decision is issued.

The ECtHR has also ruled that a virulent press campaign may adversely affect trial proceedings and the presumption of innocence by influencing public opinion, especially when jurors are involved.[10] Journalists who enjoy freedom of speech may make harsh comments, especially when public figures are involved. However, according to the ECtHR, they should not intentionally or unintentionally publish statements that reduce a defendant's chances of benefiting from a fair trial or undermine public confidence in the role of the courts in the administration of criminal justice.[11] The possible influence of media reports on judges or jurors at the time of proceedings must be objectively assessed, focusing on whether indeed particular media publications had or might have had an influence on judges or jurors at the time of proceedings.[12]

In General Comment No. 32, the United Nations Human Rights Committee also states that "media should avoid news coverage undermining the presumption of innocence".[13] Accordingly, the media may be held liable to compensate defendants for slander or defamation, for example as provided by the Austrian Media Law.[14]

2.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON ISSUING PUBLIC STATEMENTS IN CRIMINAL CASES

This section looks at the legislation and legal professionals' and journalists' views on public statements and the presumption of innocence.

All of the interviewees agree that, when reporting on criminal cases, a balance has to be found between media freedom and respect for the presumption of innocence.

National legal overview

All Member States covered in the research regulate how public authorities liaise with the media and journalists in order to respect the presumption of innocence. This includes the use of data protection laws and legislation protecting the confidentiality of investigations. Some Member States have detailed rules and guidelines governing public statements whereas others have more generic provisions.

In five Member States – Austria,[15] Belgium,[16] Cyprus,[17] Poland[18] and Portugal[19] – legislation regulates how the police, the prosecution and the courts can provide information to the media while respecting the presumption of innocence and confidentiality.

In three states, namely Bulgaria,[20] Germany[21] and Italy,[22] internal guidelines for courts and prosecutors and for police officers regulate the provision of information to the media. In addition, in Germany, in 2019 a working group presented proposals on legal regulation of this issue.[23]

In Lithuania, there are no explicit provisions regulating public references to guilt. However, the Constitutional Court holds that all state institutions and officials have a general duty to refrain from referring to a person as a criminal until that person has been found guilty by a court.[24]

Given the different approaches across the Member States covered, it is difficult to categorise them into groups. The rest of this section presents an overview of the instruments regulating the conduct of the media in the nine Member States studied.

In Austria, the code of conduct for journalists does not refer to the presumption of innocence as such, but requires respect for the dignity of the person and the protection of other fundamental rights.[25] A self-regulating body monitors it and may hear complaints.

In Belgium, the press has no legal obligation to respect the presumption of innocence under its code of conduct; rather, it has an ethical obligation.[26] However, the courts can oblige the media not to publish information that might violate the presumption of innocence, as they must report on criminal investigations in an impartial and reserved manner.[27] In recent cases, a ministry even tried to hold journalists accountable as accomplices of the perpetrator for breach of confidentiality of an investigation.[28]

In Bulgaria, a non-binding media ethics code requires journalists to respect the honour and dignity of citizens.[29]

In Cyprus, the code of conduct for journalists explicitly requires respect for the presumption of innocence, while its interpretive guidelines regulate in detail how journalists should report on criminal cases.[30] The Cyprus Media Complaints Commission deals with complaints about press conduct, but there

is no effective enforcement mechanism, as no sanctions are provided for. In contrast, the Broadcasting Authority monitors radio and television and may impose fines based on the code of practice that is appended to television broadcasting legislation.[31] In addition, subsidiary legislation and guidelines on electronic media practice refer to the protection of the presumption of innocence.[32]

In Germany, the press code stipulates that reporting must be free of prejudice and that the presumption of innocence also applies to the press. The Press Council may issue a non-binding opinion or a reprimand when it considers it necessary. According to case law, the impression that a person has already been convicted must not be given, and persons affected can bring a defamation action if they so wish.[33]

Journalists and the media in Italy are subject to detailed guidelines on the obligation to respect the presumption of innocence; however, the implementation of these guidelines depends on self-regulation.[34]

In Lithuania, codes of conduct adopted by self-regulating bodies of journalists and the media prescribe how they must respect the presumption of innocence when reporting on criminal cases.[35]

In Poland, legislation provides for civil and disciplinary sanctions for journalists who infringe the presumption of innocence.[36]

In Portugal, both legislation,[37] which gives rise to disciplinary proceedings, and a code of conduct[38] oblige journalists to respect the presumption of innocence.

However, online sources, such as various news sites not belonging to media outlets, blogs and social media, appear to be largely unregulated in all Member States.

Public statements in criminal cases: cooperation between legal professionals and the media

Article 4 (3) and recitals 18 and 19 of Directive (EU) 2016/343 allow Member State authorities to liaise with and provide information to the media, provided they respect the presumption of innocence when doing so.

The nine Member States studied have specific public relations departments or contacts within the police, prosecution services and criminal courts. They liaise with the media on criminal cases, for example by issuing press releases. Defence lawyers tend to liaise less with the media, doing so on an ad hoc basis. Legal professionals interviewed also appear to avoid contact with the media, at least during the investigative stage of proceedings.

This section focuses on the actual practices of the professionals interviewed when liaising with the media, including examples of good practice. It also includes the views and experiences of the journalists interviewed.

"Unfortunately [sanctions] do not exist except in the case of television and radio, no sanctions are imposed by the competent bodies [to journalists] in cases of violations of the Code of Ethics. [...] The worst situation is on the internet media where there is no code of conduct."
(Journalist, Cyprus)

"No, there is no guidance, media outlets prepare their own manuals on how to report on criminal cases. Media law is from 1984 and virtually non-existent in practice. However, journalists, also from tabloids, know how to deliver the message but still report within the limits, what wording to use in order to not end up in a court."
(Journalist, Poland)

"We implement and respect the presumption of innocence when we issue a statement about an offence. Our announcements do not picture the suspect, who is innocent until the contrary is decided by the court. We refer only to the age and gender. [...] If probed by journalists, we also say if the person is a foreigner or a Cypriot citizen."
(Police officer, Cyprus)

"We have very good informal contacts with police – if we work in this field long enough. [...] Formal contacts, on the other hand, are nowadays very difficult."
(Journalist, Poland)

"It is increasingly disappearing [a relationship of trust with individual police officers], because the colleagues no longer have time to maintain and build up these contacts."
(Journalist, Austria)

"In principle, the relationships are good and healthy in a sense that we neither love each other too much, nor confront each other. These two extremes are bad for both institutions, and for society as a result, because the information would be biased. There is a healthy balance, the police is partly [sharing information in doses], we partly find out more than we should know."
(Journalist, Lithuania)

"[T]here is a relationship that is as I say – it is an institutional relationship that I would say works, that it is honest on the part of the police and I think they do not want to deliberately deceive journalists. I think this is something that does not happen. Then, obviously there is an informal relationship because journalists need to have sources in addition to official sources. If we stick to official sources, nothing would be done."
(Journalist, Portugal)

"Of course there are benefits and risks when liaising with the police. [...] the police may want to direct public opinion in one direction, while there is another point of view and another version. Not a few times I can tell you that we have found that things were not exactly as the police have announced [...]. For example, to take the commission of a crime when there are suspects, it is difficult to have the side of the persons under investigation, because they are in detention, it is forbidden to approach them, it is forbidden to take statements from them."
(Journalist, Cyprus)

Police

In the nine Member States studied, the police maintain contact with the media through spokespersons. Typically, police officers prepare memos for press officers and rarely speak directly to the media about their own cases. In Portugal, police officers interviewed report a change in their relationship with the media in recent years, from a position of discretion to one of interaction. An Italian police officer stresses that they must choose carefully the words they use and the information they provide to avoid inaccurate media reporting. A police officer in Cyprus who is familiar with liaising with the press notes that the presumption of innocence can be respected by providing only limited information to the media.

In Bulgaria, the police must obtain the approval of a prosecutorial spokesperson before making public announcements about a case. In Italy, where, similarly, the police are able to provide information on a case only in the presence of the prosecutor, a criminal judge reports that sometimes police officers do disclose information about cases on television in the absence of a prosecutor. The same interviewee also raises the concern that police officers often take part in interviews with the media on cases they have been working on.

Journalists' experiences of liaising with the police range from very good to problematic.

Judges and prosecution services

In all Member States studied except for Cyprus, prosecution services and the courts have spokespersons who liaise with the media. Interviewees in Belgium emphasise that spokespersons are bound by internal guidelines, including guidelines on respecting the presumption of innocence. They must stay close to the facts and limit the provision of information that can identify a suspect (i.e. by referring only to the age, gender and area of residence of defendants). Spokespersons avoid communicating about suspected or accused children in criminal proceedings. An Austrian judge involved in court public relations emphasises that the protection of defendants' privacy is the most important guiding principle in their work. Similarly, prosecutors in Lithuania state that they limit the information released to the public during pre-trial investigations but that, if a case attracts public attention, it is difficult to avoid some kind of commentary. According to one prosecutor, press officers use careful wording to avoid accusing someone of a crime, such as 'a person is suspected of having committed a crime'.

As interviewees from Italy state, a defendant's identity can be mentioned in a press conference only if it is already public and the case is not covered by confidentiality of the investigation. Judges and public prosecutors are not allowed to disclose information on investigations that are still ongoing and subject to judicial confidentiality. In Austria, a judge with experience in speaking on behalf of the courts explains that they liaise with the media only after informing all parties involved (e.g. defence lawyer, prosecution). This is an "inviolable rule" to protect the privacy of defendants and witnesses. In practice, case files and indictments are not accessible to the media and only the first name and first letter of the surname of defendants are provided, although some defendants are already in the public eye or liaise with the media themselves. When the media do obtain more information, it is assumed that lawyers have provided it. A Bulgarian prosecutor with experience as a spokesperson explains that, although journalists often pressure them for advance information, they are careful and provide information only about past events, not future plans.

In Germany, two interviewees in charge of press and public relations refer to several challenges. One describes how the public prosecutor's office once tweeted about an indictment too early, when it was not yet clear if there would be a trial. The office included the suspect's first name and first letter of their surname. The media identified the suspect and some newspapers incorrectly reported on the case. Ultimately, the court found insufficient evidence to commit the case to trial and the interviewee accordingly issued a press release. However, the media had already 'condemned' this person.

A judge from Bulgaria notes that problems occur when the media contact lay judges outside the court where judges cannot oversee their behaviour.

Journalists confirm that communication between the courts and the media is strictly formal.

"That is actually a rather correct relationship. The judiciary is cautious and the media is respectful of the judiciary, maybe sometimes even too respectful."
(Journalist, Austria)

"Judges don't actually speak, they have their spokespersons. It always depends, there are a lot of personal contacts with the public prosecutor's office."
(Journalist, Germany)

"It is a complex relationship. Sometimes we manage, sometimes we get in the way. [...] I think the prosecutor's office also sometimes needs to communicate through newspapers. The actions taken, the ongoing procedures, etc. Other times when we find out that they are investigating something that is still under secrecy, and they don't want it to be known, we also publish it. It is not that perfectly symbiotic relationship."
(Journalist, Portugal)

However, one journalist in Portugal acknowledges that the relationship is not "perfectly symbiotic".

Lawyers

"[T]here is an attempt on our part to express ourselves in such a clear way that not a single part or a single sentence of what we say can be used for presenting completely manipulated information."
(Lawyer, Bulgaria)

Defence lawyers appear to be particularly wary of the media. Lawyers interviewed in the nine Member States studied generally avoid communicating with the media during investigations or pre-trial proceedings. Some lawyers in Austria and Bulgaria report distrusting the media as they have misreported facts in the past. For example, a lawyer in Austria claims that journalists have poor knowledge of the criminal justice system and tend to write lurid articles that do not accurately represent what defence lawyers have said; instead, they report incorrect facts and allegations. A Bulgarian lawyer notes that extremely clear communication with the media can help to avert this.

"The most common practice is for the media to depict a suspect as guilty and then add a paragraph at the bottom to say, 'of course we respect the presumption of innocence'."
(Lawyer, Cyprus)

Another lawyer from Austria says that the media are more interested in gathering information from the prosecution than from defence lawyers, "because the defence lawyer is always suspicious, the one who is on the side of the bad guys". According to some lawyers in Austria, the media include a standard note in their articles to protect themselves, such as 'the presumption of innocence applies', which they think enables them to report anything. A lawyer in Cyprus shares a similar observation.

Lawyers in Cyprus and Italy argue, however, that some lawyers liaise with the media as necessary to protect the public image of a defendant, or to present the defendant's views to counterbalance police statements that may be misleading or suggest that the defendant is guilty. In this regard, and contrary to the view of the majority of lawyers, one lawyer in Portugal states that he has frequent contact with the media to defend clients in the extra-procedural sphere and to generate public resonance that could influence the outcomes of proceedings.

"I have very frequent contacts with journalists about ongoing cases, and I have contacts on and off the record and I think it is essential that the lawyer has these contacts. [...] I think that speaking in public about the cases and having these contacts is absolutely essential for two things, one to defend clients in the extra-procedural sphere where their rights, freedoms and guarantees, the right to a good name, honour, are also at stake and, I know that what I am going to say next is controversial but I have no problem saying it, [...] I think that the public resonance of the case influences its outcome."
(Lawyer, Portugal)

A journalist in Poland echoes the importance of lawyers communicating with the media, stating "It would be good for them to be more accessible – people want to understand."

"We attempt to achieve balanced coverage in the reporting. If the prosecution gives a statement, we try to include the perspective of the defence too, but in reality this is often more difficult to come by [person in detention, unclear who the lawyer is]."
(Journalist, Belgium)

Meanwhile, a journalist in Belgium mentions the difficulty of obtaining 'the other side of the story', that is, hearing from the defence, when initially reporting on a case.

Persons other than legal professionals communicating with the media

Interviewees from several Member States, such as Belgium, Bulgaria, Germany and Poland, also refer to victims of crime and politicians publicly commenting on investigations and trials, which can influence a defendant's right to the presumption of innocence.

Politicians commenting on criminal cases – a case from Belgium

On 23 March 2017, the police in Antwerp, Belgium, were informed that a car with a French number plate had been driven recklessly at high speed along the main shopping street. The driver ignored the orders of two military officers (since the terrorist attacks of 2016 military personnel have been deployed in certain areas of Antwerp) and fled. He was later found in his car in a public car park, listening to music and clearly under the influence of drugs. The police found an airsoft weapon, two decorative daggers, a disassembled riot gun, a military camouflage vest, a water bottle, a (stolen) laptop, USB sticks and four mobile phones in his car.

On the same day, during a press conference, the city mayor expressed the opinion that this was most likely an attempted terrorist attack, although the prosecutor accused the driver not of terrorism but only of the possession of illegal weapons, reckless driving and substance abuse. The criminal court found him guilty of these charges on 24 May 2019.

Immediately after the press conference the media nicknamed the suspect the 'Meir terrorist'. His blurred photo and images of his arrest were published in the media. Even though it was clear after only a few days that there was no terrorist link, the media continued to refer to the driver as the 'Meir terrorist' until the court verdict.

In Germany, a judge expresses concerns about public statements made by lay persons acting as joint prosecutors (*Nebenkläger*, meaning victims of crime or relatives of victims of crime joining the proceedings on the prosecution's side, with their own rights[39]). This judge notes that their statements can "actually lead to a violation of the presumption of innocence, because of course the professional distance is not there". A German defence lawyer also believes that joint prosecutors can influence judges by publishing images and stories of victims' relatives. Several interviewees in Bulgaria also note that victims' public statements given outside a courtroom, for example during a press conference or in interviews with journalists, can also undermine the presumption of innocence.

Interviewees from Belgium, Bulgaria, Germany and Poland all refer, in particular, to public officials publicly commenting on cases for political reasons. For example, the police and prosecutors in Belgium find that such statements can be detrimental to ongoing investigations. A police officer in Bulgaria also notes that, when a prominent politician makes a statement, the public often take this as sufficient evidence of guilt.

Some police officers in Poland observe a growing tendency for criminal proceedings to be used for political purposes. Several interviewees in Poland – prosecutors, judges and lawyers – present the example of a press conference held in 2007, after the arrest of a famous cardiologist in Warsaw for corruption and malpractice, to highlight the specific issue of conflicting double roles and competences. A high-ranking government official, who was also a prosecutor, remarked: "This gentleman is not going to kill anyone else." This was seen as a clear violation of the presumption of innocence and an abuse of media communication measures.

"Comments from politicians, other activists and even the journalists do not have a positive impact, because without being involved in a particular case, without a legal background enabling them to assess the situation, without knowing in detail the entire body of evidence, they are planting in the society some preliminary assessment, which is not correct. Misperceptions are created, people are left with a certain attitude, which subsequently, when the relevant court decision is issued, if it does not coincide with what they have built as their perception of the outcome of the case, creates dissatisfaction, which is very often unjustified, insofar as people are not familiar with the whole body of evidence."
(Prosecutor, Bulgaria)

Possible political interference in criminal cases – a case from Germany

The question of political interference arose in proceedings concerning a fatal stabbing in Chemnitz, Saxony, in August 2018. The suspect came from Syria, which led to right-wing extremists holding a series of racist demonstrations and violent riots in Chemnitz. The mayor of Chemnitz described a possible acquittal of the Syrian suspect as 'difficult' for her city. She said that she hoped for a conviction so that the relatives of the victim could 'find peace'. As elections were to take place in Saxony that year, there was speculation that fear of an acquittal would provide further arguments against the so-called 'criminal refugees'.

The accused was convicted and sentenced to nine years and six months in prison. Some media organisations and the defence lawyers criticised the judgment for being politically motivated. They pointed to the lack of clear evidence (the absence of the suspect's DNA on the weapon or victim, and the lack of injuries that could indicate a physical confrontation with the victim) and cited issues with the main witness, who allegedly contradicted himself. After an unsuccessful appeal, the judgment became final in May 2020.

Leaks to the media

Despite the formalised communication between the authorities and the media, leaked, and often inaccurate, information may negatively affect a person's presumption of innocence, especially during the pre-trial phase. Many interviewees across all countries studied argue that both the police and victims and their representatives leak such information.

Many lawyers from Belgium, Italy and Poland complain that the media regularly publish information related to ongoing investigations, even before the defence has received this material.

"It happens unfortunately too often in Italy that newspapers obtain information far before the defendants and the lawyers. Even if investigations are confidential, it is possible to read parts of investigations' reports, interrogations or wiretapping interceptions that I, as a lawyer, have never seen before and will probably have the chance to analyse in six months when the investigations are officially concluded. [...] many times it is better to open the newspaper and read the information than resorting to public prosecutors' offices because they won't tell you anything."
(Lawyer, Italy)

According to all professionals from Portugal, such leaks serve the interests of one of the parties in the case, by trying to either influence public opinion or legitimise some investigative actions.

An Austrian lawyer identifies the police as the source of such leaks. This lawyer refers, in particular, to a case in which an expert's opinion, available only to the police, was leaked to the press. The lawyer also says that complaints made against police officers have few consequences, as in this case. An Austrian prosecutor also says that police officers may leak the nationalities of defendants. A police officer from Bulgaria refers to a case in which the police leaked information to the press that helped them apprehend the suspects.

In Cyprus, all police officers acknowledge that suspects' names are regularly leaked, sometimes even by police officers themselves. According to one officer, in Cyprus, a small close-knit society, it is difficult to keep information confidential to protect the presumption of innocence. All the prosecutors and most of the defence lawyers interviewed in Cyprus consider that cooperation between the media and the criminal justice system is a problem and poorly regulated. Many lawyers not only have a close relationship with individual journalists, but also liaise and have business arrangements with media outlets. As one media expert explains: "some of the big law firms control the share capital of a media group [in Cyprus], therefore have direct access to the media and indirectly to journalists".

