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The Impact of Directive 2016/343 on the Protection of the Presumption of Innocence in Poland

Wpływ dyrektywy 2016/343 na ochronę domniemania niewinności w Polsce

ABSTRACT

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings is one of the key legal instruments adopted by the European Union aiming at strengthening the rights of suspects in criminal proceedings. Its transposition deadline was set for 1 April 2018. However, no amendments aiming explicitly at transposing Directive 2016/343 were introduced in Polish law. The only activity undertaken by the Polish lawmaker was to add in 2019 a footnote to the Criminal Procedure Code indicating that the Code implements the provisions of Directive 2016/343. However, the implementation may be disputed. Therefore, the aim of this paper is to analyse whether Polish law is in compliance with Directive 2016/343 and how the implementation of the EU standard regarding the presumption of innocence works in practice. On the one hand the deficiencies of the Polish law and legal practice are discussed. On the other hand, however, the focus is also on another, more surprising, impact of Directive 2016/343, which is the overinterpretation of certain of its provisions both in judicial practice and legal scholarship. The analysis is concluded with the proposition of amendments that need to be adopted in order to fully implement the EU standard regarding the presumption of innocence as one of the cornerstones of modern criminal proceedings.

Keywords: Directive 2016/343; presumption of innocence; *in dubio pro reo*; right not to incriminate oneself; fair trial

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INTRODUCTION

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings[1] is one of the key legal instruments adopted by the EU aiming at harmonising and at the same time strengthening the rights of suspects in criminal proceedings. In contrast to other directives adopted for this purpose,[2] which are fairly coherent as to either the type of fair trial right secured or at least the group of suspects it refers to (Directive 2016/800), the discussed legal act covers two distinct rights which are not interlinked. This paper focuses only on the part of Directive 2016/343 concerning the presumption of innocence (Chapter 2).

According to Recital 9 of Directive 2016/343, the purpose of this legal act is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning, among others, certain aspects of the presumption of innocence. The further goal of harmonisation is to strengthen the trust of Member States in each other's criminal justice systems, to facilitate mutual recognition of decisions in criminal matters and to remove obstacles to the free movement of citizens throughout the territory of the Member States (Recital 10).

As mentioned in Directive 2016/343, only "certain aspects" of the presumption of innocence are covered by this legal act. The European lawmakers decided that the harmonisation process should encompass: the definition of the presumption of innocence (Article 3), issues related to public references to guilt made by state officials and the public or in-court presentation of suspects and accused (Articles 4 and 5), the burden of proof in criminal proceedings (Article 6), and the right to remain silent and the right not to incriminate oneself (Article 7). While, as mentioned, the list is not exhaustive, it nonetheless covers the crucial elements related to the presumption of innocence. In addition to substantive provisions concerning the content and legal consequences of this presumption, Article 10 of Directive

[1] OJ L 65/1, 11.3.2016.

[2] Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ L 280/1, 26.10.2010); Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ L 142/1, 1.6.2012); Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ L 294/1, 6.11.2013); Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ L 132/1, 21.5.2016); Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ L 297/1, 4.11.2016).

2016/343 should also be mentioned as it obliges the EU Member States to introduce procedural safeguards for the rights covered by the discussed Directive.

Apart from the detailed regulations in Articles 4 and 5 of Directive 2016/343, the other provisions, including the one on the remedies, are fairly general. The respective recitals offer at least some indications as to how they should be interpreted. Especially references to the case law of the European Court of Human Rights (ECtHR) are important, as the EU standard of protection of fair trial rights is built on the former and should harmonise with the Strasbourg interpretation of the European Convention on Human Rights (ECHR). However, as the standards developed by the ECtHR are not always straightforward and clear, as for example in the case of the right to remain silent and the right not to incriminate oneself, a wide margin of appreciation is left for domestic authorities to interpret and transpose the provisions of Directive 2016/343. As a consequence, a number of issues may be a matter of controversy.

