

# ECJ Rules on Conditions for in absentia Judgments

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## News

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Published in  
2024, Vol. 19(4) eucrim  
ISSN: 1862-6947  
<https://eucrim.eu>

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In its judgment of 16 January 2025, the ECJ ruled on the compatibility of national provisions with the requirements for criminal proceedings *in absentia* set out in EU Directive 2016/343. Specifically, the judgment concerns the compatibility of the provisions in the Bulgarian Code of Criminal Procedure regarding the possibility of conducting criminal proceedings in the absence of the defendant (Case C-400/23, VB II).

### Facts and background of the case

In the underlying case, the referring Bulgarian court is conducting criminal proceedings against VB. However, VB has fled the proceedings and, despite a search having been launched, has not yet been found. He is accused of being a member of an organised criminal group that trades in narcotics and is in the possession of weapons.

The Bulgarian court found that VB had not been formally informed of the charges against him; he has also not been informed either that his case has been brought before a court, or, a fortiori, of the date and place of the trial or of the consequences of his non-appearance. Thus, the requirements of Art. 8(2) of Directive 2016/343, which allow for the implementation of proceedings *in absentia*, were not met. This circumstance led to an initial reference for preliminary ruling in 2022. In its judgment of 8 June 2023, the ECJ answered in the negative the question of whether the national court would be obliged, in the event of a conviction *in absentia*, to make express reference to the right to a new trial in the judgment convicting the person concerned (Joined Cases C-430/22 and C-468/22, VB I).

With the second referral in the proceedings, the Bulgarian court wants to ensure that the continued criminal proceedings *in absentia* against VB are in line with the requirements of EU law, in particular Art. 8(4) and Art. 9 of Directive 2016/343. In this context, the Bulgarian court pointed out two circumstances in particular:

- First, it is unclear under Bulgarian law to which extent the person concerned must be informed about the decision by which he was convicted *in absentia*, in particular whether a copy of the full decision rendered *in absentia* must be provided to the person concerned at the time of his apprehension.
- Secondly, under Bulgarian law, the only way to obtain a new trial is to file an application for a retrial of the criminal proceedings. However, this application must be filed with the *Varhoven kasatsionen sad* (Supreme Court of Cassation) and not with the criminal court that rendered the decision *in absentia*; additionally: the application will only be considered if the person concerned appears personally before the Supreme Court of Cassation.

The referring court doubts whether this procedure is compatible with EU law. Furthermore, the court raised the question of the procedural modalities if it were to decide itself on compliance with the conditions of Art. 8(2) of the Directive, as well as the question of whether the information obligations and the right to a new trial under the Directive also apply in the case of an acquittal.

#### The ECJ's ruling with regard to the *in absentia* procedure

First of all, the ECJ states that Directive 2016/343 does not preclude a Member State from introducing a procedural regime which does not automatically lead to the reopening of criminal proceedings, but which requires persons convicted *in absentia* and interested in such reopening to make an application to that effect before another court, distinct from the court which handed down the decision *in absentia*. However, the ECJ clarifies that proceedings before the court deciding on a new trial must observe the principles of equivalence and effectiveness. The latter condition requires, *inter alia*, that the proceedings relating to the request for a new trial allow in fact such a trial to be held in all cases where it is established, after verification, that the conditions laid down in Art. 8(2) of Directive 2016/343 were not satisfied. By contrast, the requirement of effectiveness is not satisfied where the person requesting a new trial is required to appear in person before the court having jurisdiction, failing which his/her request will be rejected without further action being taken.

Regarding the extent of information, the judges in Luxembourg state that it must be ascertained whether the person convicted *in absentia* receives, at the time when he is informed of the existence of the conviction or promptly thereafter, a copy of the entire decision rendered in absentia as well as easily understandable information on his procedural rights, including the possibility of applying to reopen the criminal proceedings and the court before which and the time limit within which such an application must be made.

#### The ECJ's position on the obligation to inform

As regards the obligation to inform a person tried in absentia of his right to a retrial, the ECJ points out that the Union legislature has refrained from specifying the manner in which information relating to the "right to a retrial or to another legal remedy" must be provided. While Directive 2016/343 cannot be interpreted as requiring the court adjudicating *in absentia* to rule in its decision on the right to a retrial, it leaves a wide margin of discretion to the Member States as to its implementation. Nor, therefore, can it be interpreted as prohibiting that court from examining, in the course of a trial conducted *in absentia*, whether the conditions laid down in Art. 8(2) are met and, where those conditions are not met, from stating in its decision that the person concerned is entitled to a retrial. The requirements imposed by Directive 2016/343 are thus met where the court conducting a trial *in absentia* itself assesses, after hearing both the prosecution and the defence on the matter, whether the conditions laid down in Art. 8(2) of the Directive are met and, if not, indicates in the decision rendered *in absentia*, a full copy of which must be given to the person concerned when he is informed of that decision or promptly thereafter, that he is entitled to a retrial.

#### Application for acquittals

Lastly, the ECJ ruled that the second sentence of Art. 8(4) and Art. 9 of Directive 2016/343 must be interpreted as applying not only in the event of a conviction *in absentia*, but also in the event of an acquittal *in absentia*. Reading the provisions in the context of Art. 8(2), the decision, resulting from criminal proceedings, relates both to the guilt or innocence of the accused person.

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