A Bulgarian lawyer openly accuses journalists of bribing court and prosecution clerks to supply them with information. A German police officer, confirming the above, indicates that in several cases his colleagues sold confidential police information to the press.

"Unfortunately, it has already happened that colleagues revealed official secrets in response to enquiries from members of the press [...] for a fee [...]. Or that I have to find out that sometimes a representative of a tabloid newspaper is suddenly already on the spot during an undercover search – so that I ask myself: How are they supposed to know?"
(Police officer, Germany)

Journalists in several Member States also confirm the existence of informal contacts within the police and the leaking of information to the media, which affects the presumption of innocence.

"We also have undercover people who report observations."
(Journalist, Austria)

"We receive emails from police officers where they anonymously inform us about cases. These pieces of information have to be later verified. But these leaks happen."
(Journalist, Poland)

"[Police officers] take journalists to their raids, to detention operations, and there are times when you make friends and see some wrongdoing but have to choose. If a violation is small and you choose to report it, you lose your source, and while keeping silent you can strengthen the friendships and win more for the future. It is like everywhere else."
(Journalist, Lithuania)

"[T]he trap when it comes to cooperation of police with journalists: many times, in the early stages of a case there is off-the-record information. But this information often hides pitfalls [...]. And I will give a typical example: about a year ago there was a crime that had frozen the public opinion here in Cyprus, and the police were telling us off the record that, they were showing us that the killer was someone else. They gave us some information, we transmitted this information and at the end of the day – at least I as a journalist and other journalists – felt ashamed that we transmitted this information because we stigmatised a man as a murderer and in this case he was a minor and the police hid behind informing us off the record [...]."
(Journalist, Cyprus)

Victims' representatives are also identified as sources of leaks. A Belgian judge mentions a case in which a witness provided his views on the case to the media before he appeared in court. Although the judge in this case reported that this did not impact on his own judgment, it may have influenced other judges. Two judges interviewed in Austria add that some victims are more willing to talk to the media than to testify to the police. A prosecutor also believes that victims sometimes leak information about the nationality of suspects.

According to a lawyer from Belgium, there are also structural elements that enable the media to report on cases that are still in the investigation stage. For example, the public calendar of hearings held by the pre-trial court, in combination with the case number or reference used by the public prosecution, can be used to identify both a person and the crime for which they are being prosecuted.

Leaked images of athlete caught doping – a case from Austria

In February 2019, five Austrian media outlets published a video recorded in the context of a police operation at the Nordic World Ski Championships in Seefeld.

The video shows a cross-country skier in a hotel room in the act of doping. The police arrested the athlete and the video was published shortly after. In the publication, the face of the athlete was neither pixelated nor made unrecognisable in any other way. A police officer who was involved in the police operation leaked the video. In April 2019 the police officer was found guilty and fined by the Innsbruck Regional Court. In addition, the officer had to pay the athlete € 500 in compensation. The verdict is not final.

Most media outlets have since removed the video from their websites.

On 11 April 2019, the Austrian Press Council issued a decision (42/2019) that the publication of the video was not in line with press ethics. It violated the personal rights of the athlete and led to prejudgement of guilt during the criminal investigations against him. The Austrian Press Council requested that the decision be published in the criticised media outlets.

On 30 October 2019, the Innsbruck Provincial Court sentenced the former cross-country skier to conditional imprisonment for five months for serious sports fraud. The athlete was found to have engaged in blood doping from April 2016 until his arrest during the Nordic World Ski Championships in Seefeld in February 2019, thereby illegally obtaining prize money and sponsorship. The judgment is not final.

Right to remedy if defendants are publicly referred to as guilty

Article 10 and recital 44 of Directive (EU) 2016/343 require that suspects and accused persons have adequate and effective remedies if their right not to be publicly referred to as guilty is breached.

Interviewees in several Member States suggest that suing the media for damages is the only remedy available to defendants who are publicly referred to as guilty. However, they say that in practice this is usually unsuccessful.

For example, interviewees in Belgium refer to a Court of Cassation ruling[40] that held that extensive media coverage resulting in the infringement of the presumption of innocence in relation to the general public or public opinion does not amount to a violation of Article 6 (2) of the ECHR. A defendant has to show that the judge deciding a case is no longer impartial or has taken an approach or position contrary to the presumption of innocence. Other options are to ask for rectification in the media (right to answer), start libel and slander proceedings or seek an injunction against the publication or dissemination of coverage of ongoing investigations. These remedies are also available to law enforcement agencies if they believe that media coverage may harm an investigation. In a recent case, a prosecutor office asked the court to stop broadcasting a documentary on the murder of a young woman in 1996 that promised new evidence, arguing that the investigation was still ongoing and that the disclosure of new information could harm it. The judge, however, found that the freedom of the press outweighed the arguments of the prosecutor office.[41]

Similarly, lawyers from Austria hardly ever pursue such civil action. They note that journalists are very well briefed and know exactly how to report

information to avoid court cases. In addition, even if a defendant is vindicated in court, compensation payments are low and media outlets are obliged to publish a correction or a counterstatement resulting in the defendant and the case being portrayed repeatedly in the media.

Interviewees in Bulgaria, Germany and Poland suggest that a civil claim against the media is the only option available to defendants who are publicly referred to as guilty. No such claim can be made against prosecution service or courts because they usually respond that they do not read or follow the media coverage of cases. According to a judge from Bulgaria, the only option for a defendant publicly referred to as guilty is to raise the issue before the court and hope that the judge will disregard the public comments made in relation to their case.

One lawyer from Poland points to another remedy available under the Press Law Act, namely the right to request the correction of a misleading or untrue report. However, defendants have to consider the amount of time that has elapsed between the first media report on a case and the court's final decision, and interviewees said that this remedy is usually ineffective. Ultimately, three lawyers and one prosecutor who were interviewed believe that defendants' best 'remedy' is to ensure that their lawyers appear in the media and tell their story.

Endnotes

1 See, for example, CJEU, C-310/18 PPU, ***Milev***, 19 September 2018.
2 **Directive (EU) 2016/343**, Art. 4 and recitals 16 and 17.
3 ECtHR, ***Nešťák v. Slovakia***, No. 65559/01, 27 February 2007, Sections 88 and 89; ***Butkevicius v. Lithuania***, No. 48297/99, 26 March 2002, Sections 53 and 54; ***Fatullayev v. Azerbaijan***, No. 40984/07, 22 April 2010, Section 159; ***Allenet de Ribemont v. France***, No. 15175/89, 10 February 1995, Sections 35 and 36; see also Council of Europe/ECtHR, ***Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb)***, updated 31 August 2020, p. 64, para. 341.
4 ECtHR, ***Fatullayev v. Azerbaijan***, No. 40984/07, 22 April 2010, Section 159; ***Allenet de Ribemont v. France***, No. 15175/89, 10 February 1995, Sections 35 and 36; ***Garycki v. Poland***, No. 14348/02, 6 February 2007, Section 69.
5 See, among others, ECtHR, ***Deweer v. Belgium***, No. 6903/75, 27 February 1980, Section 56; ***Allenet de Ribemont v. France***, No. 15175/89, 10 February 1995, Sections 35 and 36; ***Daktaras v. Lithuania***, No. 42095/98, 10 October 2000, Section 41; ***Butkevicius v. Lithuania***, No. 48297/99, 26 March 2002, Sections 53 and 54; ***Garycki v. Poland***, No. 14348/02, 6 February 2007, Section 66; ***Khodorkovskiy and Lebedev v. Russia (2)***, Nos. 51111/07 and 42757/07, 14 January 2020, Sections 539–540.
6 See, for example, UN, Human Rights Committee (HRC), **General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial** (CCPR/C/GC/32), 23 August 2007, p. 9, para. 30.
7 ECtHR, ***Allenet de Ribemont v. France***, No. 15175/89, 10 February 1995, Section 36; **Directive (EU) 2016/343**, recital 17.
8 ECtHR, ***Daktaras v. Lithuania***, No. 42095/98, 10 October 2000, Section 43; ***Khodorkovskiy and Lebedev v. Russia (2)***, Nos. 51111/07 and 42757/07, 14 January 2020, Section 540.
9 ECtHR, ***Allenet de Ribemont v. France***, No. 15175/89, 10 February 1995, Sections 39–41; ***Khodorkovskiy and Lebedev v. Russia (2)***, Nos. 51111/07 and 42757/07, 14 January 2020, Section 539; ***Turyev v. Russia***, No. 20758/04, 11 October 2016, Section 21.
10 See, for example, ECtHR, ***Craxi v. Italy (no. 1)***, No. 34896/97, 5 December 2002, Section 91; ***Beggs v. the United Kingdom***, No. 15499/10, 16 December 2012, Section 123.
11 ECtHR, ***Craxi v. Italy (no. 1)***, No. 34896/97, 5 December 2002, Section 101.
12 See, for example, ECtHR, ***Beggs v. the United Kingdom***, No. 15499/10, 16 December 2012, Section 124; ***G.C.P. v. Romania***, No. 20899/03, 20 December 2011, Section 46.
13 UN HRC, ***General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*** (CCPR/C/GC/32), 23 August 2007, p. 9, para. 30.
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32 Cyprus, Regulations under Article 51 of the Law on radio and television stations (***Οι περί Ραδιοφωνικών και τηλεοπτικών σταθμών νόμοι, Κανονισμοί δυνάμει του άρθρου 51***), Κ.Δ.Π. 10/2000, Appendix III, *Cyprus Gazette* No. 3383, 28 January 2000; Code of practice for electronic media, Appendix VIII (***ΚΩΔΙΚΑΣ ΔΗΜΟΣΙΟΓΡΑΦΙΚΗΣ ΔΕΟΝΤΟΛΟΓΙΑΣ ΓΙΑ ΤΑ ΗΛΕΚΤΡΟΝΙΚΑ ΜΜΕ, ΠΑΡΑΡΤΗΜΑ VIII***), Regulations 27 (4) and 49, Art. 10.
33 Germany, Federal Court of Justice (*Bundesgerichtshof*), Karlsruhe VI ZR 51/99, 7 December 1999.

34 Italy, Self-regulation code concerning the representation of judicial proceedings in television shows and radio broadcasting (***Codice Di Autoregolamentazione In Materia Di Rappresentazione Di Vicende Giudiziarie Nelle Trasmissioni Radiotelevisive***), 21 May 2009; Consolidated text on the duties of Italian journalists, adopted by the National Council of the Association of Journalists (***Consiglio Nazionale dell'Ordine dei Giornalisti, Testo unico dei doveri del giornalista***), 27 January 2016.

35 Lithuania, **Code of ethics in providing information to the public of Lithuania** (*Lietuvos visuomenės informavimo etikos kodeksas*), 29 February 2016, Arts. 31 and 34; **Lithuanian code of ethics for journalists and publishers** (*Lietuvos žurnalistų ir leidėjų etikos kodeksas*), 15 April 2005, Arts. 37 and 40.

36 Poland, Press Law (***Prawo Prasowe***), 26 January 1984, Art. 13.

37 Portugal, Journalists' Statute (***Estatuto do Jornalista***), Lei n.o 1/99, 13 January 1999, Art. 14.

38 Portugal, Journalists' Union (*Syndicato dos Jornalistas*), New code of ethics (***Novo Código Deontológico***), 15 January 2017.

39 Germany, Code of Criminal Procedure (***Strafprozessordnung***), Sections 395-402.

40 Belgium, **Court of Cassation of 15 December 2004, P.04.1189.F**. On this see Engelbert, J. (2009), 'Imposer à la presse le respect de la présomption d'innocence est incompatible avec la liberté d'expression', *Auteurs & Media*, No. 1–2, pp. 65–91.

41 Belgium, Brussels Court of First Instance (*Nederlandstalige Rechtbank van Eerste Aanleg Brussel*), ***'10e Kamer - Kortgeding Voorlopige maatregelen Art 584 Ger. W.'***, 7 February 2019. See also HLN Niewus, ***'Rechter beslist dat VTM programma 'Cold Case' vanavond toch mag uitzenden'*** ['Judge decides that VTM may broadcast the program 'Cold Case' tonight after all'], 7 February 2019.

3

PHYSICAL PRESENTATION OF SUSPECTS AND ACCUSED PERSONS

This chapter examines the physical presentation of suspects and accused persons – at court and in other settings, such as when being transported – and its potential impact on the presumption of innocence. The professionals interviewed share their opinions on whether or not the use of physical restraints, placing defendants in separate areas and other physical attributes such as the clothes worn by defendants influence the presumption of innocence.

3.1. LEGAL OVERVIEW

According to Article 5 of Directive (EU) 2016/343, suspects and accused persons should not be presented in court or in public as being guilty through the use of measures of physical restraint.[1] Recital 20 of the directive explains that authorities should avoid using measures such as handcuffs, glass boxes, cages and leg irons unless their use is required for case-specific reasons. This includes for security reasons, such as to prevent suspects or accused persons from harming themselves or others or from damaging property, or to prevent suspects or accused persons from absconding or from contacting third persons such as witnesses or victims. In addition, to avoid giving the impression that suspects or accused persons are guilty, recital 21 encourages Member State authorities to avoid presenting defendants in court or in public while wearing prison clothes. It should be noted that Member States have a margin of appreciation, as this recital uses the term 'when feasible'.

International law

In the context of the overall fairness of a trial, the ECtHR assessed a case in which the defendants were placed in metal cages in the courtroom. The ECtHR considered that "the applicants' exposure to the public eye in a cage must have undermined their image and must have aroused in them feelings of humiliation, helplessness, fear, anguish and inferiority".[2] It concluded that the use of metal cages to hold defendants during the trial, which lasted for years, not only violated the prohibition of torture and ill treatment, but also may have negatively impacted on the presumption of innocence. In another case, in which the defendants "were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing",[3] the ECtHR found that this must have adversely affected the fairness of the proceedings as a whole.[4] While it did not single out the presumption of innocence, this aspect was taken into account in assessing the fairness of the trial.

The ECtHR has also found that requiring defendants who are detained to attend their trial in prison clothes can have such a negative impact on the court's perception of them that it amounts to a violation of the presumption of innocence under Article 6 (2) of the ECHR.[5]

Police use of handcuffs has mainly been examined in the context of the prohibition of torture and degrading and inhuman treatment. The ECtHR holds that the use of force and restraint measures by the police is not prohibited as such; however, proportionality has to be maintained and authorities should assess whether or not "there is reason to believe that the person concerned would resist arrest or abscond, cause injury or damage or suppress evidence".[6]

The United Nations, in its *Standard minimum rules for the treatment of prisoners*, stipulates that instruments of restraint, such as handcuffs, may be used "as a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority".[7] In General Comment No. 32 on the right to equality before courts and tribunals and a fair trial, the United Nations Human Rights Committee states that "Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence."[8]

Furthermore, in 2014, the United Nations Human Rights Committee held that the placement of a defendant in a metal cage during a public trial in Ukraine, with his hands cuffed behind his back, violated Article 7 of the ICCPR concerning torture and ill or degrading treatment, affecting the fairness of the trial.[9]

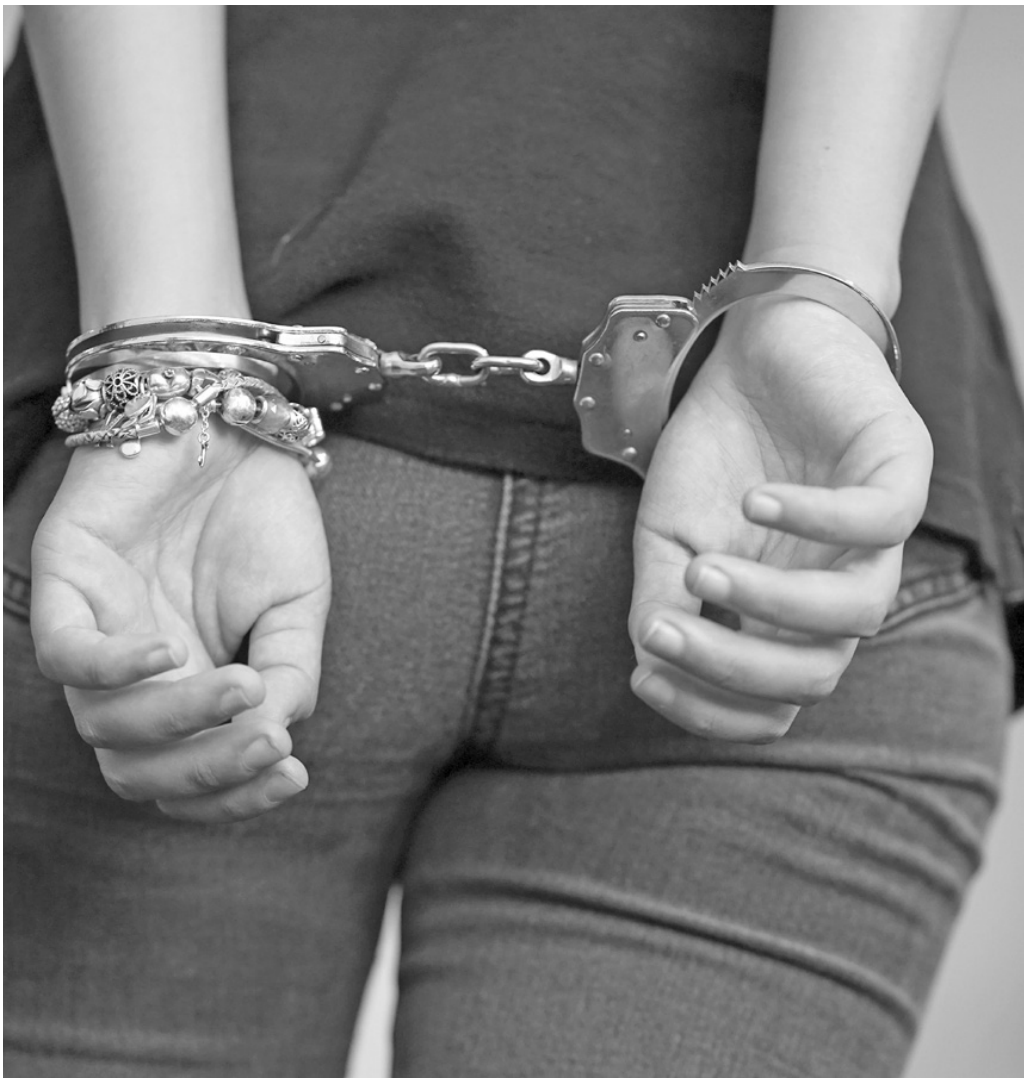
3.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON THE PRESENTATION OF DEFENDANTS IN PRACTICE

This section looks at the views of legal professionals and journalists on the presentation of defendants in public and in the media. It considers practices related to the use of restraint measures, clothing worn in court and the taking and publishing of photographs of defendants.

In general, interviewees across all professions agree that handcuffs and other restraint measures are used for security reasons and are not intended as a visual sign of guilt. They also agree that the way that defendants are presented does not influence the opinions of professional judges. However, they also concur that it may affect lay judges and jurors, and public opinion.

Use of restraint measures

As mentioned earlier, Article 5 and recital 20 of Directive (EU) 2016/343 require Member States to refrain from presenting suspects or accused persons as guilty, in court or in public, through the use of physical restraint measures. Such restraint measures can be used when required for case-specific reasons, related to security, prevention from absconding or prevention from having contact with third persons.