According to Article 14 of Directive 2016/343, the transposition deadline was set for 1 April 2018. Until this date, as well as after the deadline expired, no amendments aiming explicitly at transposing Directive 2016/343 were introduced in Polish law. The only activity undertaken by the Polish lawmaker was to add in 2019 a footnote to the Criminal Procedure Code (CPC) indicating that this Code, within the scope of its application, implements the provisions of Directive 2016/343.[3] It can therefore be inferred that the official position of the government is that the provisions of the Directive in question are fully transposed into the Polish legal system and the latter guarantees the minimum standard established in EU law. Therefore, the aim of this paper is to analyse whether the relevant Polish legal provisions are in fact in compliance with the provisions of Directive 2016/343 and how the implementation of the EU standard regarding the presumption of innocence works in practice. On the one hand, the deficiencies of Polish law and legal practice are discussed. On the other hand, however, the focus is also on another, more surprising, impact of Directive 2016/343, which is the overinterpretation of certain of its provisions in judicial practice and legal scholarship. The analysis is concluded with the proposition of amendments that need to be adopted in order to fully implement the EU standard concerning the presumption of innocence as one of the cornerstones of modern criminal proceedings.

[3] Amendment introduced by the Act of 19 July 2019 amending the Criminal Procedure Code and certain other acts (Journal of Laws 2019, item 1694).

SCOPE OF APPLICATION OF THE DIRECTIVE – THE DEFINITION OF "SUSPECT" IN POLISH LAW

Article 2 of Directive 2016/343 defines the scope of its application. Two issues are of crucial importance. First, the Directive applies only to criminal proceedings in a classic understanding of this concept, meaning a formal procedure aiming at deciding on liability for a criminal offence. As clearly stated in Recital 11, proceedings also treated as criminal within the framework of Article 6 ECHR, such as proceedings relating to competition, trade, financial services, road traffic, tax or tax surcharges, as well as investigations by administrative authorities in relation to such proceedings, are excluded from the scope of application of Directive 2016/343. Second, the Directive applies exclusively to natural persons. As expressed in Recital 14, "at the current stage of development of national law and of case-law at national and Union level, it is premature to legislate at Union level on the presumption of innocence with regard to legal persons. This Directive should not, therefore, apply to legal persons".

The natural persons who are the subject of the Directive's protection are suspects or accused persons in criminal proceedings. The scope of protection granted to them starts from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, and lasts until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.

The initial moment a person becomes a suspect is not understood exclusively as a formal notification or other communication by the investigating authorities about this fact but also as a moment when a person simply starts to be suspected of having committed a criminal offence, or an alleged criminal offence, by the investigating authorities, even before this fact has been communicated to the suspect. While Directive 2016/343 does not specify what it exactly means to be suspected of having committed a criminal offence, or an alleged criminal offence,[4] obviously gaining the status of a suspect is not limited to situations where an official notification or any equivalent has been given. This is exactly where the first important and structural deficiency of the Polish legal system can be identified. As already extensively discussed elsewhere,[5]

[4] In this context it is rightly pointed out that, e.g., Directive 2013/48/EU is more precise, by indicating that it is applicable to "persons other than suspects or accused persons who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons" (A. Pivaty, A. Beazley, Y.M. Daly, L. Beckers, D. de Vocht, P. ter Vrugt, *Opening Pandora's Box: The Right to Silence in Police Interrogations and the Directive 2016/343/EU*, "New Journal of European Criminal Law" 2021, vol. 12(3), p. 333).

[5] See K. Kremens, W. Jasiński, D. Czerwińska, D. Czerniak, *There and Back Again: A Struggle with Transposition of EU Directives*, [in:] *Effective Protection of the Rights of the Accused in the EU Directives: A Computable Approach to Criminal Procedure Law*, eds. G. Contissa, G. Lasagni, M. Caianiello, G. Sartor, Leiden 2022, pp. 159–163.

