

# FRA Report on Presumption of Innocence and Right to Be Present – More Needs to Be Done in Practice



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News

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On 31 March 2021, the EU Agency for Fundamental Rights (FRA) presented its findings on how the rights to be presumed innocent, to remain silent, and to be present at trial – as specifically spelled out in Directive 2016/343 – are applied in practice. The findings are based on 123 interviews with defence lawyers, judges, prosecutors, police officers, and journalists in nine EU Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Lithuania, Poland, and Portugal). The report aimed at a practice-oriented evaluation of the implementation of the Directive in selected Member States that represent different legal traditions. The report covers various aspects of the aforementioned rights, e.g., the attitudes of criminal justice professionals, public references to defendants' guilt as well as defendants' physical presentation before or during a trial, and rules on the burden of proof.

On the positive side, FRA highlights that the conduct of criminal proceedings is generally regulated well in the legal orders of the nine Member States. In general, considerable efforts are made to conduct a new trial if the suspect was absent through no fault of his/her own. Yet, FRA also stressed that problems in implementing the necessary safeguards persist. In particular, media coverage of the accused is criticised as being too one-sided, which may contribute to influencing (lay) judges and the public. The presentation of the accused in handcuffs in the courtroom and/or isolated placement away from his/her defence lawyer also often suggest/s his guilt, even though it has not yet been legally established. Regarding the different elements of the procedural safeguards set out in the Directive, the report makes several recommendations for future improvement:

- Equal application of the right to be presumed innocent:
  - Ensuring that the presumption of innocence applies equally to all defendants, regardless of their ethnic background, status, and gender;
  - Putting in place effective measures against bias and prejudice among police officers, judges, and jurors, which may include codes of ethics/conduct and practitioners' training;
  - Promoting diversity among justice professionals so that they are representative of all cultural, social, and ethnic backgrounds of a given society.
- Public references to guilt:
  - Only press officers should inform the media about ongoing cases;
  - Personal data and details about the private life of defendants should not be included;
  - Information leaks should be strictly prohibited and breaches of rules dissuasively sanctioned;
  - States should provide guidance and material to the media in order to raise awareness of the sensitiveness of presenting defendants in public.

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- Physical presentation of suspects and accused persons:
  - Restraints and security measures should only be used when needed;
  - Photos should only be allowed of unrestrained defendants;
  - Member States should provide for possibilities to protect defendants from public viewing, e.g., use of side entrances to courtrooms and covering faces while transported to and into courtrooms.
- Burden of proof:
  - Member States should ensure that the defence can request investigating and prosecuting authorities to investigate specific circumstances and search for crucial evidence on its behalf, when justified;
  - Member States should ensure that legitimate presumptions of law or facts that reverse the burden of proof are limited to the extent necessary in order to ensure the effectiveness of criminal proceedings and that the presumptions always possible to rebut.
- Rights to remain silent and not to incriminate oneself:
  - Suspects must be properly informed of their rights and not treated as witnesses;
  - Suspects' confessions and other testimony must be excluded as evidence if made outside the strict procedural framework;
  - Likewise, hearsay evidence by police officers on what suspects confessed or testified should not be accepted as evidence;
  - Evidence should also be excluded if doubts persist as to whether defendants were properly informed about their rights to remain silent and not to incriminate themselves;
  - Examinations of suspects and accused persons by the police should be subject to strict guidelines and strict judicial assessment;
  - Indirect methods used to pressure defendants into providing incriminating evidence – such as the promise of milder treatment, reduced sentences, or shorter proceedings – should never be used;
  - In this regard, systematic guidance and training of police officers is needed.
- Rights to be present at trial and to a new trial:
  - Legal orders should promote efforts to ensure that defendants can be present at their trials, including, for instance, the need for courts to make reasonable efforts to locate defendants whose whereabouts are unknown;
  - Systems that presume that defendants have been notified by a summons served to their address should take additional steps to ensure that this presumption is up-to-date, e.g., when defendants are in state custody.

In conclusion, the FRA report on Directive 2016/343 corroborates previous findings on other criminal safeguards. These studies identified similar shortcomings in the practical implementation of the EU's rights accorded to suspects/accused persons in criminal proceedings, for example regarding how defendants are informed about their rights in criminal proceedings and how access to a lawyer is ensured (→ [eucrim 3/2019, 174](#)). The FRA report also supported the Commission in the preparation of its own implementation report of Directive 2016/343, which was also published on 31 March 2020 (→ [related link](#)).

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