

# CJEU: EU Directive Does Not Cover Procedure For Reviewing the Lawfulness of Pre-Trial Detention



## News

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On 19 September 2018, the CJEU rendered a judgment on the interpretation of Directive (EU) 2016/343 on the presumption of innocence and Arts. 47 and 48 CFR (Case C-310/18 PPU – *Emil Milev*).

The judgment is based on a request for a preliminary ruling by the *Spetsializiran nakazatelen sad* (Specialised Criminal Court, Bulgaria) in criminal proceedings against *Emil Milev*. He had been prosecuted for armed robbery and applied for withdrawal of the pre-trial detention imposed on him. The Bulgarian court was in doubt as to whether the Bulgarian law and court practice to order or continue pre-trial detention is in line with EU law.

According to Bulgarian case law, the prerequisite for pre-trial detention, namely the existence of “reasonable grounds” for having committed a criminal offence, is understood as a mere *prima facie* finding. Furthermore, national case law only requires stating the reasons for a decision to vary the coercive measure of “pre-trial detention,” without comparing the incriminating and exculpatory evidence, even if the accused’s lawyer submitted arguments to that effect. Hence, the referring Specialised Criminal Court sought guidance as to whether these two lines of Bulgarian case law are compatible with the requirements of Arts. 3 and 4 of Directive 2016/343 and with the procedural safeguards on the presumption of innocence as laid down in the CFR.

The CJEU first clarified the scope of Arts. 3 and 4 of the Directive. These provisions require Member States to ensure that:

- Suspects or accused persons are presumed innocent until proved guilty according to law (Art. 3);
- For as long as a suspect or an accused person has not been proved guilty according to law, judicial decisions in particular, other than those on guilt, do not refer to that person as being guilty (Art. 4(1)).

Art. 4(1) is, however, subject to the proviso that it be “without prejudice to preliminary decisions of a procedural nature which are taken by judicial authorities and which are based on suspicion or on incriminating evidence.”

Read in the light of recital 16 of the Directive, this reservation is interpreted as widely excluding pre-trial detention from the Directive’s harmonisation objective. Therefore, the CJEU concluded that the Directive only requires pre-trial court decisions not to refer to the person in custody as being guilty. It does not govern the circumstances under which such a decision on pre-trial detention may be adopted. The posed questions concerning the degree of certainty that a court must have, the rules governing the examination of evidence, and the extent of the statement of reasons fall solely within the remit of national law.

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ISSN: 1862-6947

<https://eucrim.eu>



The CJEU deviates here from AG *Melchior Wathelet* in his [opinion of 7 August 2018](#). The AG found that the Directive, read in conjunction with Arts. 6, 47 and 48 CFR, also contain substantive, positive rules on pre-trial detention. He further concluded that a judge examining an appeal against pre-trial detention must take exculpatory evidence into account unless it appears implausible or frivolous.

It is also worth mentioning that the present reference for a preliminary ruling is the second one in criminal proceedings against *Emil Milev*. In a first reference procedure ([Case C-439/16 PPU](#)), the CJEU had to decide whether case law of the Supreme Court of Cassation of Bulgaria on continued custody during the trial phase compromised the attainment of the objectives prescribed by Directive 2016/343.

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The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).



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