All Member States studied except for Belgium have specific rules on the use of restraint measures during the transport and presentation of suspects deprived of liberty.[10] Handcuffs may be used to restrain a suspect if deemed necessary based on a security assessment but are generally taken off when the suspect appears in front of the judge. In practice, Belgium also follows this standard. Furthermore, all Member States allow defendants to wear their own clothes in court.

Across the nine Member States, interviewees confirm that, in practice, defendants deprived of liberty are handcuffed and accompanied by uniformed officers when being transported to trial.

Police officers from Austria, Bulgaria, Italy, Lithuania, Poland and Portugal argue that handcuffs are used purely for security purposes and do not imply guilt in any way.

Prosecutors and judges tend to agree that restraining measures do not necessarily have a negative effect on the presumption of innocence, but may affect the general atmosphere in court. In Belgium, one judge did acknowledge that strict restraining measures create a certain atmosphere that can have a negative impact on the presumption of innocence.

"[Defendants in] heavy cases can be cuffed at their feet too and they are guarded by a specific law enforcement unit. You need to disregard it but it could influence a court."
(Judge, Belgium)

Prosecutors, defence lawyers and judges in Austria also acknowledge that the presentation of an accused person in handcuffs can influence the views of the public or lay assessors in jury trials. In addition, the presence of officers can imply guilt. However, judges and prosecutors in several Member States (e.g. Belgium, Italy and Portugal) confirm that defendants are never handcuffed during a trial (except, as noted below, when they are deemed a security risk).

"In the courtroom, we [the judges] demand always, always that they [the defendants] are not restrained. Always. The handcuffs must be taken off before entering the room and if they are not, we order to take them off. All the Italian judges. All of us."
(Judge, Italy)

A judge from Portugal reports that a trial would not be allowed to start if a defendant was handcuffed.

"I have never conducted a trial in which the defendant was handcuffed. It is humiliating, vexing and even causes discomfort to the person. [...] Some might argue that the person is dangerous, but there are other ways to ensure safety for everyone in the courtroom."
(Judge, Portugal)

A Belgian lawyer mentions a good practice used in the Court of Assizes, whereby handcuffs are removed before an accused person enters the courtroom, as such measures may influence a jury more than a professional judge.

In several countries, interviewees report taking part in trials where the accused remained handcuffed during the entire hearing, typically in cases with a high security risk. For example, in Belgium and Poland, accused persons deemed to pose a security risk often remain handcuffed in the courtroom, and their cuffs can also be chained to their feet. Similarly, in Germany, two lawyers report that clients accused of terrorism were brought to the courtroom with their hands and feet tied, placed in a glass case and accompanied by special officers with machine guns, a presentation that was very stigmatising in their view.

"Someone who is presented as a prisoner is also treated and perceived like a prisoner. And then, one might give less value to his personal rights and the presumption of innocence."
(Lawyer, Germany)

"The police, for their part, were encouraged to revise their guidelines, but police assured their usefulness and argued that handcuffs have been used when a person could be a risk to themselves or others. In some cases, it is highly questionable whether these dangers were realistic."
(Judge, Lithuania)

"Taking them to court in handcuffs, for the hearing in which the remand measures were decided, is a clear way to show that these people are very guilty and that they are socially dangerous, provided that the law clearly states that the restraining measures have one single purpose – to prevent escape and to ensure the safety of persons in the immediate vicinity. Putting handcuffs on a woman who weighs no more than 50 kilograms is an obvious attempt to simply damage her reputation."
(Lawyer, Bulgaria)

Lawyers and judges from Lithuania claim that the police also use handcuffs in cases where there is little risk of a prisoner being violent or trying to escape, and question whether this is proportionate.

In Bulgaria, lawyers echo this sentiment, stating that handcuffs are unjustly used on accused persons who do not pose a threat to security.

Publication of photographs of a fully restrained suspect – a murder case from Poland

In June 2019 the body of a 10-year-old girl was found in the Polish village of Mrowiny. Three days later a 22-year-old man was arrested on suspicion of murder.

The police published video footage of the moment the suspect was apprehended and transported into custody. The video shows the police anti-terror squad entering the premises where the suspect was hiding. A man is seen lying on the floor, face down, having his hands and legs cuffed with combined shackles. Next, the suspect, wearing only a t-shirt and boxers, is transported barefoot to a police van (at one point, the police officers even seem to drag or carry him). After questioning, two police officers escort the man to a cell, still only partially dressed, barefoot and cuffed. Parts of the video were shown on all major nationwide news programmes on the day of the arrest, as well as being made available on the internet.

A day after the suspect was questioned at the prosecutor's office, a photograph of the suspect that was allegedly leaked appeared on a local news Facebook fan page. It was said to have been taken during questioning. The post was taken down a few hours later but in the intervening time other users shared it and it went viral on social media. The police investigated the disclosure of the suspect's image.

The Commissioner for Human Rights (acting as the National Mechanism for the Prevention of Torture (NPM)) published a **statement** expressing deep concern about the manner in which the police apprehended and treated the defendant. In the NPM's opinion, the measures used were not proportionate to the situation and therefore were not justified. The NPM expressed doubts over the use of the police anti-terror squad to apprehend the suspect, who was not a member of an organised criminal group or armed group.

In particular, the Commissioner's Office criticised the use of hand and leg cuffs together with an incapacitating grip on a man who was not resisting arrest. It also criticised the fact that the suspect was not fully dressed and was barefoot while being escorted and interrogated, which could have amounted to a violation of his dignity. Finally, the NPM was concerned that the suspect was not given adequate legal aid at the beginning of the proceedings and that questioning by the prosecutor had taken place at night. The unlawful disclosure of the suspect's image was also addressed.

In Germany, Italy and Lithuania, lawyers refer to the practice of separating accused persons from others in the courtroom, even from their own lawyers. In Germany, some defence lawyers report having to sit separately from their clients, which is not always seen as justified and hampers the exercise of defence rights. In Lithuania, lawyers are highly critical of the use of security bars in courtrooms and of the separation of suspects in general. They argue that, although this may not influence a professional judge, it may negatively influence the public. Finally, in Italy, a lawyer reports that defendants are forced to follow hearings from a specific area of the courtroom separated by bars, called 'the cage'. The lawyer declares that this practice is prevalent, even though it is supposed to be adopted only in marginal cases where there is a security risk. A judge from Italy admits that this may influence the public image of a defendant.

"The fact that a defendant is held in that area [the cage], this can engender in the press the conviction of the guilt of the defendant. Sometimes this choice is based on the danger; other times the defendant is held there even if there is no danger."
(Judge, Italy)

Interviewees also speak of the role that the media play in presenting accused persons while they are restrained by handcuffs or shackles. The interviewees agree that media depictions of defendants being restrained have no impact on judges; however, they do influence public opinion and also damage a defendant's reputation, as three lawyers from Bulgaria note, for example. The interviewees acknowledge that reporters may begin filming during the transport of a defendant and continue doing so in the courtroom if the judge allows. In Austria, a journalist points to the practical limitations set by the judiciary, meaning that journalists can take photographs only when (handcuffed) defendants are brought to court.

"We publish pictures of handcuffed suspects. Although this is actually controlled by the judiciary and court guards, they decide when photos can be taken. Journalists take pictures in handcuffs because it is the only slot available for taking pictures. For the trial itself, the handcuffs are removed."
(Journalist, Austria)

Several interviewees note the use of measures to protect defendants' privacy and presumption of innocence when entering and exiting a courtroom. Some interviewees in Italy report good practices, such as dedicated pathways and separate entry points in some courts that are not accessible to journalists and the public. In Lithuania, two police officers report that defendants are brought into court through a back entrance and can take separate pathways and stay in separate waiting rooms before a hearing. In addition, a police officer in Portugal states that back doors are routinely used to enter court – at great speed – to avoid exposure.

"If there is no need, we don't subject anyone to exposure. There is no need for the police to expose the 'trophy', the result of our work. We often enter courts through the back doors at great speed, with people covered, exactly to avoid this."
(Police officer, Portugal)

Some interviewees note that such practices depend on the construction and layout of court buildings. Poorly designed courts sometimes force a defendant to be exposed to the media on the way to or from the courtroom. A judge in Portugal believes that this does not have an impact on the presumption of innocence, but does reflect negatively on the public image of a defendant, who is pictured in a fragile and degrading situation.

Clothing

Recital 21 of Directive (EU) 2016/343 stipulates that Member States should refrain, where feasible, from presenting suspects or accused persons, in court or in public, while wearing prison clothes to avoid giving the impression that these persons are guilty.

Defendants' clothing can be an important part of how they present themselves to the court. Across the nine Member States, interviewees confirm that defendants can choose their own clothes and are not obliged to wear prison clothing during court hearings, even if they are in pre-trial custody.

Almost all legal professionals interviewed say that clothing does not have an impact on the presumption of innocence, as professional judges

are trained to disregard such factors; rather, in Belgium, Cyprus, Germany, Lithuania and Poland, legal professionals remark that defendants' clothing may influence the media and the public.

In some Member States, however, interviewees acknowledge that clothing may have an indirect effect on a judge's impression of a defendant, coupled with the defendant's behaviour and general attitude. In Bulgaria, several lawyers argue that wearing suitable clothing is a matter of showing respect for the judicial institution, a sentiment that lawyers in Lithuania and Portugal echo. In Belgium, a judge remarks that certain details of clothing and accessories may influence the view of a suspect, for example when someone suspected of drug dealing attends a hearing carrying an expensive designer bag.

"[I]n these cases [fast-track trials] the outfit has a great impact [...] because you are arrested and immediately prosecuted. This means that you spend two days in a security cell and then you are brought before the judge in the same clothes you had two days before. This is something that might have a strong impact on the judge because your outfit captures your image in the moment you have allegedly committed a crime. It also happened to me that [...] a defendant entered the courtroom with torn clothes and it later on emerged that the clothes were torn because of the abuses perpetrated by police officers on that person."
(Lawyer, Italy)

Similarly, in Italy, interviewees remark that defendants' clothing contributes to how the public and judicial authorities perceive them. One lawyer reports concerns about fast-track proceedings as defendants have to wear the same clothes that they were arrested in days before.

In Austria and Belgium, interviewees note that, although in theory defendants have the right to wear what they want to a hearing, in practice this is not always respected, in particular in cases of pre-trial detention. For example, a lawyer in Belgium argues that there is often insufficient time before a court hearing to ensure that detained defendants are provided with their normal clothes. Furthermore, defendants who do not reside in the country of arrest are at a disadvantage, as it is difficult for them to obtain clean clothes from relatives. Homeless people or those from disadvantaged socio-economic backgrounds may also not have access to suitable clothing. In this case, Austrian social services can provide clothing if available, but otherwise defendants have to resort to prison clothing.

Presentation of children and defendants with disabilities

Recital 42 of Directive (EU) 2016/343 prescribes that the particular needs of vulnerable persons who are not able to understand or effectively take part in criminal proceedings because of their age, their mental or physical condition or any disability they may have must be taken into account.

Interviews across the nine Member States indicate that legal or policy safeguards to ensure the presumption of innocence for vulnerable people, such as persons with disabilities, are mostly absent. However, interviewees mention several measures concerning children. For example, in Austria, Bulgaria, Germany, Lithuania and Portugal, interviewees remark that hearings for children take place behind closed doors, with the public and media excluded. In Belgium, a police officer states that minors are escorted in unmarked police cars.

Interviewees in Germany and Lithuania also mention that cases involving children and young persons may take place in secluded areas of the court, avoiding the need for defendants to walk through public corridors. Across all Member States, interviewees speak of a tendency not to handcuff children and young persons and to let them wear their own clothes. Lastly, in Austria, interviewees note that a support person – such as a probation officer, who is also present during the investigation stage – can accompany young defendants in addition to their defence lawyer.

Interviewees do not share many examples of specific safeguards for defendants with disabilities. Some interviewees do mention that measures to protect the unbiased presentation of a suspect or accused person do not always accommodate persons with a disability. For example, judges in Belgium and Poland say that special entrances shielded from the public are not always accessible to persons using wheelchairs.

In Lithuania, people with intellectual disabilities are not usually escorted to court and the proceedings take place *in absentia*; a defence lawyer is mandatory for them. People with health issues are transported without handcuffs.

In Italy, one judge mentions videoconferencing, a tool that, at the time of the interview, was reserved for severe criminal offences as a potential safeguard for vulnerable defendants to minimise public attention.

Seeking remedies

Article 10 and recital 44 of Directive (EU) 2016/343 require that suspects and accused persons have adequate and effective remedies in case their right not to be presented as guilty is breached. However, interviewees across all Member States indicate that defendants lack effective remedies when they are presented as guilty.

Some interviewees, mainly judges and prosecutors, say that defendants can raise complaints in this regard during proceedings, which the court can then address. In Belgium, several judges mention that accused persons can bring up the presumption of innocence during a hearing, which can then be taken into account during the judgment and determination of a sentence. However, they also mention that this rarely happens in practice. Lawyers can also alert the court when safeguards are not in place and ask for the adjustment of safety measures.

An Italian judge emphasises the crucial role played by judicial authorities in controlling what happens in the courtroom and their regular practice of taking swift action if a violation occurs.

Children in judicial proceedings

For more information about child participation in judicial proceedings, see the following FRA reports:

Child-friendly justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States (2017) – This report is based on interviews with justice professionals and the police, as well as with several hundred children involved in criminal judicial proceedings as victims or witnesses.

Children's rights and justice – Minimum age requirements in the EU (2018) – This report outlines Member States' approaches to age requirements and limits regarding child participation in judicial proceedings, procedural safeguards and the rights of children involved in criminal proceedings, as well as issues related to depriving children of their liberty.

"The judge is generally in control of the procedures to accommodate the defendant in the courtroom; if the defendant is escorted with chains at his feet, the judge will make a scene, it would be a critical situation. And the penitentiary police officers who did this would for sure face disciplinary consequences."
(Judge, Italy)

Lawyers are more pessimistic about the available options. In Lithuania, one defence lawyer mentions that complaints can be submitted about the actions of pre-trial investigators or prosecutors, but doubts their effectiveness in this regard. Two other lawyers mention the possibility of raising the issue of the proportionate use of restraint measures during proceedings.

In Belgium, a lawyer reports often relying on informal practices in the courtroom to ensure that the presumption of innocence of defendants is properly safeguarded, such as talking to the court registry or investigating judge before a trial begins to see what adjustments can be made. In Germany, while interviewees acknowledge that it is possible to legally object to restraining measures if one is not convinced of their necessity, two lawyers argue that remedies lack effectiveness, as the trial judge reviews the measures or they are justified by the structural conditions of a courtroom. Similarly, lawyers in Bulgaria are pessimistic about the effectiveness of remedies should a defendant want to make a complaint, for example with respect to the inappropriate use of handcuffs.

"Accused persons have a civil right to sue if the presumption of innocence is infringed but in the absence of legal aid this is impossible. This is something that NGOs [non-governmental organisations] must claim. Someone without money cannot apply to court, it is hard enough for them to find money to pay their lawyers in the criminal case against them."
(Lawyer, Cyprus)

In Bulgaria, Cyprus and Portugal, lawyers mention that defendants can file a civil lawsuit against the state for breaching its positive obligation to protect their right to be presumed innocent. However, they do not consider this to be a very promising solution, as it entails significant financial costs and can take a long time.

With regard to the media, interviewees in several countries – Cyprus, Italy and Portugal – mention that defendants can bring a defamation case if they have been unjustly portrayed as guilty. According to a lawyer from Italy, this option is rarely used and does not properly compensate for the damage done.

"[The defendant can ask for] a compensation for the damages to their public image [...] however, this is irrelevant if compared to the damage they might have suffered. Again, if you think of a judicial case, the first image that will come to your mind is the handcuff. This is how it works!"
(Lawyer, Italy)

Endnotes

1 **Directive (EU) 2016/343** Art. 5: "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".
2 ECtHR, ***Svinarenko and Slyadnev v. Russia***, Nos. 32541/08 and 43441/08, 17 July 2014, Section 129.
3 ECtHR, ***Khodorkovskiy and Lebedev v. Russia (2)***, Nos. 51111/07 and 42757/07, 14 January 2020, Section 469.
4 ECtHR, ***Khodorkovskiy and Lebedev v. Russia (2)***, Nos. 51111/07 and 42757/07, 14 January 2020, Sections 469 and 470
5 See, for example, ECtHR, ***Samoilă and Cionca v. Romania***, No. 33065/03, 4 March 2008, Sections 99–101; ***Jiga v. Romania***, No. 14352/04, 16 March 2010, Sections 101–103.
6 See, for example ECtHR, ***Gutsanovi v. Bulgaria***, No. 34529/10, 15 October 2013, Section 126.
7 UN, Office on Drugs and Crime (UN ODC), ***Standard minimum rules for the treatment of prisoners***. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, para. 33 (a).
8 UN HRC, ***General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*** **(CCPR/C/GC/32)**, 23 August 2007, Section 30.
9 UN HRC, ***Communication No. 1405/2005 – Views adopted by the Committee at its 110th session***, 12 May 2014, Sections 9.3–10.
10 Austria, Criminal Procedure Code (***Strafprozessordnung 1975***), Federal Law Gazette No. 631/1975, Section 239; Detention Order (***Verordnung der Bundesministerin für Inneres über die Anhaltung von Menschen durch die Sicherheitsbehörden und Organe des öffentlichen Sicherheitsdienstes, Anhalteordnung – AnhO***), Federal Law Gazette No. 128/1999, Section 26; Bulgaria, Instruction No. 1 of 22 March 2019 on the organisation and procedure for carrying out the convoy activity by the employees of the Directorate-General for Execution of Sentences (***Инструкция № 1 от 22 март 2019 г. за организацията и реда за осъществяване на конвойната дейност от служителите на Главна дирекция 'Изпълнение на наказанията'***), 22 March 2019, especially Arts 13 (1) and 21 (8); Cyprus, Police Regulation (*ΑΣΤΥΝΟΜΙΚΗ ΔΙΑΤΑΞΗ*), No. A.D. ΑΡ. 5/39, 23 February 2018; Police Regulation (*ΑΣΤΥΝΟΜΙΚΗ ΔΙΑΤΑΞΗ*), No. A.D. 5-4; Law on criminal procedure, Cap 155 (***Ο περί Ποινικής Δικονομίας Νόμος Κεφ. 155***), Arts 63 (1) and 171; Italy, Ministry of Justice, Department of Penitentiary Administration (*Ministero della Giustizia*, *Dipartimento dell'Amministrazione Penitenziaria*), *New organisational model of the translation and guarding service* (***Nuovo Modello Organizzativo delle Traduzioni e dei Piantonamenti. Divulgazione su siti sindacali***), 22 March 2013; Lithuania, Rules on convoy (***Konvojavimo taisyklės***), approved by Order of the Minister of Justice and Minister of the Interior, 29 July 2005 (with later amendments), No. 1R-240/1V-246, especially para. 223; Lithuanian Supreme Administrative Court (*Lietuvos vyriausiasis administracinis teismas*), **No. AS-196-502/2017**, 1 March 2017; Vilnius Regional Court, No. **2A-1379-656/2017**, 19 October 2017; Vilnius Regional Administrative Court (*Vilniaus apygardos administracinis teismas*), No. **I-737-815/2019**, 10 January 2019, with references to previous case law of the Lithuanian Supreme Administrative Court; Poland, Act on Direct Coercive Measures and Firearms (***Ustawa o środkach przymusu bezpośredniego i broni palnej***), 24 May 2013; Portugal, Ministry of Justice (*Ministerio da Justica*), Code of enforcement of prison sentences or measures involving deprivation of liberty, Decree Law No. 265/79 (***Decreto-Lei n.o 265/79***), 1 August 1979, Arts. 112 and 123/124; General rules on prison establishments, Art. 27; Code of Criminal Procedure (***Codigo di Processo Penal***), 1987, Art. 140.
In Germany, the issue of restraint measures during transport is dealt with on *Länder level*. See, for example: Germany, Prisoner Transport Regulation, Brandenburg: ***Gefangenentransportvorschrift – GTV***, 22 March 2002 (**JMBl/02, [Nr. 4], S.57**) and subsequently amended (latest: 20 January 2020 (**JMBl/20, [Nr. 2], S.10**)), Art. 12 in conjunction with the Penal Procedure Code (***Gesetz über den Vollzug der Freiheitsstrafe und freiheitsentziehenden Maßregeln der Besserung und Sicherung, Strafvollzugsgesetz – StVollzG***), 16 March 1976, and state-specific police acts (*Polizeigesetze der Länder*). In addition, courts ultimately derive their authority to impose security- and order-related measures from federal law. See Courts Constitution Act (***Gerichtsverfassungsgesetz – GVG***), 27 January 1877 and subsequently amended (latest 1 January 2021), Arts. 176-182; Code of Criminal Procedure (***Strafprozessordnung***), 1 February 1877 and subsequently amended (latest 1 January 2021), Section 231 (1). See also Federal Court of Justice (*Bundesgerichtshof*), Karlsruhe/**1 StR 22/62**, 10 April 1962; Higher Regional Court (*Oberlandesgericht*), Hamm/**5 RVs 134/13**, 9 January 2014; Federal Constitutional Court (*Bundesverfassungsgericht*), Karlsruhe/**2 BvR 2374/10**, 19 April 2011; Gmel, D. (2019), 'StPO § 231 recital 2, Anwesenheitspflicht des Angeklagten' in: Hannich, R. (eds.), *Karlsruher Kommentar zur Strafprozessordnung*, Munich, C. H. Beck.