Polish law defines a suspect as a person against whom a formal charging decision has been issued, and unless not possible,[6] he or she has been informed about the charges and interviewed (Article 313 CPC). Only after fulfilling these formalities does the person become a suspect (*podejrzany*) and a party in the ongoing investigation, which allows them to exercise a full range of defence rights. From the perspective of the transposition of Directive 2016/343, the discussed narrow definition of "suspect" has a negative impact on its correct implementation. It is visible in respect of the right to remain silent and the right not to incriminate oneself enshrined in Article 7 of Directive 2016/343. There are two problems related to the full implementation of these rights in the Polish legal order.

First, the rights of the arrested person are not properly secured. Directive 2016/343 expressly provides that each suspect (in the meaning of the Directive) should be duly informed about his or her right to silence and right not to incriminate oneself (Recitals 31 and 32). However, this is not the case in Poland if a person has been arrested under suspicion of having committed a criminal offence. According to Article 244 § 2 CPC, an arrested person should be informed of the right "to make statements or to refuse to make statements". This formula is however seriously flawed as it does not inform expressly that he or she has the right to silence and right not to incriminate oneself. Moreover, there is no mention about the consequences of making statements which might be used as incriminating evidence in court. Therefore, it can hardly be said that an arrested person receives, as demanded by Directive 2016/343, comprehensive information about the right to silence and the right not to incriminate oneself.

Second, a person who does not have a formal status of a suspect (*podejrzany*), even if the investigating authorities have a suspicion (not sufficient for official charging) that he or she might have committed a criminal offence, may be questioned as a witness. In such a case the person is obliged to testify truthfully and not to conceal the truth under the threat of criminal penalty of up to 8 years' imprisonment (Article 233 § 1 of the Criminal Code). Of course, during the interrogation, the witness may refuse to answer a question if the answer could expose him or her or their next of kin to criminal liability. The interrogated person is however obliged to state that he or she refuses to testify because of the potential exposition to criminal liability. While no further justification is needed, nonetheless the effectiveness of such a protection of the right not to incriminate oneself is questioned by the Polish legal doctrine.[7] Undoubtedly, stating the reason for refusal to answer the question gives the investigating authorities a hint as to who the perpetrator might be. The

[6] The person fled or his/her state of health prevents the announcement of charging decision and questioning.

[7] See, e.g., M. Matusiak-Frącczak, *Ochrona wymiaru sprawiedliwości a prawo do obrony (art. 233 § 1a k.k. w świetle standardu EKPC)*, "Państwo i Prawo" 2023, no. 10, pp. 79–96 and the literature cited therein.

refusal itself is of course not enough to secure a conviction, but is a valuable source of information that can be verified in the course of preliminary proceedings. Giving false testimony to conceal one's own (or next of kin's) criminal liability in such circumstances is penalised by up to 5 years' imprisonment (Article 233 § 1a of the Criminal Code). The described status of a person who is not formally a suspect (*podejrzany*) is therefore radically different from a person who is a suspect. The latter enjoys the right to testify as he or she wishes, or to refuse testimony or to answer questions, without the need to produce any justification for refusal. Moreover, even if such a person lies, there is no criminal liability. Taking that into account it can hardly be justified why it is the formal presentation of charges – which is not decisive from the European perspective for being treated as a suspect as it is understood in EU law, as well as ECtHR case law – that is relevant for differentiating the scope of defence rights possessed by the interrogated person.

In recent judgments, the Polish Supreme Court attempted to cure the described situation at the practical level. By invoking Article 42 (2) of the Polish Constitution, the judges stated that the right to defence has been granted to "everyone" against whom criminal proceedings are being conducted. Therefore, the differentiation discussed above cannot be considered as justified. As a consequence, the Supreme Court held that if a person who is a potential perpetrator but is interrogated as a witness gives a false statement, he or she cannot be held criminally liable for such an act.[8] The verdicts of the Supreme Court will definitely shape the case law of common courts in Poland. Nonetheless, the defective CPC provisions which are still in force need to be amended.

Apart from the deficient regulations protecting the right not to incriminate oneself discussed above, there is also one more shortcoming in relation to the Directive's standard, which is a paradoxical consequence of the Supreme Court's rulings aiming at remedying the flawed statutory protection of the discussed right. As mentioned in the context of the arrested person, each suspect (in the EU law's meaning) has to be duly informed about his or her rights. Currently, the letter of rights handed to the witness, regardless of whether the witness is or is not a suspect in the EU law's meaning, contains information only about the right to refuse to answer a question if the answer could expose him or her or their next of kin to criminal liability (Article 191 § 2 and Article 300 § 3 CPC). As it is not provided in the legal provisions themselves, there is no information about the lack of criminal liability for false testimony as it is established in the case law of the Supreme Court. In consequence, the suspect (in the EU law's sense) questioned as a witness who is entitled to the right to defence is deprived of adequate information about measures that can be undertaken within the boundaries of the right not to incriminate oneself.

[8] See, i.a., resolution of the Supreme Court of 9 November 2021, I KZP 5/21, OSNK 2022, no. 1, item 1.

Hopefully, the deficient domestic framing of the definition of "suspect" in the CPC has limited negative effects, which are visible exclusively in relation to the rights enshrined in Article 7 of Directive 2016/343. The flawed framing does not influence the proper understanding of the definition of the presumption of innocence expressed in Article 2 of Directive 2016/343. An equivalent definition has been adopted in Article 42 (3) of the Polish Constitution which states that everyone shall be presumed innocent until his guilt is determined by the final judgment of a court. The unanimous interpretation of this provision is that it refers to "everyone", so the scope of protection is not limited to suspects and accused as defined in the CPC.[9] Nor does the narrow definition of "suspect" affect the correct understanding of the burden of proof in the Polish criminal procedure. Although Article 6 of Directive 2016/343 uses the term "suspect", the issues related to burden of proof come into play in front of the court which decides on criminal liability. From that perspective the flawed protection of suspects in Poland is irrelevant. In the case of public references to guilt and the presentation of suspects and accused persons (Articles 4 and 5 of Directive 2016/343), the crucial issue is how the temporal limits of the presumption of innocence are understood in the domestic legal system. In Poland, as mentioned above, the Constitution, regardless of the procedural status of being a suspect or accused person, provides that everyone is covered by the presumption of innocence. Therefore, similarly as in the case of burden of proof, the framing of the definition of "suspect" in the CPC is not relevant.

PUBLIC REFERENCES TO GUILT AND PRESENTATION OF SUSPECTS AND ACCUSED PERSONS

While Articles 3 and 6 of Directive 2016/343 concerning the presumption of innocence and the burden of proof and at least to some extent Article 7 concerning the right not to incriminate oneself, as framing the understanding of crucial concepts of modern criminal proceedings, demand from domestic authorities, first and foremost, legislative action, the situation seems to be slightly different with the obligations stemming from Articles 4 and 5. Obviously they also demand some legislative effort, but especially in the case of public references to guilt it is more a practice of public statements made by EU Member State officials which is important. In general, there are three major issues regulated by Articles 4 and 5. These are: public statements referring to suspects and accused persons and their potential criminal liability, reference to the matter of guilt in procedural decisions other than on the merits of the case,

[9] See P. Wiliński, *Proces karny w świetle Konstytucji*, Warszawa 2011, p. 168 and the literature cited therein.

and the way in which suspects and accused persons are presented during criminal proceedings, including the application of measures of restraint.