4

BURDEN OF PROOF

This chapter examines the burden of proof that rests with the prosecution as a central principle of the presumption of innocence, as defined in Article 6 of Directive (EU) 2016/343. After a brief legal overview, it discusses the different elements of this principle, namely the existing formal or *de facto* derogations and the *in dubio pro reo* principle, meaning that defendants may not be convicted when doubts about their guilt remain.

The fieldwork aims to establish if, in practice, the burden of proof is in fact on the prosecution and if exceptions are provided or derogations made, either in law or in practice before the court.

4.1. LEGAL OVERVIEW

International human rights law recognises the principle of the burden of proof as an integral aspect of the presumption of innocence, although this is not expressly stated in the main international human rights instruments.[1] It imposes on the prosecution the burden of proving a charge beyond reasonable doubt.[2] EU law and Council of Europe standards guarantee this fundamental procedural right to suspected and accused persons in criminal proceedings, requiring that the burden of proof rests with the prosecution.

Building on these standards, and limited to the allocation of the burden of proof in the adoption of judicial decisions on guilt only,[3] Directive (EU) 2016/343 explicitly provides for this rule in Article 6. It goes on to explain further that any doubt as to the question of guilt should benefit the defendant. Recital 22 of the directive also explains that shifting the burden of proof from the prosecution to the defence infringes the presumption of innocence.[4] However, it should be noted that any existing legal and factual presumptions of criminal liability should be reasonably and proportionally limited and only be used when the rights of the defence are respected – as they should always be maintained.[5] In addition, recital 23 of the directive specifies that Member States not having an adversarial system should be able to maintain their system, provided it complies with the directive and other provisions of EU and international law,[6] meaning that non-adversarial systems are not in principle incompatible with the rule that the burden of proof rests with the prosecution.

The ECtHR has confirmed that the burden of proof rests with the prosecution and that any doubt should benefit the accused.[7] However, this is not an absolute requirement, as certain presumptions of fact or of law "are not prohibited in principle by the Convention, as long as States remain within certain limits, taking into account the importance of what is at stake and maintaining the rights of the defence".[8]

4.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON THE BURDEN OF PROOF IN PRACTICE

Member States have different legal doctrines regarding the burden of proof, meaning that in some states the burden of proof is explicitly enshrined in legal texts whereas in others it must be derived from the principle of determining the objective truth. This report does not discuss these differences in detail. It mentions certain aspects relating to the burden of proof only in reference to the practical experiences of defendants in criminal proceedings. The findings presented here show that the principle of the burden of proof resting with the prosecution plays a significant role in facilitating other procedural rights, such as the right to remain silent.

Five out of the nine Member States stipulate in their national laws that the burden of proof rests with the prosecution or the investigative bodies: Belgium,[9] Bulgaria,[10] Italy,[11] Lithuania[12] and Portugal.[13] Austria[14], Cyprus[15], Germany[16] and Poland,[17] while they do not explicitly spell out this principle in the legislative acts, nevertheless acknowledge it as a cornerstone of criminal proceedings. All nine Member States link the burden as resting with the prosecution to prove guilt with the *in dubio pro reo* principle, meaning that the defendant may not be convicted when doubts about their guilt remain.

All interviewees agree that a defendant must be considered innocent unless the prosecutor proves their guilt. It is not up to the defendant to prove their innocence. A judge from Italy explains that this has crucial implications for criminal proceedings: the defendant is neither compelled to provide an alibi nor required to explain where or with whom they were when the crime was committed. As a consequence, the defendant must be discharged if the evidence against them is insufficient to prove their guilt beyond any reasonable doubt.

"In the movies, there is often a reference to the alibi. The defendant does not need an alibi because it is up to the prosecutor [...] to prove that the specific person – the defendant – did commit the action considered in the proceeding and that they voluntarily committed it."
(Judge, Italy)

A judge from Bulgaria notes that public prosecutors often try to imply that, if a defendant does not actively contest the charges, they are guilty.

"In their closing pleadings, the prosecutor emphasises only the defendant's procedural inaction in the sense that they have not refuted the indictment at all, so they are guilty. But these are legal arguments that I take into account in my motives that, in the end, the defendant is not required to prove that they are innocent, the prosecution must prove that they are guilty. The prosecution cannot take advantage of the defendant's passive procedural behaviour and draw conclusions in this direction."
(Judge, Bulgaria)

However, some lawyers from Austria and Poland further point out that, in reality, the defence must present evidence and call witnesses to avoid a conviction.

"In practice, such a 'passive defence' means giving up and ending with a conviction. If you sit back and wait for the court to apply the objectivity principle or the presumption of innocence, you'll end up with a ruling reading that the guilt has been proven. If you want to mount a proper defence, you'll need to forget about the theory and act."
(Lawyer, Poland)

While they share this opinion, lawyers from Lithuania add that, in practice, the prosecutor comes to court with a 'presumption of guilt' and the defence lawyer has to provide evidence to contest this. Lawyers from Austria also explain that it is the defendant's duty to provide evidence against their presumed guilt simply because the prosecutor cannot always access all the evidence.

Some professionals argue that, in their legal system, it is not strictly the case that the prosecution must prove a defendant's guilt. One prosecutor and one police officer from Austria argue that the burden of proof is not placed on the prosecution. It is the case that defendants do not need to prove their innocence; however, the prosecution is also not assigned with the burden of proving a person's guilt. The court evaluates the evidence and then decides on and justifies a person's guilt or innocence.

Reversing the burden of proof in practice

Directive (EU) 2016/343 states in Article 6 and recital 22 that, generally, Member States should ensure that the burden of proof for establishing the guilt of suspects and accused persons rests with the prosecution. Any shift of this burden should be considered an infringement of the presumption of innocence.

However, in all Member States studied, interviewees highlight certain *de facto* exceptions to the rule that the prosecution has to prove guilt, such as in cases of certain procedural practices or certain types of crimes. Some of these entail presumptions of facts or law that are permitted by recital 22 of Directive (EU) 2016/343 and some stem from established practice.

Lawyers in several Member States point out the systemic imbalance between the defence and the prosecution. A lawyer from Italy, for example, explains that requests from the prosecution on evidence are treated more preferably than those from the defence.

"During the proceeding – even if this practice is a violation of judicial procedures but it still occurs often in the courtroom – if a witness for the defence does not show up at the hearing, the defence loses the possibility to interrogate them; if a prosecutor's witness does not show up, the hearing is postponed until the prosecutors can find this person. These are violations of judicial procedures [...] you can file a complaint in the appeal phase, but these are considered by judicial authorities as petty issues."
(Lawyer, Italy)

A defence lawyer from Cyprus provides the following example of the prosecution using the weight of testimony.

"In a recent case, when I informed the police officer that my client will plead not guilty, he looked surprised and asked me: 'But the accused has four police officers testifying against him, how can he not plead guilty?' In other words, they start on the premise that they are guilty because the police officers say so. Wherever there is testimony from a police officer the starting point is 'they are guilty'. The testimony of the police officers is, by definition, of greater force and the accused person must prove his innocence and this is precisely where the burden of proof is reversed."
(Lawyer, Cyprus)

Lawyers from Belgium also note that evidence gathered by the police tends to be given stronger weight than evidence collected by the defence.

A lawyer from Lithuania suggests that there is a tendency for pre-trial investigators not to accept evidence that questions or denies a defendant's guilt. This interviewee also adds that lawyers have fewer opportunities to collect evidence than pre-trial investigators.

Pointing to the issue of judicial supervision of the charges, a lawyer from Bulgaria notes that the lack of judicial supervision of prosecutors in the course of pre-trial proceedings facilitates the practical reversal of the burden of proof. There is no mechanism by which a judge may inspect charges against a defendant, and the court sees the evidence of whether the defendant is innocent or guilty only during the trial.

Addressing the same issue, German lawyers criticise the judicial supervision of prosecutors in the intermediary phase of proceedings (*Zwischenverfahren*), arguing that the mechanism of judicial supervision over the indictment contributes to the reversal of the burden of proof. The interviewees are critical of the law pursuant to which the judge who reviews the indictment during the intermediate proceedings, and decides if a conviction in the main trial is likely, is the same judge who is subsequently in charge of the main trial. According to the interviewees, this may lead to a biased judgment in the main trial, as people tend to have problems reviewing their own decisions critically.

In addition, a lawyer from Bulgaria points out that, when experts are appointed to a case, the case becomes very difficult from the defence point of view.

"The system is full of exceptions. The prosecutor in Bulgaria is the master of pre-trial proceedings. We have no mechanism in Bulgaria, like in other countries, by which, when the prosecutor wants to charge someone, a judge may review the charges and evidence and assess whether the prosecutor has the right to bring such charges [...]. Very often prosecutors collect only evidence they are interested in, bring the case to court and thus pass the ball to judges to make a new investigation in the trial phase to see whether the person is innocent or guilty."
(Lawyer, Bulgaria)

"The biggest problem in Germany for the presumption of innocence [...] is that in our country the same judge decides on the opening of the main trial as decides on the final judgment. So the public prosecutor's office sends the indictment and you read through them as a judge, say, yes, this sounds good, I'll sign it, I'll start the main trial and then finally there is a hearing of evidence in the trial and you yourself should review your own decision afterwards. But how do we deal with our own decisions? We as humans, and I am the same, we always find everything right, what we did before."
(Lawyer, Germany)

"[I]t is a simple situation – experts are appointed by the pre-trial authorities [...] and are paid by the budget of the respective authority. If the expert is paid by the prosecution, and not by me or my client, guess what the direction of his/her opinion will be and how fervently he/she will defend it, including with absurd arguments."
(Lawyer, Bulgaria)

Even if the defence requests another opinion, this request is usually assigned to the same experts. This reverses the burden of proof in practice because defence lawyers have to challenge the experts' prosecution-oriented opinions.

Legal presumption of law or facts

Recital 22 of Directive (EU) 2016/343, while requiring overall that the burden of proof rests with the prosecution, exempts existing legal and factual presumptions of criminal liability from this rule, provided they are reasonably and proportionally limited, rebuttable and only used where the rights of the defence are respected.

Interviewees refer to presumptions of law or facts in their jurisdictions, usually related to types of crime that actually entail the reversal of the burden of proof, ranging from possession of illegal goods to money laundering.

Possession of illegal goods, such as drugs or weapons, appears to be the most common offence for which the burden of proof in practice may rest with the defence. According to a lawyer from Italy, the defendant is expected to explain the possession, but mere possession is not considered sufficient to convict them. For one of the prosecutors, the case of a defendant caught red-handed cannot be considered an exception, as – according to this interviewee – the burden of proof still rests with the prosecution; it might be easier for the prosecutor to prove, but the system is still the same. An Italian judge further explains that, if a defendant is caught in possession of illegal goods, the proceedings will be based on the testimonies of the police officers who caught the defendant. Defendants are always allowed to explain their actions, for example the possession of the goods in this case.

"[E]ven if all the incriminating evidence is there, I always have to question it. For example, if it is in a car, I always have to ask: did he know what was in his car, is it a rental car? Was it built in somewhere? Did he have a passenger who had it in his pocket and didn't tell the driver? There is always something – even if you say: the fact of the matter is like this, there is always something that is completely different. Just because it looks black doesn't mean it's black."
(Police officer, Austria)

According to police officers from Austria, defendants need to provide a credible explanation for how they came to possess the illegal goods; otherwise, they are presumed to be guilty. The prosecution must still prove guilt even if a defendant is caught with illegal or stolen goods if they insist that they do not know how these goods came into their possession or if they make use of their right to remain silent. Finding a defendant with such goods is not enough for a conviction, as the prosecution still needs to prove the criminal act of coming into possession of stolen goods. A police officer mentions always taking different options into consideration.

However, a lawyer from Bulgaria states that in cases of drug possession the accused person is effectively presumed guilty.

"Drug crimes. For example, the person held some green substance. How could they prove that they actually knew what that substance was. And somehow, it is presumed that they knew. This is a situation in which the burden of proof is practically reversed."
(Lawyer, Bulgaria)

Some interviewees from Belgium refer to money laundering cases. In such cases, while law enforcement authorities have to show only that a legal origin is excluded, defendants have to provide evidence of a legal origin. Such a rebuttable reversal of the burden of proof is also present in certain areas of criminal law, such as tax and customs and road traffic law, for example the identification of a driver on the basis of a number plate.

Endnotes

1 See, for example, UN HRC, ***General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*** (CCPR/C/GC/32), 23 August 2007, p. 9, para. 30.
2 UN HRC, ***General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*** (CCPR/C/GC/32), 23 August 2007, p. 9, para. 30.
3 CJEU, C-653/19 PPU, ***Spetsializirana prokuratura***, 28 November 2019, paras. 31–33 and operative part.
4 **Directive (EU) 2016/343**, recital 22.
5 *Ibid*, recital 22.
6 *Ibid*, recitals 22 and 23.
7 ECtHR, ***Barberà, Messegué and Jabardo v. Spain***, No. 10590/83, A/146, 6 December 1988, Section 77; see also Council of Europe/ECtHR, ***Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (criminal limb)***, 31 August 2020, p. 60, para. 317.
8 ECtHR, ***Phillips v. the United Kingdom***, No. 41087/98, 5 July 2001, Section 40.
9 Belgium, Code of Criminal Procedure (***Code d'instruction criminelle***, ***Wetboek van strafvordering***), Art. 326, Chapter VIII, Book II, publication in the Belgian Official Gazette 31 January 2013, entered into force 12 February 2013; Court of Cassation, AR P.99.0887.F, *Arr. Cass.* 1999, 1593, 8 December 1999, and AR P.04.0665.F, *Nullum Crimen* 2006, issue 2, 124, 6 October 2004.
10 Bulgaria, Criminal Procedure Code (***Наказателно-процесуален кодекс***), 28 October 2005.
11 Italy, Criminal Procedure Code (***Codice di Procedura Penale***), Arts. 530.2 and 533.
12 Lithuania, Criminal Procedure Code (***Baudžiamojo proceso kodeksas***), 14 March 2020 (with later amendments), No. IX-785, Arts. 21 (4), 22 (3), 42 and 44 (6).
13 Portugal, Code of Criminal Procedure (***Codigo di Processo Penal***), 1987, Arts. 53 and 340.
14 Austria, Criminal Procedure Code (***Strafprozessordnung 1975***), Federal Law Gazette No. 631/1975, Section 3.
15 United Kingdom (Appeal Court), ***Woolmington v. DPP*** [1935] AC 462, p. 481.
16 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), Karlsruhe/2 BvR 814/87, 23 September 1987.
17 Poland, Code of Criminal Procedure (***Kodeks postępowania karnego***), 6 June 1997, Art. 5.

5

RIGHTS TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF

The rights to remain silent and not to incriminate oneself guarantee that defendants are not compelled to speak while being interrogated, nor answer questions or provide evidence against themselves, including confessing. While, in general, witnesses to a crime are obliged to cooperate with law enforcement authorities and answer their questions, those charged with a crime – defendants – are free to choose silence as their defence strategy. Their silence should not be used as incriminating evidence. The right not to incriminate oneself also applies to witnesses, as they can refuse to answer questions that may raise suspicions or provide proof of their involvement in a crime.[1]

This chapter presents the fundamental rights standards regarding this procedural safeguard and examines the views of and examples provided by the interviewees.

5.1. LEGAL OVERVIEW

Directive (EU) 2016/343 sets out in Article 7 the right to remain silent and not to incriminate oneself. Suspects and accused persons should have the right to remain silent in relation to the charges and not to incriminate themselves. Judicial authorities should not use the exercise of these rights against defendants. However, cooperation with authorities can be taken into account when sentencing.[2]

As recitals 25 and 26 specify, defendants should not be forced to make statements or answer questions relating to the criminal offence that they are suspected or accused of having committed, produce evidence or documents, or provide information that may lead to self-incrimination. This means that authorities should not compel suspects or accused persons to provide information if they do not wish to do so, as recital 27 sets out. However, as recital 29 specifies, competent authorities are allowed to gather evidence that may be lawfully obtained from defendants through the use of legal powers of compulsion and that has an existence independent of their will, such as material acquired pursuant to a warrant and material in respect of which there is a legal obligation of retention and production on request, such as breath, blood and urine samples, and bodily tissue for the purpose of DNA testing.

The right to remain silent is also set out in Article 3 of Directive 2012/13/EU on the right to information in criminal proceedings. This is one of the most important rights and should be communicated to defendants in a proper manner.[3] The directive specifies in the same article that information about this right should be given to suspects orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or accused persons.

The right to a fair trial and the right to a defence in criminal proceedings are set out in Article 47 and Article 48 (2) of the EU Charter of Fundamental Rights. These should also be taken to include the privilege against self-incrimination and the right to remain silent. The Court of Justice of the European Union (CJEU) takes these rights to constitute the fundamental principles of the EU legal order.[4] The CJEU also clarifies that the right to remain silent is triggered in any kind of proceedings that may give rise to criminal liability or sanctions of a criminal nature.[5]

The above rights are well established in the case law of the ECtHR and international law. While the ECHR contains no explicit provision, according to the ECtHR, the privilege against self-incrimination is inherent in the concept of a fair trial.[6] The ECtHR also holds that the presumption of innocence is closely related to the right not to incriminate oneself.[7] Acknowledging this well-established jurisprudence, recital 27 of Directive (EU) 2016/343 provides that, in order to determine if the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the ECtHR of the right to a fair trial under the ECHR should be taken into account.