As to the second and third of the above-mentioned issues, the Polish legal order is in compliance with the obligations of Directive 2016/343. None of the binding legal provisions in Poland force the court or prosecutor to issue procedural decisions which neglect the presumption of innocence of the suspect or accused person. Also the provisions on the way suspects and accused persons are presented during criminal proceedings provide the respective criminal justice authorities with a legal framework allowing them to take proportionate and case-specific decisions respecting the presumption of innocence, especially in terms of the application of measures of physical restraint. That being said it does not of course mean that in individual cases violations of the discussed obligation may not occur. The judgments of the ECtHR stating the violation of Article 6 (2) ECHR by Polish courts confirm this observation.[10] However, taking into account the number of trials and procedural decisions issued each year, nothing indicates that these are more than isolated cases. Even best laws and practices can only minimise the risk of violations of the presumption of innocence. Obviously, there is always room for introducing more detailed provisions concerning particularly the way the accused persons are presented in public. However, at least for now, there is no indication that Poland suffers any systemic deficiency in this respect. Moreover, practical training in the discussed area seems to be better tailored to reducing the risk of violations of the presumption of innocence then mere amendments of binding legal provisions.

In relation to public statements of state officials referring to suspects and accused persons and their possible guilt, the situation is more complex. In general, there are almost no express provisions concerning this issue in Polish law. Obviously, the Polish legal order contains several regulations (civil and criminal) protecting an individual's dignity and reputation, which are of course applicable also in the discussed case. Most of these provisions offer protection against defamatory statements. However, there is one additional regulation in the Prosecution Service Act,[11] namely Article 12 (2) to (5), which is relevant and raises controversies. It concerns public statements of the prosecutors, including the Public Prosecutor General, the position held in Poland by the Minister of Justice. Article 12 (2) to (5) of the Prosecution Service Act provides that the Prosecutor General and the head prosecutor of each public prosecution service unit can share with the media information, with the exception of classified information, about the functioning of the Public Prosecution Service as

[10] See judgment of the ECtHR of 6 February 2007, *Garycki v. Poland*, application no. 14348/02; judgment of the ECtHR of 11 January 2018, *Małek v. Poland*, application no. 9919/11; judgment of the ECtHR of 20 July 2017, *Chojnacki v. Poland*, application no. 62076/11.

[11] Act of 28 January 2016 – Law on Public Prosecution Service (Journal of Laws 2016, item 177, as amended).

well as information about any ongoing investigation taking into consideration the important public interest at stake. The indicated prosecutors can share information with the media themselves or delegate this power to any other prosecutor. In the case of information about ongoing investigations, the consent of the prosecutor conducting this investigation is not needed. The liability for any civil claims arising in connection with the activities of prosecutors that share information with the media is not borne by the individual prosecutor but by the State Treasury. The latter has only a recourse claim to the prosecutor whose statements resulted in a violation of third-party rights. It is however limited to three times the amount of the monthly salary of the prosecutor in question, regardless of the amount paid by the State Treasury.

As it is rightly emphasised, the discussed provisions allow the information policy of the Polish Prosecution Service to be instrumentalised. As the links between the executive branch of the government and the Public Prosecution Service are very close, there is a risk that the Prosecution Service will be used as a tool to build support for the Minister of Justice and his or her political party. Therefore, the adopted provisions leave room for abuse in "informing" about Prosecution Service achievements and allow the accomplishment of *ad hoc* political goals of the Minister of Justice holding the office of Prosecutor General.[12] Moreover, what is symptomatic is that the regulation on recourse claims differs significantly from the general rules of labour law to which it refers. The latter provide for a limitation of recourse claims by the employer to three times the amount of the monthly salary, but also provide for an important exception. If the employee acts intentionally to cause damage to a third person, the employer holds a right to demand the whole amount paid to this person. However, this exception is not applicable to prosecutors' statements to the media. Last but not least, one has to keep in mind that the fear of instrumentalisation of the Public Prosecution Service information policy for political purposes is not unjustified in the Polish context. It is worth remembering the case of Polish medical doctor Mirosław Garlicki, who was accused during a press conference held by Minister of Justice Zbigniew Ziobro[13] in 2007 at the early stage of criminal investigation of killing his patients, bribe-taking and medical malpractice. Ultimately the manslaughter charges were dropped and Garlicki subsequently won the case for damages in front of the Polish civil courts. The case ended at the ECtHR, which did not hold that there had been a violation of Article 6 (2) ECHR, but only because the applicant lost the victim status due to the successful result of his defamation case against the Minister of Justice before the Polish courts. Nonetheless, the violation of Article 6 (2)

[12] K. Kremens, W. Jasiński, *The Prosecution Service in the Polish Legal System*, "Diritto Pubblico Comparato ed Europeo" 2024, vol. 62(1).