Obtaining evidence by compulsion

According to recital 29 of Directive (EU) 2016/343, the right not to incriminate oneself does not prevent authorities from applying lawful means of compulsion to gather evidence that exists independently of the will of suspects or accused persons, such as documents or DNA samples.[8] This provision reflects established ECtHR case law.[9]

In a landmark judgment, the ECtHR dealt with a case in which the authorities forced the applicant to vomit in order to obtain the plastic bag that he had swallowed. The ECtHR held that the privilege against self-incrimination has a broader meaning, also encompassing cases of coercion to hand over real evidence to the authorities. In delivering its judgment, the ECtHR considered various factors, such as the nature and degree of compulsion, the public interest at issue, the relevant safeguards and the use of the materials obtained. It concluded that the use of such evidence would violate the applicant's right not to incriminate himself and would therefore render his trial as a whole unfair.[10]

Adverse inferences from a defendant's decision to remain silent

According to the ECtHR, remaining silent is an applicant's right and the courts cannot conclude that an accused person is guilty merely because they choose to remain silent.[11] National courts remain free to draw conclusions from a defendant's behaviour, but must respect the presumption of innocence. For example, when deciding on pre-trial detention, national courts should not rely mainly on the fact that a defendant has not confessed. Such reasoning, according to the ECtHR, is a manifest disregard for the principle of the presumption of innocence, as a lack of confession cannot be relied on as a legitimate ground for deprivation of an applicant's liberty.[12]

Interrogation of suspects and accused persons with or without a lawyer of their own choosing

The presence of a defence lawyer during the questioning of a suspect is one of the most important safeguards to ensure that any confession is voluntary and that the right to remain silent and not to incriminate oneself is respected. The ECtHR developed the so-called 'Salduz safeguards' as a result of a case in which it condemned authorities for using an incriminating statement made without the presence of a lawyer as a basis for conviction.[13]

Under the ICCPR, a defendant is explicitly entitled "not to be compelled to testify against himself or to confess guilt".[14]

Right to a lawyer

For more details on the right to a lawyer during criminal proceedings, see FRA's report on this subject – **Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings (2019).**

5.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON HOW THE RIGHT TO REMAIN SILENT IS RESPECTED IN PRACTICE

Laws in all nine Member States studied recognise the right to remain silent and not to incriminate oneself in their legal traditions. Six Member States – Austria, Belgium, Bulgaria, Cyprus, Italy and Lithuania – include these rights in their criminal codes.[15] In Germany and Portugal, these rights are considered unwritten constitutional principles.[16] In the Polish legal system, no legal provision expressly grants the accused the right to remain silent. According to the Polish Code of Criminal Procedure, accused persons may, however, without giving reasons for doing so, refuse to answer particular questions or generally refuse to provide explanations. They must be advised of this right[17] and are under no obligation to prove their innocence or submit self-incriminating evidence.[18]

It should be noted that, as with other procedural rights of defendants, in Bulgaria and Poland the formal presentation of charges triggers the application of these rights. In this context see the detailed analysis of different procedural statuses attributed to actually suspected persons in Chapter 2.2 of FRA's 2019 report ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***.

Most interviewees across the nine Member States describe the rights to remain silent and not to incriminate oneself as well regulated and formalised in criminal procedure. Defendants should be advised of these rights at an early stage of police questioning and also during court proceedings. The police typically provide information about rights in writing, for example using the letter of rights, and sometimes also orally during police questioning; the judge provides this information again in writing or orally at the hearing stage.[19]

When it comes to a confession, interviewees underline that this should be voluntary. Judges must review confessions for credibility, plausibility and consistency with other evidence. However, some professionals indicate that a confession may seriously hamper the presumption of innocence, while at the same time shortening and simplifying the proceedings and frequently resulting in a milder sentence. Therefore, a confession can sometimes be a strategic choice by the defence – to 'sacrifice' the presumption of innocence in an effort to save time and costs and receive a milder sentence from the court.

Police informing defendants of their rights to remain silent and not to self-incriminate

Interviewees do not raise concerns about defendants being informed of the right to remain silent at the hearing/courtroom stage. However, interviewees in all Member States reveal problems in practice with the police informing defendants of their rights at the earliest stage of questioning. Delaying the provision of or not providing such information may well infringe the right to a fair trial, as the ECtHR cautions.[20]

In Germany, for example, defence lawyers report that the police regularly do not inform suspects about their rights to remain silent and not to incriminate themselves, despite police reports often claiming otherwise. Lawyers also state that the police frequently make false claims and deceive suspects to pressure them to self-incriminate. However, most police officers who were interviewed dispute this, although one police officer admits that some of his colleagues do not understand the right to remain silent in its entirety and pressure suspects to give evidence.

"Of course, there are also colleagues who do not immediately understand the right to remain silent and say: 'Come on, man, talk to me!' "
(Police officer, Germany)

In Cyprus, too, a lawyer describes how the police sometimes pressure suspects to make a statement before reading them their rights.

"The police often tell suspects 'what have you got to say?' without explaining that in fact they do not have to say anything. Persons without legal training facing a police officer sometimes feel that they have to say something, and the police will write down everything they say and can use it against them in court. The police need to explain that silence does not mean guilt. We as lawyers must have time and means to speak to our clients before the police have the chance to take their testimony. Often, the right to remain silent is only explained to suspects once the police have secured all the testimony they required and have completed their investigation. This is a serious abuse of the procedure."
(Lawyer, Cyprus)

Another Cypriot lawyer confirms this practice. This lawyer adds that, when the police present testimony in court, it is impossible to distinguish between testimony that was extracted before informing defendants of their rights and that delivered after they were informed. If this issue is raised at a hearing, the police may claim that a suspect started talking voluntarily and the court will usually accept this. In Lithuania, lawyers also refer to the 'ambiguous' period between the first encounter of a suspect with the police and the point when the letter of rights is presented, for example the period when a suspect's home is searched, when they have not yet been arrested. Lawyers from Poland also note that police officers keep memos to record suspects' impromptu statements made after their arrest and before their first interview, which are then used as evidence. One of the judges interviewed strongly criticises this practice.

"Each time I see these police memos [with information of the suspect's alleged confession], a warning light goes off in my head. That's something the suspect said without having been informed about their rights, in some casual conversation in a patrol car, this is not legal evidence, but still, for me, it's some kind of information that the things may have been different from what the defendant says."
(Judge, Poland)

Interviewees from Portugal emphasise the following good practice stemming from Portuguese criminal procedural law: statements made before the police are never admissible in trial, unless the defendant so requests, while a confession is admissible as evidence only if made before the court.[21]

Moreover, some defence lawyers in Austria further claim that police officers promise defendants procedural advantages to encourage them to confess, such as support for their case or a milder sentence if convicted. A prosecutor from Germany also reports that shorter sentences are sometimes offered to defendants as a reward for giving evidence. One of the police officers interviewed reports always asking the state prosecutor for assurances before offering a suspect the prospect of a lower sentence. Other police officers in Austria and Germany report that they point out the advantages of a confession, for example pre-trial detention can be avoided, sentences can be shortened and the police will support defendants. Lawyers in Poland observe that the police are very friendly towards defendants and gain their trust to try to make them confess.

"They [the defendants] often think that an admission of guilt is going to improve their situation because this is what they hear right after the arrest when sitting in the back of the patrol car."
(Lawyer, Poland)

In Bulgaria, according to two lawyers, first-time defendants can easily be persuaded to speak without the presence of a lawyer.

"The defendant has no real idea of the rights he has. [...] Everything is done in a hurry, the rights are read in a hurry or the paper is given out and said, 'read it at home quietly and your lawyer will explain it to you', and I always say, 'I won't explain anything. That is your obligation'. [...] But the fulfilment of these formalities is written in the official report 'it was fulfilled! Everything was said to the defendant and explained!' "
(Lawyer, Portugal)

When it comes to understanding their rights, according to two police officers in Bulgaria, the police can ask defendants verbally if they understand but they cannot be certain that they do understand. Defendants may claim that they do not understand, in which case their rights are explained again; however, if they remain silent the police assume that they understand and continue with their questioning. Some lawyers in Portugal argue that, most of the time, defendants' rights are not duly explained, even when a lawyer is present.

"In practice, people are informed of their procedural rights in an extensive manner, underlining that they can choose whether or not to remain silent, and always stressing that this option can never be seen or valued as an assumption of guilt or as a presumption of guilt. I also inform them that they can opt for total or partial silence, as to some facts or questions; they can answer certain questions and remain silent in response to others."
(Judge, Portugal)

The rights to remain silent and not self-incriminate are reportedly explained in a much clearer way in the courtroom according to interviewees. A Portuguese judge observes that defendants are given detailed explanations about their procedural rights, including what their rights entail, possible actions they can take and any consequences.

In Belgium, interviewees also paint a relatively positive picture. It emerges from interviews with the police that the values of the 'Salduz safeguards', including the right to remain silent, are well established in the mind-set of most judicial police, and they actually welcome the assistance of lawyers. Lawyers in turn find that the police now more frequently accept the decision of defendants not to speak and do not continue to probe. All interviewees in Belgium agree on the pivotal role that lawyers play in informing suspects about their rights.

"Many proceedings with slightly bigger accusations are eventually settled by a deal. And [...] the condition for such a deal is that a confession is made [...]. So in this respect, the courts make an offer and say: In case you confess, we will punish you much less than in case you do not and we still prove your guilt, so this is more of a 'blackmail' situation."
(Lawyer, Germany)

Police 'warnings' about remaining silent

The findings also show that some law enforcement officers 'warn' or inform defendants about the advantages and disadvantages of exercising the right to remain silent. Some lawyers from Belgium and Germany believe that such 'warnings' constitute pressure on the defendant to speak.

"It is reasonable to inform the defendant that if they don't want to explain things, the court won't be as pleased as it would be if they wanted to cooperate."
(Police officer, Poland)

However, a prosecutor from Belgium highlights that it is important that the police inform a suspect of the potential consequences of exercising the right to remain silent. This interviewee notes that the framing of the message to the suspect is important, that is, whether it is presented as information or as a threat. Similarly, a police officer in Poland believes that it is fair to inform a defendant about the consequences of a refusal to speak. This officer believes that the court is more likely to be suspicious of defendants who

remain silent during criminal proceedings; thus, defendants need to know that their silence may negatively affect their situation.

Some lawyers believe it is important that their clients are informed about the possible negative consequences of remaining silent. For example, two lawyers in Lithuania explain that, in cases in which the evidence against a person is clear, it is not worth remaining silent; silence precludes the possibility of explaining the circumstances from their point of view and thus making the situation more favourable for them. A prosecutor agrees with this view.

Consequences of remaining silent during sentencing and pre-trial detention

Directive (EU) 2016/343 stipulates in Article 8 (5) and recital 28 that exercise of the right to remain silent should not be held against a suspect or accused person. It should not, in itself, be considered as evidence that the person concerned has committed the criminal offence.

"There are incentive measures in the law to motivate a person to confess or tell the exact details of the accident and say, that they did not want to do so, did it accidentally and this will be treated as a kind of confession. When a person remains silent we inform them that they will not receive those benefits, but we never say that the punishment will be more severe, because that would be a lie."
(Prosecutor, Lithuania)

The vast majority of interviewees report that, if defendants remain silent when there is material evidence against them, this will, in general, result in a conviction – and often a longer sentence – or in pre-trial detention.

"A defendant's decision to remain silent may have a psychological effect on a law enforcement officer or the judge, creating a sentiment that the defendant is trying to hide something, which only confirms that the charges against them must have at least some merits."
(Lawyer, Poland)

"Let me refer to the extensive jurisprudence of courts concerning pre-trial detention: although the lack of confession cannot give rise to any negative consequences for the defendant, it strengthens the suspicion of obstruction of justice, which in turn leads to the necessity of applying pre-trial detention."
(Lawyer, Poland)

The police may 'warn' defendants of these consequences and all respondents find that it is often in defendants' best interests to provide their own account of the facts. Several judges elaborate on this, reporting that, if defendants exercise the right to remain silent, they have to rely on the version of facts provided by the prosecution. Moreover, defendants cannot benefit from a reduced sentence if they do not provide the court with information to explain or justify their actions.

"Some judges say: 'If you want to remain silent, you can, but if you speak it can be used in your favour'. In that context, it is a subtle and soft way to exert pressure."
(Lawyer, Portugal)

"[T]he defendant does not provide me any positive element, for instance I committed a robbery because my son is hospitalised in the neuropsychiatry department and I need to pay an assistant etc. What can I do? I mean, I only know you committed a robbery! So, if the defendant decides to remain silent, they are not giving me any element: what their life and context are like, what the reasons of the crime are, I would not know! So, this choice has an indirect impact on the sentence."
(Judge, Italy)

Remaining silent as a defence strategy

Article 7 (1) and recital 24 of Directive (EU) 2016/343 also enshrine the negative right not to remain silent, as the exercise of the right is incumbent upon the right holder. Defendants may thus waive their right to remain silent by means of a full or partial confession.

Some interviewees agree that whether a defendant confesses or decides to remain silent may be part of the defence strategy. Many lawyers admit that they often advise their clients to remain silent, at least during the pre-trial phase. Interviewees in Belgium, Bulgaria and Cyprus observe that suspects rarely remain silent throughout the whole investigation and trial phases; most will provide some explanation in a later phase of the proceedings. A judge

"I advise them not to talk in all those cases where I don't have access to the file and where the person was not caught in the act. [...] There are cases in which if the person does not speak they will be in pre-trial detention. These are the few cases in which I advise them to make statements [...]. In others, when in doubt, it is better not to speak. Without being aware of the case it is usually harmful to make statements."
(Lawyer, Portugal)

"A strategy that is decided by the defendant and their lawyer. This is how our system works. Those who confess will of course benefit significantly when it comes to the sanction."
(Judge, Italy)

"Admission of guilt does not make your sentence worse. If you did something bad and took responsibility for what you did, you have a chance to make things right, apologise and, above all, have a say in your punishment."
(Judge, Poland)

"In fact, if the accused person confesses their guilt, in the sense that if the circumstances of the offence are clear and they admit guilt, it is easier for them, because the sentence is reduced by one third and less, respectively. In such cases, the shortened examination of the evidence is possible, without inviting the participants to the court, and as a result considerably less disclosure of personal information is made."
(Police officer, Lithuania)

"There is no presumption of innocence any more. Unless it emerges in the proceedings that this is an absolute confession of protection (*Schutzgeständnis*) [confession for purposes of protecting someone else]. Because if an accused confesses guilt, it is very difficult for the judge to say that he is not convinced of the guilt. [...] The presumption of innocence applies only to those who deny having committed a crime."
(Lawyer, Austria)

in Bulgaria notes that, at the pre-trial stage, about 90 % of defendants who have a lawyer remain silent and refuse to give explanations, on the advice of their lawyer; this is because of the low level of trust in the investigative authorities. Interviewees claim that about half of defendants prefer to remain silent during the trial.

A prosecutor from Austria also reports that defendants exercise the right to remain silent so that they can see first what evidence the prosecution has. They confess at a very late stage of the proceedings and only when the evidence is against them, to show they are cooperating and to receive a shorter sentence. According to lawyers from Germany a confession has strategic value in the context of a so-called 'deal', by providing more certainty about the outcome of the trial in terms of sentencing. A judge from Italy acknowledges this practice.

Confessing rather than remaining silent

Many interviewees from all Member States studied agree that if a defendant confesses the proceedings are easier and shorter – usually through the use of special procedures, as in Austria. This can also result in shorter sentences. For example, two lawyers from Austria note that, if a defendant confesses, it can be argued that they have actively cooperated; they can be presented as a victim of circumstances, resulting in a shorter sentence. A lawyer from Italy, a police officer from Lithuania and a judge from Poland confirm that if a defendant confesses and shows remorse it may convince judicial authorities to impose a shorter sentence.

As for the confession itself, many professionals from all Member States studied emphasise that other evidence also needs to be provided in support. As a judge from Bulgaria underlines, a confession is not binding on the courts. However, as many argue, in practice, when a defendant confesses the presumption of innocence ends.

A lawyer from Germany recalls statistics showing that 15–20 % of confessions are false, meaning that a confession does not constitute sufficient evidence on which to base a conviction. However, according to this interviewee, his clients are regularly convicted once they confess. He mentions, in particular, a client who was accused of spraying graffiti and who confessed to protect his friends, even though he was innocent. The client was convicted, even though there were no fingerprints or witnesses to corroborate his confession.

In contrast, two interviewees share experiences of judges not accepting uncorroborated confessions as the basis for their decisions.

"I have had situations where the judge has suspected that the confession was not free and spontaneous and has asked further questions. The judge always has the opportunity to investigate the case and to evaluate whether the confession is made freely and spontaneously. Moreover, the defendant is represented by a lawyer."
(Lawyer, Portugal)

"Even when there is such a confession, the court is required to *ex officio* establish that that confession is supported by the facts of the case and then declare that it will use the confession as the basis for the conviction. There have been cases, not in my practice though, when the court has refused to accept a confession, since the facts do not support that confession, i.e. the court has concluded that the defendant is covering up someone else's guilt."
(Judge, Bulgaria)

A police officer from Cyprus also stresses that an accused person can argue that a confession was not obtained freely and can change their plea to not guilty. If any of their rights are violated they can bring this before the courts, and they often do so.

Self-incrimination: defendants coerced to provide incriminating evidence

Article 7 (2) and recitals 27 and 29 of Directive (EU) 2016/343 allow national authorities to gather only evidence that may be lawfully obtained and that has an existence independent of the will of the person concerned.

When it comes to other incriminating evidence, such as data stored on electronic devices, the majority of interviewees (e.g. in Austria, Germany, Italy and Poland) agree that defendants are generally not obliged to provide, for example, phone PINs or computer or email passwords. Defendants can only voluntarily provide evidence that may affect their presumption of innocence.

Judges and prosecutors in Poland agree that it is the job of the police to obtain access to secured phones and password-protected computers. A prosecutor in Germany recalls a public discussion on 'borderline cases' involving the unlocking of mobile phones using iris scans or fingerprints. It was discussed whether this represented active participation of a suspect, which would be illegal, or passive participation.

However, some interviewees, in particular defence lawyers, report that, in practice, the police sometimes coerce defendants into providing incriminating evidence. In Austria, for example, a lawyer observes that some defendants, namely those who are innocent, provide their passwords during the first police interrogation; either they say that they have nothing to hide or they do not know that they can refuse. According to one lawyer, when a police officer reads out their rights, most defendants are not able to fully comprehend this information in the time available; this includes the fact that there is no obligation to provide their passwords.

Interviewees in Poland note that, although defendants do not have to disclose their computer passwords or phone PINs, sometimes the police ask them to do

so 'off the record', arguing that if they cooperate the proceedings will be shorter. One police officer indicates that, for the most serious crimes, for example terrorism, he would consider using coercive methods to unblock a phone, for example to save lives. Similarly, in Lithuania, a police officer describes how the police will often ask suspects to provide evidence voluntarily; if they do not do so, as is their right, the police will employ other means to obtain the evidence, for example through a legally mandated house search. The police officer suggests that the only effect that a defendant's choice to remain silent has on the proceedings is that the process takes longer because of the need to look for evidence.

"Then I will make it clear to the defendant what it entails [...] that they will probably not see their things again for another five years – exaggeratedly – because then the effort is simply much higher to get the documents."
(Police officer, Germany)

In addition, police officers from Germany indicate that, in practice, they explain to suspects that either they can provide them with their PINs or passwords voluntarily or their devices can be forcibly unlocked, which will take significantly longer and cost money. The police officers report that they present the advantages and disadvantages of both options in an impartial manner and do not think that this puts pressure on suspects.

However, most of the other professionals interviewed in Germany perceive such behaviour differently. Prosecutors admit that this behaviour does put pressure on suspects, while a lawyer states that the police often act as though suspects are obliged to provide their passwords. Two other lawyers note that the police sometimes falsely claim that they can obtain a court order for a certain measure or make false promises about a shorter sentence in a potential trial. Similarly, in Italy, a lawyer reports that the police can pressure suspects and accused persons to accept an unauthorised police search by telling them that a public prosecutor will authorise it anyway. One interviewee describes such behaviour as deceptive, as the police have no influence on courts and sentencing.

"These are all empty promises, and I believe that it actually happens every day that the police make these promises and deceive the suspects."
(Lawyer, Germany)

Lawfully obtained evidence

Aside from instances where defendants are reportedly put under pressure or coerced to provide information or evidence that may incriminate them, authorities can legally obtain certain evidence in line with Article 7 (3) and recital 29 of Directive (EU) 2016/343.

In many countries, interviewees mention that this relates to obtaining biometric evidence such as urine, blood and DNA, which does not fall under the prohibition of self-incrimination if competent judicial authorities authorise such a procedure.

In Cyprus, the rule against self-incrimination concerns only oral evidence, not 'real' evidence, which is distinguished in the case of *Avraamidou* from 2004.[22] After a subsequent amendment of the Police Law of 2004, if a person refuses to give consent the police may seek a court order obliging them to do so.[23]

In Bulgaria, professionals are divided as to when a court decision can oblige a defendant to provide incriminating information. A judge and a prosecutor say that in some cases a defendant can be obliged to provide a DNA sample, but this cannot be applied to data such as PINs and passwords, as this would violate their right to remain silent. They explain that there is a difference between obliging a defendant to 'give' a DNA sample and requiring the defendant to 'reveal' a password.

"In my opinion, it violates the right to non-self-incrimination, since, from the outset, it is not specifically foreseen that the defendant is obliged to submit himself to this diligence of evidence."
(Lawyer, Portugal)

Apart from searches and DNA samples, interviewees in Portugal highlight two particular circumstances in which defendants are obliged to provide evidence that may affect their presumption of innocence. The first is the obligation of defendants to provide handwriting samples. Following a Supreme Court ruling in 2014,[24] courts have ruled uniformly that defendants who refuse to give their

signature, at the order of the public prosecutor, are committing the crime of disobedience. Lawyers find this a violation of the right not to incriminate oneself.

The second circumstance is where defendants are obliged to provide information and documents to the tax authority under tax law. Under the Constitutional Court's ruling, using these documents in future criminal proceedings is not unconstitutional and does not infringe the right not to incriminate oneself.[25] However, the Constitutional Court also ruled that using these documents is unconstitutional and infringes the right not to incriminate oneself if a criminal investigation is pending.[26]

Several interviewees in Belgium appear to be unsure whether or not and to what extent suspects can be forced to hand over material or intellectual evidence, such as passwords and encryption codes. The Court of Cassation and Constitutional Court recently decided that a suspect can be forced to provide encryption codes;[27] however, interviewees remain unconvinced. One judge finds this practice to be in violation of the presumption of innocence and opposes the practice. Respondents note that, in practice, suspects will often provide these data voluntarily.

Safeguards: access to a lawyer

When reflecting on available safeguards, interviewees highlight the pivotal role that defence lawyers play at the earliest stages of proceedings with regard to advising defendants of their rights.[28]

Many interviewees, primarily lawyers themselves but also judges, identify early access to a defence lawyer as a key safeguard of a defendant's rights, including to be given adequate information about the rights to remain silent and not to self-incriminate.

As mentioned earlier, the police do not always effectively inform suspects about their right to a lawyer, and some interviewees claim that police officers discourage defendants from exercising this right.

Regarding the protection of a defendant's right to remain silent, lawyers in Austria and Bulgaria argue in favour of video documenting police interrogations if a defence lawyer is not present as a way of preventing possible abuse of the obligation to inform suspects about the right to remain silent (police interrogations are currently documented only in writing).

Many interviewees note that, without a lawyer present to carefully explain their rights, defendants may not understand them well, as they are often provided in writing in a format that is not easy to understand. They will often have to sign something to say that they have received and understood these rights without having understood them at all.[29]

"[C]ertain police officers control defendants and indirectly influence and discourage them to make use of their right to a defence lawyer. They would say, firstly, the lawyer costs money and if you call the lawyer, that takes time and you have nothing to gain from it, because he is not allowed to say anything anyway. So, it is smarter if you talk to us because we will tell the judge that you have been very cooperative."
(Lawyer, Austria)

Interpretation and translation

For more information on interpretation and translation during criminal proceedings, see FRA's 2016 report **Rights of suspected and accused persons across the EU: Translation, interpretation and information**.

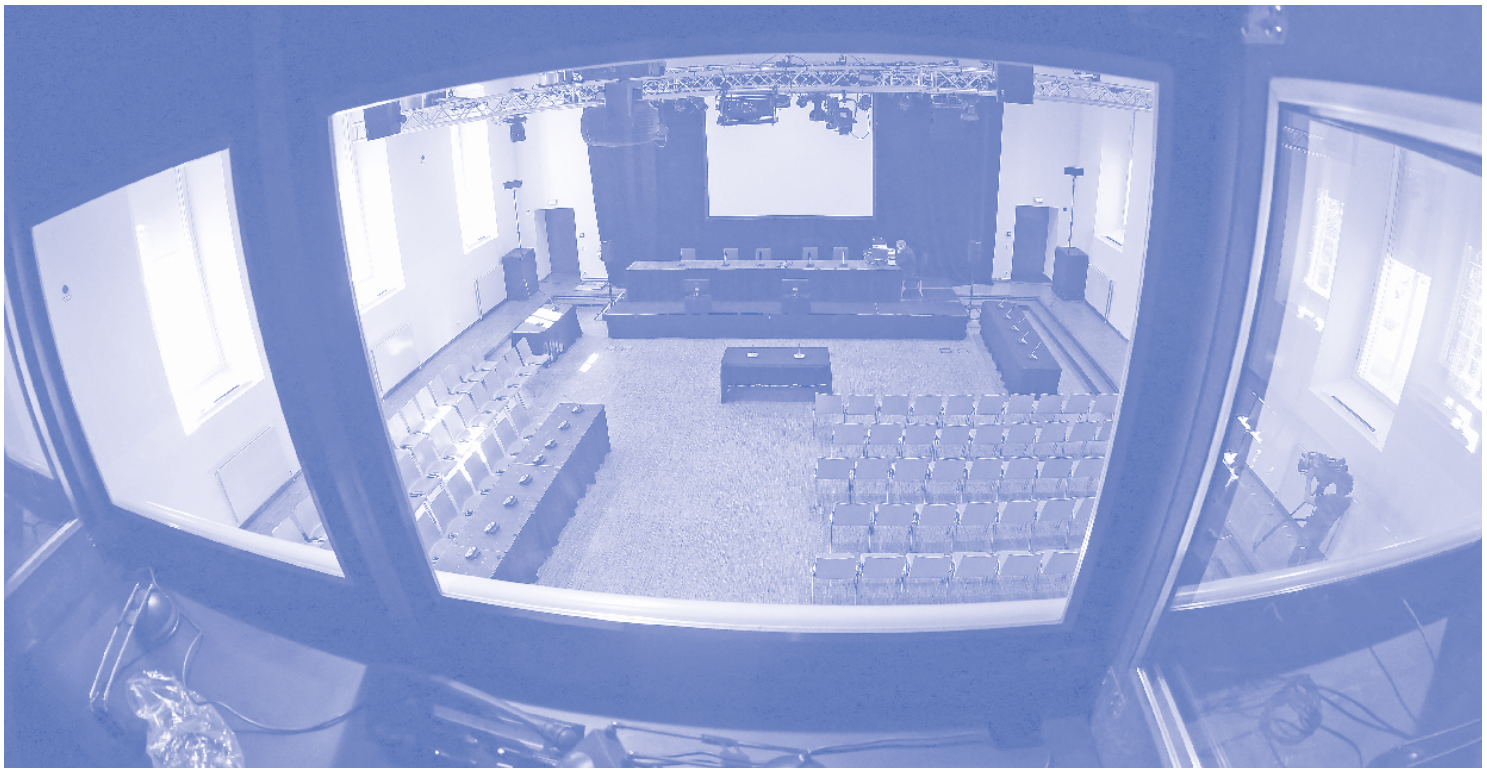
Other safeguards

Among other safeguards, interviewees refer to procedural guarantees for certain defendants, such as interpretation and translation services.

In addition, interviewees from all Member States studied mention safeguards that are in place for children and defendants with intellectual and/or psycho-social disabilities. A police officer from Bulgaria says that specially trained officers treat such persons very carefully. A judge from Sofia notes that, if a vulnerable defendant makes a confession, the court is obliged to check if they knew that they were making a confession and what the consequences of such a confession would be.

A lawyer from Poland underlines some shortcomings in relation to safeguards for children and defendants with intellectual and/or psycho-social disabilities. In particular, even if a suspect being interviewed belongs to a vulnerable group and shows, for example, signs of an intellectual disability, the questioning continues and the record of the questioning is included in the case file. It is only after being interviewed that the prosecutor files a motion with the court for the appointment of a defence lawyer or for a psychiatric evaluation of the defendant.

In the opinion of the interviewee, police or prosecution interviews should be stopped as soon as the interviewing official realises that the suspect may have difficulties in understanding, and the court should immediately be asked to appoint a defence lawyer. The interviewee mentions two cases of suspects with intellectual disabilities who were interviewed without the presence of a defence lawyer and confessed to crimes they did not commit as examples of shortcomings related to appropriate safeguards for persons with intellectual disabilities in criminal proceedings.



Endnotes

1 ECtHR, ***Serves v. France***, No. 20225/92, 20 October 1997, Sections 43–47.
2 CJEU, C-467/19 PPU, ***Spetsializirana prokuratura (presumption of innocence)***, 24 September 2019, Order, paras. 33 and 34.
3 See also CJEU, C-216/14, ***Covaci***, 15 October 2015, para. 55.
4 CJEU, Case 322/82, ***Michelin v. Commission***, 9 November 1983, Section 7; Case 374/87, ***Orkem v. Commission***, 18 October 1989, Section 32. For decisions made before the entry into force of the Treaty of Lisbon on 1 December 2009, this also includes cases dealt with by the former European Court of Justice (ECJ).
5 CJEU, C-481/19, ***DB v. Commissione Nazionale per le Società e la Borsa (Consob)***, 2 February 2021.
6 ECtHR, ***Ibrahim and others v. the United Kingdom*** **[GC]**, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, Sections 266 and 267; ***Gäfgen v. Germany*** **[GC]**, No. 22978/05, 1 June 2010, Section 168; ***Van der Heijden v. the Netherlands*** **[GC]**, No. 42857/05, 3 April 2012, Section 64.
7 ECtHR, ***Heaney and McGuinness v. Ireland***, No. 34720/97, 21 December 2000, Section 40.
8 **Directive (EU) 2016/343**, Art. 7 (3) and recital 29.
9 ECtHR, ***Saunders v. the United Kingdom*** [GC], No. 19187/91, 17 December 1996, Section 69; ***O'Halloran and Francis v. the United Kingdom*** [GC], Nos. 15809/02 and 25624/02, 29 June 2007, Section 47.
10 ECtHR, ***Jalloh v. Germany***, No. 54810/00, 11 July 2006 [GC], Sections 110–122.
11 ECtHR, ***John Murray v. the United Kingdom***, No. 18731/91, 6 February 1996, Sections 45 and 47.
12 ECtHR, ***Garycki v. Poland***, No. 14348/02, 6 February 2007, Section 48.
13 ECtHR, ***Salduz v. Turkey*** **[GC]**, No. 36391/02, 27 November 2008, Section 50 - 55; ***Ibrahim and others v. the United Kingdom*** **[GC]**, Nos. 50541/08, 50571/08, 50573/08 and 40351/09, 13 September 2016, joint partly dissenting, partly concurring opinion of Judges Sajo and Laffranque; ***Beuze v. Belgium*** **[GC]**, No. 71409/10, 9 November 2018, Section 124 *et seq*.; ***Martin v. Estonia***, No. 35985/09, 30 May 2013, Sections 77–79 and 94–97; ***Dvorski v. Croatia*** **[GC]**, No. 25703/11, 20 October 2015, Sections 111–113.
14 UN, **ICCPR**, 16 December 1966, Art. 14 (3) (g).
15 Austria, Criminal Procedure Code (***Strafprozessordnung 1975***), Section 7 (2); Belgium, Code of Criminal Procedure (***Code d'instruction criminelle***, ***Wetboek van strafvordering***), Art. 47*bis*; Bulgaria, Criminal Procedure Code (***Наказателно-процесуален кодекс***), Art. 55; Cyprus, Law on criminal procedure, Cap 155 (***Ο περί Ποινικής Δικονομίας Νόμος, Κεφ. 155***), Art. 8; Italy, Criminal Procedure Code (***Codice di Procedura Penale***), Art. 64; Lithuania, Criminal Procedure Code (***Baudžiamojo proceso kodeksas***), 14 March 2020 (with later amendments), No. IX-785, Art. 7.
16 In Germany, the right not to incriminate oneself is neither prescribed explicitly by the Basic Law (***Grundgesetz***) nor prescribed by the Code of criminal procedure. However, its constitutional status is undisputed, with the prevailing view arguing that it is part of human dignity – see Federal Constitutional Court (*Bundesverfassungsgericht*), Karlsruhe/1 BvR 116/77, 13 January 1981.
17 Poland, Code of Criminal Procedure (***Kodeks postępowania karnego***), 6 June 1997, Art. 175.
18 Poland, Code of Criminal Procedure (***Kodeks postępowania karnego***), 6 June 1997, Art. 74.
19 For more information see FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***, Luxembourg, Publications Office, Chapter 2.2.
20 ECtHR, ***Beuze v. Belgium*** **[GC]**, No. 71409/10, 9 November 2018, Sections 130 and 146.
21 Portugal, Code of Criminal Procedure (***Codigo di Processo Penal***), 1987, Arts. 344 and 357.
22 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο*), ***Δημοκρατία v. Αβραμίδου κ.α.*** 2004 2 ΑΑΔ 51.
23 Cyprus, Police Law of 2004 (***Ο περί Αστυνομίας Νόμος του 2004***), 73(I)/2004, Art. 25.
24 Portugal, Supreme Court, **Case 171/12.3TAFLG.G1-A.S1**, 28 May 2014.
25 See Portugal, Constitutional Court, **Case Law 340/2013**, 17 June 2013.
26 See Portugal, Constitutional Court, **Case Law 298/2019**, 15 May 2019.
27 Belgium, Court of Cassation 4 February 2020, **P.19.1086.N/6**, Juristenkrant 2002, afl 403, 1 - 7 and Constitutional Court 20 February 2020, nr. **28/2020**.
28 For more information in this area see FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***, Luxembourg: Publications Office.
29 For further information, see FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings***, Luxembourg: Publications Office.

6

RIGHT TO BE PRESENT AT TRIAL AND RIGHT TO A NEW TRIAL

This chapter deals with the right to be present at the trial and the right to a new trial – if a defendant has unjustifiably been deprived of their right to be present at the first trial – in criminal proceedings. It discusses the various aspects of these rights emerging from law and practice in the Member States studied. The fieldwork, in particular, examines the nature and content of these rights, the consequences of being absent from the trial and awareness of these consequences. Particular focus is placed on the participation of persons in a vulnerable situation in criminal proceedings.

6.1. LEGAL OVERVIEW

Directive (EU) 2016/343 lays down common minimum rules regarding the right to be present at the trial and the right to a new trial in criminal proceedings.[1] Article 8 generally requires the presence of an accused person. However, it also sets out the conditions under which a trial can be held in their absence, including the notification requirements and the obligation for a new trial if these conditions are not complied with.[2] Recitals 36 and 37 specify that a decision on the guilt or innocence of a suspect or accused person can be handed down even if the person concerned is not present at the trial as long as certain conditions are fulfilled, for example the suspect or accused person has been given sufficient notice of the trial and of the consequences of non-appearance and still does not appear. In addition, a trial can go ahead *in absentia* when a suspect or accused person has had sufficient notice of the trial and been informed of the consequences of not appearing at that trial and a lawyer has represented them.

If a represented person does not appear at a hearing for a reason beyond their control, additional requirements must be met.[3] These demand that, after that hearing, the represented person must be informed of the steps taken in their absence and, with full knowledge of the situation, must decide and state either that they do not call the lawfulness of those steps into question with respect to their non-appearance or that they had in fact wished to take part in those steps.[4] If the suspect or accused person had wished to take part in those steps, the national court hearing the case must repeat those steps, for example conducting further examination of witnesses, with the suspect or accused person being given the opportunity to take part fully.[5] However, if these conditions are not met, defendants have the right to a new trial or a fresh determination of the merits of their case.

The rights to be present at the trial and to a new trial are also regulated in EU law by Framework Decision 2009/299/JHA, which reflects the case law of the ECHR on decisions *in absentia* in the context of EU mutual recognition instruments.[6] However, assessment of the implementation of this instrument is outside the scope of this report.

The rights to be present at the trial and to a new trial are constituents of the right to a fair trial, enshrined in the last two paragraphs of Article 47 and in Article 48 of the Charter of Fundamental Rights.[7] These Charter provisions correspond to Article 6 of the ECHR.[8] The Charter and the ECHR, in contrast to the directive, do not explicitly refer to the right to be present at the trial or the right to a new trial. Nonetheless, both European courts are clear in that a person charged with a criminal offence is entitled to take part in the hearing, having their case 'heard'. This means that defendants are entitled, among other things, to give evidence in their defence, hear the evidence against them, and examine and cross-examine witnesses.[9]

Being present at the trial allows the defendant to corroborate their statements with those of the witnesses and victims.[10] In this sense, the right to be present enables defendants to 'effectively' take part in the trial, irrespective of whether or not a lawyer represents them.[11] This means that defendants should be able to hear and follow the proceedings, for example by keeping notes.[12] This also has important repercussions for children; authorities must respect their vulnerability, capacities and feelings to ensure that they understand and can take part in criminal proceedings.[13] The ECtHR has also indicated that certain forms of unfairness can amount to a flagrant denial of justice, including a conviction *in absentia* with no subsequent possibility of a fresh determination of the merits of the charge.[14]

Moreover, authorities must ensure that defendants are properly summonsed and informed of the trial.[15] They should also ensure that defendants have enough time to prepare their case and to attend the hearing.[16] EU law and case law do not require a re-trial in all cases of judgments *in absentia* or by default;[17] rather, they afford a margin of appreciation to Member States in this regard.[18] Accordingly, trials *in absentia* or by default are not prohibited as long as the accused has waived – tacitly or explicitly – their right to appear and defend themselves.[19]

An implied waiver not to appear at the trial is valid as long as it is established that the accused could reasonably have foreseen the consequences,[20] for example when they are aware of the proceedings and decide not to attend, such as by fleeing.[21] When national law provides for the possibility of a re-trial, irrespective of the reasons for a defendant's absence, no fundamental rights issues arise.[22] Directive (EU) 2016/343 and Framework Decision 2009/299/JHA also do not prohibit trials *in absentia* or by default provided that the accused either has been informed of the trial and does not appear or is represented by a lawyer, or cannot be found after the authorities have made all reasonable efforts to locate them.[23] The accused should be informed of the consequences of their absence.[24] When the above requirements are not met, the accused should obtain a re-trial and a fresh determination of the legal and factual issues of the case.[25] In essence, therefore, the right to a new trial acts as a remedy when the requirements to secure the presence of the accused are not met.

The right to effective participation in the above sense applies predominantly to the first-instance trial. It also applies to any other degree where the court fully and directly assesses the merits of the case, in terms of both fact and law.[26] Moreover, it applies to subsequent proceedings determining the cumulative sentence where the national court enjoys a margin of discretion.[27] However, it does not apply to subsequent proceedings in which suspension of a sentence is revoked.[28]

The Council of Europe Conventions dealing with criminal matters also regulate the right to be present at the trial and the right to a new trial.[29] For example, extradition may be refused for judgments rendered *in absentia*, unless the

requesting state allows a re-trial.[30] These rights are also found in many international legal instruments, including predominantly the ICCPR.[31] They are further enshrined in the Convention on the Rights of the Child[32] and guaranteed in criminal trials held before the International Criminal Court and other international criminal tribunals.[33]

6.2. FINDINGS: NATIONAL LAWS AND PROFESSIONALS' PERSPECTIVES ON PRESENCE AT TRIAL IN PRACTICE

National laws regulate extensively the presence of defendants throughout proceedings, the consequences of not appearing and the consequences of the violation of the right to be present. All Member States studied have legal provisions ensuring that defendants have the right to be present at their trial.[34]

Overall, the findings from the selected Member States reveal that the right to be present at the trial and the right to a new trial are generally respected and applied both in law and in practice. Defendants are generally informed of trial proceedings and the consequences of their absence. However, some concerns exist, mainly related to informing defendants of the consequences of their absence from trial and making efforts to locate them, obligations that are set out in Article 8 (2) and (4) of Directive (EU) 2016/343. Interviewees also have a similar understanding of what effective participation entails. The findings also show that, apart from Italy, where trials *in absentia* are no longer held, such trials take place in all Member States studied, in a general or more nuanced manner.

"They do not understand anything, so that the trial takes place like a movie that cannot be followed. Unfortunately, this is often the case."
(Lawyer, Germany)

The findings indicate that issues exist in all countries studied in relation to defendants in a vulnerable situation. Recital 42 of Directive (EU) 2016/343 requires Member States to ensure that the particular needs of vulnerable persons are taken into account. Illiteracy, lower social and educational status, minor intellectual and/or psycho-social disabilities that go unnoticed, and lack of systemic safeguards and standardised procedures for such persons can undermine their effective participation.

Participation in trial proceedings: a right or an obligation?

It appears that the right to be present during proceedings is seen both as a right and as an obligation. This is the case in Austria, Cyprus, Germany, Lithuania and Portugal. In Austria the law stipulates that defendants have the right to take part in the entire proceedings and the duty to be present during the main hearing.[35] In Cyprus, where the right to be present is afforded constitutional status, courts can order all accused persons to be present at their trial;[36] only exceptionally are lawyers allowed to represent a defendant.[37] In Lithuania, the participation of accused persons in first-instance hearings is mandatory unless a defendant is abroad and unable to appear in court.[38] In Germany, in principle, accused persons are also obliged to appear at their trial.[39] There are limited exceptions that enable the continuation of a trial when the defendant has already exercised their rights. According to Portuguese law, the presence of the defendant at a hearing is mandatory.[40]

The rest of the Member States studied treat the presence of the accused more as a right and only exceptionally as an obligation. For example, in Belgium, defendants are not obliged to be present and the courts can order them to take part only in certain cases.[41] In Bulgaria, the presence of defendants at

the trial is mandatory in cases of serious crime with a sentence of more than five years.[42] The courts may also request their presence to establish the truth in other cases.[43] In Poland, a 2015 amendment to the Code of Criminal Procedure abolishes the general rule of mandatory appearance and provides that defendants have a right to be present.[44] Only in felony cases is the presence of defendants mandatory when the prosecution presents the charges. Courts may nevertheless order the presence of defendants. Only in Italy, following a reform in 2014, defendants have the right and not the obligation to be present at the trial. In their absence the proceedings are suspended.[45]

Notification of the trial

To ensure the participation of defendants they must be informed of the trial and the consequences of their absence in accordance with recital 36 of Directive (EU) 2016/343. The findings show that the implementation of the directive has enhanced the provision of such information; there is no indication of any systemic issues. For example, in Germany, the implementation of the directive has led to the introduction of an obligation to inform defendants about the consequences of non-attendance.[46] The law now also requires that defendants are informed of their right to be present at appeal proceedings and the remedies available if they are not present. [47]

Most interviewees from Austria, Bulgaria, Germany and Portugal, prosecutors from Cyprus and lawyers from Lithuania confirm that defendants are properly informed about the trial and the consequences of their absence in summons. For example, in Lithuania, defendants are informed by registered letter; the contents of the letter can be translated if necessary. If the letter is not received, authorities contact defendants by phone. In Poland, a summons must be served personally.[48] When this is not possible, the summons is left at the nearest post office, with a copy left at the nearest police station or local municipal office.[49] An Italian judge describes the notification procedure as highly protective of defendants' rights, as authorities have to send at least three notices to inform the defendant of the trial.

"The defendant must be given at least three different notices. The public prosecutor must communicate the end of the investigation and deliver the indictment, as well as the information notice about the fact that all the documents are lodged by the court's registry. Then, the preliminary hearing judge must inform them about the prosecutor's request of indictment and the date of the preliminary hearing. After the preliminary hearing, the preliminary investigation judge must inform them of the beginning of the proceeding, the charges against them and the date of the first hearing. So, from this point of view, the safeguards in place are very strong."
(Judge, Italy)

However, according to two Italian lawyers, police authorities are not really interested in ensuring that defendants are adequately informed about proceedings and do not properly investigate their whereabouts.

The findings from the selected Member States further reveal a mixed picture with regard to the efforts that authorities make to locate defendants when responding to their obligation under Article 8 (4) and recital 39 of Directive (EU) 2016/343. In Austria, Bulgaria, Lithuania and Poland, authorities appear to engage in efforts to locate defendants; however, in Belgium, Italy and Portugal, there are concerns about the adequacy of these efforts.

In Bulgaria, a judge and a lawyer confirm that, if authorities cannot locate a defendant, they carry out searches in official registers. According to a different lawyer and a different judge, the intensity of the efforts to locate a defendant depends on the judge's assessment of the importance of their participation. As these interviewees report, such efforts include making enquiries at prisons, in detention facilities and of border authorities, visiting defendants' workplaces, making enquiries of mobile phone operators and obtaining contact details from banks and social security services.

"The police department in Vilnius responsible for transporting defendants does a lot: they search, ask neighbours at the place of residence of the defendant, they give an official report. If they do not bring the person to the courtroom, then they check all the records of that person, check the workplace, the population register, and social media. [...] At the beginning we search in a friendly manner: by phone, in the places of residence. At the moment I have a drug-addicted defendant, who does not have parents, just a grandmother and thus we called the grandmother and asked her to pass the message to her grandson. If those friendly methods don't work, then we initiate a search. The search department of Vilnius County then starts looking for the person and if there are enough legal grounds of the crime to allow an arrest, we issue an arrest warrant [pre-trial detention] and a stronger system of search follows."
(Judge, Lithuania)

"I try to find out where they live, where they are. I do this by means of a query via the central register of residents. If they do not appear there, then I try to communicate with the police station where they were last located. They then try to find out where they are – sometimes that works too. And otherwise there is a so-called judicial alert to find out where they are, which means that at the next occasion, the police will inform them that the court is looking for them and then their current details of where they live will be recorded and sent to the court. And then he is summonsed again."
(Judge, Austria)

In Poland, a judge and two prosecutors confirm that databases are searched extensively to locate defendants (e.g. the national address database, healthcare system database and police and border guard records). When these efforts fail, notice is served to the last known address. Judges from Austria and Lithuania also report that authorities make comprehensive efforts to locate defendants.

In Belgium, when a person cannot be located, the summons is presented to the prosecutor, who searches for their address. However, according to a judge and two lawyers, the public prosecution does not make sufficient efforts to ensure that defendants are informed of the trial. For example, defendants in pre-trial detention are summonsed at their residence, as the relevant software does not inform authorities of their arrest. Another judge highlights the important issue of foreigners being summonsed and tried *in absentia* after their removal from the country, depriving them of the possibility of defending themselves.

In Portugal, defendants are notified of the trial by registered post to the address they declare at the pre-trial proceedings and it is presumed that they have actually been notified unless a nullity of proceedings is declared.[50] Defendants are obliged to declare any change to their address;[51] however, as one judge says, the system is deficient because defendants are sometimes tried without being notified when they no longer reside at the address they have declared, for example when they are in detention and the system does not register this.

Consequences of being absent and awareness of the consequences

The findings indicate that being absent from a trial has a number of consequences, with the most common one being the issue of an arrest warrant or other restrictive measures. Article 5 of the ECHR, which corresponds to Article 6 of the Charter of Fundamental Rights, allows a person suspected of having committed an offence to be arrested and brought before the court.[52]

In many of the countries studied, for example Austria,[53] Cyprus,[54] Germany,[55] Lithuania[56] and Portugal,[57] if a defendant is not present at the trial, the court adjourns the hearing and issues a warrant to appear in court or an arrest warrant. A judge and a lawyer from Germany note that, in cases of minor offences, it is possible to transfer the trial into 'penalty order proceedings' (*Strafbefehlsverfahren*, a simplified written procedure resulting in a penalty). A judge from Lithuania also adds that courts in Lithuania impose such measures only when they are sure that a defendant is aware of the pending trial. If the accused does not appear at the appellate hearing without good reason, the court may discontinue appellate proceedings or hear the case *in absentia*. Two lawyers from Bulgaria stress that, in practice, the law makes the presence of the accused mandatory by prescribing the issuance of an arrest warrant and a harsher remand measure when they are absent from the trial.[58]

"I am asking here: can you afford, in Bulgaria, to state you do not wish to go to the trial if your remand measure can become heavier if you do not appear? [...] There is collision here [...] There is no obstacle for procedural actions to be taken if you are properly notified about the trial [...] but how would a court not change your remand measure."
(Lawyer, Bulgaria)

Other interviewees identify further consequences. A lawyer in Belgium argues that, although a defendant has the right to be absent, this can have a negative impact as the judge will most likely accede to the requests of the prosecution. One judge, however, argues that this depends on the judge. Other judges from Belgium highlight that detainees are often not transported to court because of miscommunications with the prisons. They also report cases of irregular migrants removed from the country who are tried in their absence and have no opportunity to defend themselves.

A judge from Portugal notes that, when a trial involves more than one defendant and one of the defendants is absent from the court, the other defendants tend to blame everything on the absent defendant. However, in such cases the court may issue an arrest warrant to try to hear the missing defendant.

The findings further indicate that some factors hinder the proper awareness of the consequences of being absent from the trial. A Lithuanian judge notes that sometimes defendants do not realise the seriousness of their situation and why they must attend the trial. Similarly, all judges and two lawyers interviewed in Portugal question if defendants are always aware of the consequences. A Cypriot lawyer says that judges do not properly inform defendants of the consequences of their absence.

"The judge will not explain to each and every defendant, 'if you don't appear I would either order your arrest or minimise your chances in the exercise of your right to bail' and so on. However, lawyers do that."
(Lawyer, Cyprus)

Other interviewees refer to the language used in official notices. In Poland, a judge and two lawyers find it difficult to assess whether or not defendants understand these notices. According to several respondents in Belgium, the language used in summonses is too complex for defendants to understand.

"You should ask ten ordinary citizens what is written in that form. I assure you that of those ten citizens without legal background, eight will not at all understand what is written there."
(Lawyer, Belgium)

Moreover, the summonses do not state the consequences of being absent from the trial, as a judge and two lawyers note. In addition, the paper-based notice procedure used in Belgium often means that defendants are not notified, for example because of their precarious housing situation and the lack of means to contact them.

In addition, three defence lawyers in Germany criticise authorities for not translating summonses for defendants of different nationalities.

Effective participation and its barriers

"That the defendants have the same rights and duties as, for example, the defence lawyer, so that it does not depend on having a good lawyer [...] amongst other things, the full right to request evidence, [...] that one has the opportunity to make confessions, [...] that one can question witnesses."
(Judge, Germany)

Most interviewees from all Member States studied share the same core understanding of effective participation, which includes the physical presence of the defendant, an ability to follow the proceedings, including in the language of the proceedings, presenting evidence and questioning witnesses.

"The defendant attends the trial, is watching everything that is going on, and at all times, except for circumstances that may hinder the progress of the proceedings, is able to ask to speak and be heard."
(Prosecutor, Portugal)

A Portuguese judge notes that effective participation also entails the right to be present at or absent from the trial according to the defendant's own free and informed will.

Some interviewees across the Member States studied have an even broader understanding of the right to be present. For example, according to two Cypriot lawyers this right includes the proper disclosure of evidence, the proper understanding of the proceedings by vulnerable persons and having adequate time to prepare their defence. Some Italian judges see effective participation as consisting of defendants' full awareness of the charges, the roles of the actors in the trial and their rights. Three Austrian lawyers see defendants' presence during the first stages of the proceedings as important for ensuring their effective participation. Another prosecutor from Cyprus and a lawyer from Portugal also stress that effective participation entails that defendants – especially persons who are incapacitated or vulnerable – are able to fully understand the proceedings. Two lawyers from Germany point out that access to the case file is an indispensable condition for effective participation. However, as one stresses, in practice, defendants have no access to the case file unless they have a lawyer.

Interviewees identify a number of barriers to the effective participation of defendants in criminal proceedings. Professionals from Belgium, Germany, Italy and Portugal identify illiteracy or a low level of education of defendants as barriers to effective participation.

German lawyers suggest that a low level of education can be a barrier to the adequate understanding of proceedings, especially when it comes to legal terminology. Two even say that, as a rule, accused persons do not fully understand proceedings. In addition, a judge from Italy notes that the extreme complexity of judicial proceedings can hinder defendants' understanding. Defendants do not have the knowledge to comprehend the technicalities of proceedings. An Austrian judge also believes that time limitations can prevent defendants from fully understanding what is happening in court.

"It is a tragedy from two points of view, because there is a significant number of interpreters who aren't of sufficient quality [...] in the languages that I know, the interpretation isn't of sufficient quality, either because they don't master the language well, or because they don't understand that interpreting has certain requirements, [...] and then it is also a tragedy because there is no obligation, at least practical, for a complete interpretation for the accused to understand what is happening and there should be."
(Lawyer, Portugal)

Interviewees also refer to language issues and the poor quality of interpretation and translation services as barriers to the effective participation of defendants who do not speak the national language well.

A German lawyer further elaborates on defendants with intellectual disabilities, and notes that experts are not employed on a regular basis. As a result, those with less obvious intellectual and/or psychosocial disabilities are not treated properly. A prosecutor from Germany stresses the courts' obligation to meet the special needs of defendants to facilitate their effective participation.

Legal translation and interpretation

For more information about the different requirements for legal translation and interpretation, see FRA's 2016 report **Rights of suspected and accused persons across the EU: Translation, interpretation and information**.

A Polish judge and a lawyer criticise the use of 'glass boxes' to separate defendants in the courtroom. These impede defendants' rights to communicate freely with their lawyers and take part directly in the trial.

"[I]f we are talking about restricting defendants' rights, I think this glass box is clearly a restriction of the defendant's rights. It is convenient for the courts, but you wouldn't like to be tried in that way [...] it is a different story if you are sitting right behind your lawyer and you can freely talk with your lawyer. But in this situation [when a glass box is used] things are different: the proceedings have to be stopped, the defence lawyers have to exchange notes with the defendants, and they are not able to communicate with each other on an ongoing basis."
(Judge, Poland)

A judge and a lawyer from Poland, and three Italian lawyers, add that the videoconference system used at the time of their interviews – before the Covid-19 pandemic, which may have brought changes to the respective approaches used – compromised effective participation, as communication was less immediate.

However, another lawyer from Italy sees this differently and stresses the positive effects of videoconferencing, noting that it facilitates communication between detainees and their lawyers.

"Videoconference is a battle the lawyers have fought. I am aware that if I have the defendant sitting next to me and they tell me: 'this is false. This is not true. The witness is saying this for this reason, here is the document', etc., it is one thing. A completely different situation is having the defendant connected from Avellino [an Italian city where a detention facility is located] where they have a guardian, who makes a phone call [to the courtroom], the call is transmitted [to the lawyer] [...] it's obvious, it is a lost battle the lawyers decided to fight because we believe that the right to defence is extremely compromised by this kind of technique."
(Lawyer, Italy)

A judge from Austria and a lawyer from Belgium also identify the poor quality of representation and/or preparation by defence lawyers as a barrier to effective participation.

Trials in absentia

With the notable exception of Italy, trials *in absentia* are allowed in all Member States studied. In Belgium, Bulgaria, Poland and Portugal, trials *in absentia* are allowed for all crimes, provided, of course, that notification procedures are complied with. In Austria, Cyprus, Germany and Lithuania, such trials are allowed only exceptionally, under stricter conditions and usually for certain crimes only.

In Bulgaria, for example, trials *in absentia* are allowed when a defendant is not found at their stated address, is of unknown residence or was properly summonsed but did not appear.[59] Defendants living abroad are also tried in their absence, when the summons cannot be served for other reasons.[60] In all instances, the court must appoint a lawyer to represent an absent defendant.[61] Two judges stress that only when efforts to locate a defendant are unsuccessful can the judge decide that the defendant is intentionally absconding and continue the proceedings.

In Belgium, all lawyers and one judge interviewed agree that this often occurs, although another judge disagrees. Moreover, a trial is not considered *in absentia* when the accused or their lawyer is present during one of the hearings.[62] In Poland, the failure of a defendant or their lawyer to appear does not prevent the trial being held *in absentia*;[63] however, in the opinion of one of the lawyers interviewed, judges tend to exercise considerable caution in dealing with a defendant's absence during the trial.

"I have already conducted a trial of a dead person and this is something that can happen very easily. But worse than that, I have conducted a trial of a defendant who was in prison. When in the course of the investigation the defendant gives his identity and residence statement and indicates an address for the purpose of notification, from that moment on they are notified of the trial date at that address. [...] I conducted a trial of a person for theft and sentenced him to imprisonment. That person signed the identity and residence statement and was notified at the address given, and I conducted the trial in his absence. [...] I convicted him. [...] They went in search of him at the address he indicated in his identity and residence statement and were informed that he was in prison. A complex problem arose: the trial was held in the defendant's absence and he has the right to be present, but he did not get to indicate another address during the proceedings. [...] Can the defendant be held responsible for failing to indicate his new address, when the new address is prison? [...] I don't think so, and I have annulled the trial. I repeated the trial."
(Judge, Portugal)

In Portugal, defendants are summonsed at the address they declare during the pre-trial stage; if they later do not appear at trial, they are tried *in absentia*.[64] For a defendant who has never shown up to any pre-trial proceedings, Portuguese law allows for not holding a trial *in absentia* before the defendant has been personally notified.[65] One judge highlights that this system may have serious consequences for defendants who are sent to prison after reporting their address and who are thus not able to provide their new address.

The two public prosecutors interviewed, however, do not share this view, arguing that it is the responsibility of defendants to declare their current address and of their lawyers to inform them of the consequences of failing to do so.

In Austria, trials *in absentia* are held only for offences that are punishable with a maximum sentence of up to three years, when the defendant has attended a pre-trial hearing and when the summons to the main hearing is given to the defendant personally.[66] In such cases, judges are allowed to hold the trial in the absence of the defendant, although they are not obliged to do so. However, two lawyers and two judges say that, in practice, proceedings *in absentia* rarely take place and trials are adjourned. An arrest warrant is issued only when a defendant is repeatedly absent or difficult to locate.[67] In Germany, defendants can also be tried *in absentia* provided they have attended a previous hearing on the accusation, they are informed of the hearing and the court does not consider their presence necessary.[68]

In Cyprus, the courts may try a case *in absentia* only exceptionally in summary trials held for limited offences. However, such trials rarely happen in practice. None of the professionals interviewed reported that they had ever

encountered a case tried *in absentia*. Trials *in absentia* are held in Lithuania only when the accused is not present in the country and avoids appearing in court.[69] In such cases, the court must appoint a lawyer.[70] Nevertheless, one judge states that in practice it is risky to try a defendant *in absentia* and the court adjourns the hearing.

A lawyer from Italy notes that the law was recently reformed to abolish trials *in absentia*.

This amendment, however, has increased the backlog of cases, as another Italian lawyer comments.

"[T]his reform was possible also thanks to some EU legislation and case law on the in absentia procedure. Before the reform, the defendant who was not traceable was nonetheless prosecuted even if they were not aware of the proceedings [...] now the proceedings can start only if the defendant is informed."
(Lawyer, Italy)

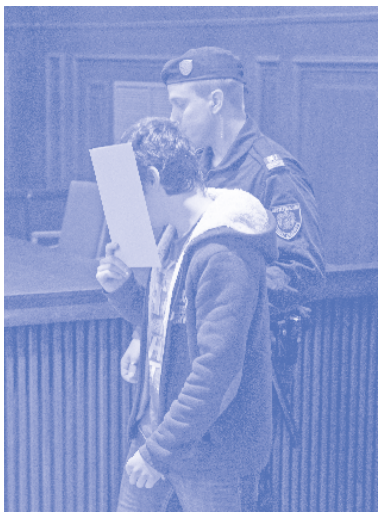
Right to a new trial and remedies

As stated previously, under EU law and the ECHR, defendants are, in principle, entitled to a new trial, including a fresh determination of their case, if they are unjustifiably deprived of their right to be present at the first trial. When this requirement is not complied with, defendants are entitled to a remedy that places them in the same position as had their rights not been violated. Such remedies should ensure defendants' fair trial and defence rights.[71]

All Member States studied ensure the right to a new trial and may also provide for further remedies, albeit with looser or stricter conditions, the findings show. In Austria, defendants can challenge a judgment issued *in absentia* and obtain a re-trial. A lawyer who was interviewed explains that defendants need to show that they were residing elsewhere or were abroad when the summons was issued or explain why their registered address is not their place of residence. Moreover, a violation of the right to be present at the trial or to obtain a re-trial justifies an action for annulment before the Austrian Supreme Court.[72] Similarly, in Belgium, defendants tried *in absentia* may request a re-trial provided they were not informed of the trial or there is a legitimate reason for their absence, or in cases of *force majeure*.[73] Following a 2016 amendment of the criminal law and criminal procedure, the absentee must show that they did not receive notice of the trial or that there was a case of *force majeure sensu stricto*.[74] The Constitutional Court, however, ruled that the absentee should provide only a reason for their absence, which the authorities may then rebut.[75] However, a lawyer stresses that the information included in summonses is not clear.

"[P]eople are not aware that they can no longer just not show up and get a new trial."
(Lawyer, Belgium)

In Cyprus, a violation of the right to be present at trial almost certainly leads to a new trial. Those convicted *in absentia* can have their conviction quashed using various national legal provisions.[76] In Germany, a new trial can take place before the Court of Appeal if the main hearing took place in the absence of a person whose presence was required.[77] In Poland, persons tried *in absentia* can secure a new trial only when they were not informed about the pending proceedings.[78] In Lithuania, a defendant tried *in absentia* enjoys an almost unrestricted right to appeal, in which case the appellate court must conduct a fresh examination of the evidence.[79] A prosecutor states that defendants can appeal judgments issued *in absentia* for up to 10 years after the case, compared with the 20-day limit for other judgments. In Bulgaria, persons tried *in absentia* can obtain a re-trial as long as they did not flee after the presentation of the charges during the pre-trial stage.[80] However, as one judge from Bulgaria says, "if it is proved that they knew and still hid or changed their address without informing the authorities, accordingly, there will be no reason for reopening".



Young and vulnerable persons

Recital 42 of Directive (EU) 2016/343 obliges Member States to take into account the particular needs of vulnerable persons. These are persons who are not able to understand or effectively take part in criminal proceedings because of their age, their mental or physical condition or a disability.

The findings reveal a mixed picture with regard to the provisions for such persons. Young persons and persons with recognised or noticeable disabilities are treated with care, and special measures are applied to ensure their participation. However, this is not the case for those with vulnerabilities such as illiteracy, a low level of education and minor mental disabilities that go unnoticed, which bar them from fully understanding and taking part in proceedings. In addition, systemic measures to ensure the effective participation of such persons are lacking in all Member States studied.

Children and those with legally recognised disabilities enjoy many safeguards across the Member States studied. For example, a judge in Austria stresses that, when children are accused, no hearings can take place without their presence, and their parents are also informed. Interviewees from Belgium indicate that juvenile courts try children and these courts have additional guarantees and protection mechanisms in place.

Interviewees also confirm that defendants with intellectual and/or psycho-social disabilities should, in general, benefit from some safeguards. Judges from Austria note that psychiatrists support persons with intellectual and/or psycho-social disabilities by assessing if they can understand and follow the trial. Similarly, interviewees from Italy and Lithuania indicate that experts assess defendants' disabilities, and proceedings are suspended when they cannot fully take part. According to Polish law, a lawyer must always represent a defendant with an intellectual disability. Under Portuguese law, a lawyer must be present during any procedural act taken against a defendant who is under 21 years old, deaf, mute, blind, illiterate, unfamiliar with the Portuguese language or thought not to have legal capacity.

However, as already mentioned, systemic safeguards and standardised procedures to identify and address vulnerabilities are generally absent. A judge and a prosecutor from Bulgaria state that failure to identify the vulnerabilities of defendants amounts to a violation of their rights. In Austria, there are no rules for dealing with defendants with mild intellectual and/or psycho-social disabilities or those who are illiterate. As a judge from Austria reports, such special needs are considered only when they are documented, invoked or visible. A German prosecutor underlines that experts examine the mental state of accused persons only in cases of serious crimes. A lawyer adds that only obvious intellectual and/or psycho-social disabilities are recognised because of a lack of experts. Two other lawyers from Germany further stress that, for clients who are illiterate and do not speak German, a translation of the written summons or indictment is not helpful. According to these interviewees, it often goes completely unnoticed that a defendant is unable to read and there are no safeguards in place in such cases.

In addition, interviewees from Portugal note that there are practical barriers to participation for persons with low levels of literacy, low educational levels or mental health issues or disabilities.

"They would have to get the investigation file somehow. They could not even submit the request for that in writing. They would then have to find a translator, go there with the file, have everything translated and then memorise everything in order to be able to question witnesses in the main hearing. Well, that is actually not feasible [...] That is a big problem. They [...] are particularly vulnerable, because they simply do not know the written language, neither German nor any other language. There are actually no safeguards for them."
(Lawyer, Germany)

"Formally, they are informed, because they are notified at the address provided in the statement of identity and residence. But we live in a country where education in some sectors is still very low, information and literacy are still low and I believe that the lack of awareness of these consequences is a reality."
(Judge, Portugal)

"I once had a situation in which the defendant was clearly unaware of the charges against him. He was clearly a person who lacked the necessary personal conditions and who had no perception of things. He was a person with a severe cognitive impairment. In the middle of the trial I asked for a medical examination. It had not been done during the investigation phase."
(Judge, Portugal)

According to most interviewees from Portugal, having a social worker or an expert present to assist such defendants can help, but this does not happen often.

In Belgium, Bulgaria and Lithuania, judges and lawyers interviewed confirm that there are no adequate safeguards for vulnerable persons besides delaying proceedings to appoint a lawyer. There is no standardised procedure to assess vulnerability and ensure effective participation. Two lawyers from Belgium mention the assistance of an interpreter as the only available measure. Professionals from Poland also report that the only available measure for vulnerable persons is to appoint a lawyer and an interpreter. However, it is doubtful if simply providing an interpreter and appointing a defence lawyer will be enough to ensure participation. According to one Lithuanian lawyer, a state-appointed defender is not always effective in ensuring the rights of persons who cannot follow the trial. A Belgian judge recalls a case in which the defendant clearly could not understand what was being said. He refused a lawyer and the appointed lawyer did not want to represent him because of the difficulties in communication.

Three lawyers from Cyprus also indicate a lack of standardised procedures and adequate means and facilities to address the special needs of vulnerable persons. One lawyer explains that the law only very generally takes into account such needs.[81]

"We put it before the court in several cases that the defendant could not follow the proceedings. In all cases the court always decided that the accused could follow the proceedings. We had a case of a defendant who was feeling dizzy because of an accident. The accused person was hospitalised and the hearing was taking place inside the hospital. He was accused of homicide, after a bomb exploded in his car. We argued that he was injured and could not follow the proceedings, but the court rejected our argument. The judge asked for a medical opinion and then decided that the accused could follow. [...] That is where our system fails. The question should be 'can the accused person follow or not'? What would happen if the case was adjourned for a week? There are cases where time is of the essence and irreparable damage can be caused, but it was not the case here."
(Lawyer, Cyprus)

Endnotes

1 **Directive (EU) 2016/343**, Art. 1 and recitals 9 and 10; CJEU, C-310/18 PPU, ***Milev***, 19 September 2018, para. 45; C-688/18, ***TX, UW***, 13 February 2020, para. 29.
2 **Directive (EU) 2016/343**, Arts. 8 and 9 and recitals 36–43.
3 CJEU, C-688/18, ***TX, UW***, 13 February 2020.
4 *Ibid.*
5 *Ibid.*
6 Council of the European Union (2009), **Council Framework Decision 2009/299/JHA** of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ 2009 L 81, recitals 1–5 and 11 and Art. 1.
7 CJEU, C-399/11, ***Stefano Melloni v. Ministerio Fiscal***, 26 February 2013, para. 49; C-688/18, ***TX, UW***, 13 February 2020, para. 34.
8 EU (2012), **Charter of Fundamental Rights of the European Union**, OJ 2012 C 326; **Directive (EU) 2016/343**, recitals 33 and 47; CJEU, C-399/11, ***Stefano Melloni v. Ministerio Fiscal***, 26 February 2013, para. 50; C-688/18, ***TX, UW***, 13 February 2020, paras. 34 and 35.
9 CJEU, C-688/18, ***TX, UW***, 13 February 2020, para. 36; ECtHR, ***Murtazaliyeva v. Russia*** **[GC]**, No. 36658/05, 18 December 2018, Section 91 - 95; ***Hermi v. Italy*** **[GC]**, No. 18114/02, 18 October 2006, Section 59; ***Chong Coronado v. Andorra***, No. 37368/15, 23 July 2020, Sections 29–31.
10 For example, ECtHR, ***Tolmachev v. Estonia***, No. 73748/13, 9 July 2015, Section 47.
11 ECtHR, ***Murtazaliyeva v. Russia*** **[GC]**, No. 36658/05, 18 December 2018, Section 91.
12 ECtHR, ***Murtazaliyeva v. Russia*** **[GC]**, No. 36658/05, 18 December 2018, Section 91.
13 For example, ECtHR, ***Blokhin v. Russia***, No. 47152/06, 23 March 2016, Sections 195 and 196.
14 ECtHR, ***Einhorn v. France*** **(Dec.)**, No. 71555/01, 16 October 2001, Section 33; ***Sejdovic v. Italy*** **[GC]**, No. 56581/01, 1 March 2006, Section 84; ECtHR, ***Stoichkov v. Bulgaria***, No. 9808/02, 24 March 2005, Section 56.
15 For example, ECtHR, ***Vyacheslav Korchagin v. Russia***, No. 12307/16, 28 August 2018, Sections 64 and 65.
16 ECtHR, ***Vyacheslav Korchagin v. Russia***, No. 12307/16, 28 August 2018, Sections 64 and 65.
17 **Directive (EU) 2016/343**, Art. 9; **Council Framework Decision 2009/299/JHA**, Arts. 2 (1) (a) (i), 3 (1) (a) (i), 4 (1) (a) (i), 5 (1) (a) (i) and 6 (1) (a) (i); CJEU, C-399/11, ***Stefano Melloni v. Ministerio Fiscal***, 26 February 2013, paras. 42–43, 46 and 49–54 and operative part.
18 **Directive (EU) 2016/343**, recital 39; ECtHR, ***Sejdovic v. Italy*** **[GC]**, No. 56581/00, 1 March 2006, Section 83; Trechsel, S. (2005), *Human rights in criminal proceedings*, Oxford, Oxford University Press, p. 254.
19 CJEU, C-399/11, ***Stefano Melloni v. Ministerio Fiscal***, 26 February 2013, paras. 49 and 50; ECtHR, ***Sejdovic v. Italy*** **[GC]**, No. 56581/00, 1 March 2006, Sections 81–95; ***Chong Coronado v. Andorra***, No. 37368/15, 23 July 2020, Section 29.
20 CJEU, C-399/11, ***Stefano Melloni v. Ministerio Fiscal***, 26 February 2013, paras. 49 and 50; ECtHR, ***Sejdovic v. Italy*** **[GC]**, No. 56581/00, 1 March 2006, Section 87; ***Chong Coronado v. Andorra***, No. 37368/15, 23 July 2020, Section 30.
21 ECtHR, ***Chong Coronado v. Andorra***, No. 37368/15, 23 July 2020, paras. 30 and 35.
22 Trechsel, S. (2005), *Human rights in criminal proceedings*, Oxford, Oxford University Press, pp. 254–255; ECtHR, ***Sejdovic v. Italy*** **[GC]**, 1 March 2006, No. 56581/00, para 85.
23 **Directive (EU) 2016/343**, Art. 8 (2) (3); **Council Framework Decision 2009/299/JHA**, Arts. 2 (1), 3 (1), 4 (1), 5 (1) and 6 (1).
24 **Directive (EU) 2016/343**, Art. 8 (2) (a) and recitals 36 and 38; **Council Framework Decision 2009/299/JHA**, Arts. 2 (1) (a) (ii), 3 (1) (a) (ii), 4 (1) (a) (ii), 5 (1) (a) (ii) and 6 (1) (a) (ii).
25 **Directive (EU) 2016/343**, Art. 9; ECtHR, ***Sejdovic v. Italy*** **[GC]**, No. 56581/00, 1 March 2006, para. 82; ***Chong Coronado v. Andorra***, No. 37368/15, 23 July 2020, Sections 29 and 35.
26 CJEU, C-270/17 PPU, ***Tadas Tupikas***, 10 August 2017, paras. 77–86 and operative part; C-271/17 PPU, ***Sławomir Andrzej Zdziaszek***, 10 August 2017, paras. 76–82; ECtHR, ***Hokkeling v. Netherlands***, No. 30749/12, 14 February 2017, Sections 56–58 and 61.
27 CJEU, C-271/17 PPU, ***Sławomir Andrzej Zdziaszek***, 10 August 2017, paras. 88–91 and 93–4 and operative part.
28 CJEU, C-571/17 PPU, ***Samet Ardic***, 22 December 2017.
29 Council of Europe, **European Convention on the International Validity of Criminal Judgments**, ETS No. 70, 1970, Arts. 21–26 and 29; Council of Europe, **European Convention on the Transfer of Proceedings in Criminal Matters**, ETS No. 73, 1972, Art. 17; Council of Europe, **Second Additional Protocol to the European Convention on Extradition**, ETS No. 98, 1978, Art. 3.
30 Council of Europe, **Second Additional Protocol to the European Convention on Extradition**, ETS No. 98, 1978, Art. 3.
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Conclusions

This report examines the relevant legal provisions and the views and experiences of practitioners and journalists in nine Member States on the practical implementation of Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and on the right to be present at trial in criminal proceedings. While the research addresses two particular aspects of the Council of the European Union's Criminal procedural roadmap, namely the presumption of innocence and the right to be present at trial, its findings are relevant in the wider context of criminal procedural rights as a whole.

The findings indicate that, although the conduct of criminal proceedings appears, on the whole, to be well regulated in national law in the nine Member States studied, problems in implementing safeguards persist. This corroborates previous FRA findings on criminal procedural rights, which identified some shortcomings in practice, for example in how defendants are informed about their rights in criminal proceedings and how access to a lawyer is facilitated. These findings show that a range of factors related to both the proceedings themselves and external influences, such as media coverage, can have an impact on perceptions of the presumption of innocence and, therefore, the course and outcome of the proceedings themselves.

More specifically, this project indicates that the police and criminal justice professionals, to which groups judicial authorities belong, may perceive that certain persons, because of their personal characteristics, are more prone to committing certain crimes. This calls for efforts to address possible biases and prejudices at an institutional level through training and by promoting diversity among the police, lawyers and judicial authorities.

Two rights that are essential in democratic societies are freedom of the press and freedom of speech on one side, and the fairness of a criminal trial and the presumption of innocence on the other side. The findings also point to a necessary balance between them, which is seemingly difficult to achieve. While detailed coverage of criminal cases, illustrated by vivid images, can contribute to public scrutiny and satisfy public curiosity, it can also have damaging effects on defendants, which are often neglected. A balance needs to be found and maintained between these rights, which can be underpinned by raising awareness and training journalists.

The practical 'inequality' of arms may also affect the overall fairness of criminal proceedings. In this regard, FRA's interviews with defence lawyers provide examples of difficulties in adducing evidence and hearing witnesses. In this context, criminal justice authorities should be encouraged to strengthen the practical application of the equality of arms in criminal proceedings.

In addition, professionals' accounts point to instances of the 'bending' of rights – such as the right to remain silent and not to incriminate oneself – by encouraging defendants to speak off the record or to confess under the premise that their situation will be improved and proceedings shortened. Similarly, professionals interviewed refer to the police 'warning' defendants about the negative consequences of remaining silent. In this regard, it should be noted – with respect to both what suspects might be told and what may be assumed from their silence – that exercising one's fundamental right to remain silent should never result in negative consequences.

Looking at the positive findings, in general, authorities do their best to guarantee in practice the rights to be present at trial and to have a new trial, if a suspect was absent through no fault of their own, the evidence indicates. Interviewees provide examples of reasonable efforts to find defendants, let them know about the trial and enable them to be present. However, they identify some shortcomings, such as defendants being summonsed at their home address when they are being held in custody. Nevertheless, judges seem to be reluctant to hold trials *in absentia* and would rather adjourn hearings. In this regard, throughout the research, interviewees recognise judges as the guardians of proper conduct with respect to criminal proceedings.

FRA's findings underline the essential role that evidence from practitioners can play; in this project the evidence directly illustrates the application of core criminal procedural rights in practice. Respondents are guaranteed anonymity and therefore feel able to speak openly about their experiences. The results should serve to inform the European Commission in the context of its own implementation report on Directive (EU) 2016/343. The report should also inform other stakeholders, including the police and criminal justice authorities at Member State level and the media, of the importance of the long-established rights – with respect to the presumption of innocence and the right to be present at trial – in functioning European democracies.

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PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

This report looks at the practical implementation of the presumption of innocence in criminal proceedings, and related rights, in 9 EU Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Lithuania, Poland and Portugal). Article 48 of the EU Charter of Fundamental Rights guarantees the presumption of innocence – but, as FRA's research underscores, it can be undermined in many ways.

By taking a closer look at this reality, the findings presented support transparency about how fundamental rights are dealt with in practice across the EU. In so doing, they can encourage both better rights protection and stronger cooperation in criminal matters among Member States.

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