[13] Also holding this position in the years 2015–2023. The exact words used by the Minister of Justice Z. Ziobro during the press conference were: "No one else will ever again be deprived of life by this man".

ECHR in the discussed circumstances was unquestionable.[14] Taking all the above into account, it has to be concluded that Article 12 of the Prosecution Service Act creates a specific regime for the liability of prosecutors informing the public which can hardly be justified. In consequence, it does not offer effective protection against the abuse of information policy.[15]

OVERINTERPRETATION OF DIRECTIVE 2016/343

As mentioned at the outset, apart from deficiencies of the Polish legal system in the implementation of Directive 2016/343, there is also a visible phenomenon of overinterpretation of the Directive's provisions by the domestic authorities, including courts, and by the legal doctrine. On the one hand, a positive element can be found in this phenomenon. Even though the direct application of EU directives in the domestic legal system is not a straightforward solution for the courts and is also controversial as to when it is permissible, at least some Polish courts are not afraid of referring directly to EU law. This is a positive trend if one takes into account that there are important deficiencies in the transposition of directives strengthening the rights of suspects in criminal proceedings in Poland and Polish courts are overwhelmingly reluctant to refer directly to EU law in their decisions.[16] On the other hand, however, the overinterpretation of the provisions of Directive 2016/343 indicates that the complex interrelations between the nature and specificity of national and EU legal systems raise interpretative problems even after two decades of Polish presence in the European Union.

Two examples of the overinterpretation of the provisions of Directive 2016/343 can be given. The first one is visible in the Polish Ombudsman's official letter to the Minister of Justice of 26 July 2018[17] and concerns the definition of the presumption of innocence adopted in Article 2 of Directive 2016/343. The wording of this definition, emphasising that the process of proving guilt shall be done "according to the law", is understood as prohibiting the use of improperly obtained evidence

[14] See judgment of the ECtHR of 14 June 2011, *Garlicki v Poland*, application no. 36921/07.

[15] In 2023 Lex Super Omnia Association of Prosecutors presented a proposal of an entirely new Law on Public Prosecution Service, which aims at securing independence of public prosecutors in Poland. Not surprisingly the discussed provision was not included in this proposal. See Lex Super Omnia, *Projekt nowej ustawy o ustroju prokuratury*, 26.12.2023, https://lexso.org.pl/2023/12/projekt-ustawy (access: 9.9.2024).

[16] More on the transposition, see K. Kremens, W. Jasiński, D. Czerwińska, D. Czerniak, *op. cit.*, pp. 154–169. See also the national report prepared by the same authors available at https://site.unibo.it/cross-justice/en/project-results/publications (access: 9.9.2024).

[17] See Rzecznik Praw Obywatelskich, *Dyrektywa „niewinnościowa" nadal niewprowadzona do polskiego prawa. Rzecznik pyta Ministra Sprawiedliwości*, II.510.619.2018, 10.8.2018, https://bip.brpo.gov.pl/pl/content/dyrektywa-niewinnosciowa-nadal-nie-wprowadzona-do-polskiego-prawa (access: 9.9.2024).

in criminal proceedings. This interpretation is clearly too extensive as EU law and ECtHR case law do not provide for any general and automatic exclusion of tainted evidence, even in the case of the most serious violations of human rights, e.g. Article 3 ECHR.[18] This is confirmed implicitly by Article 10 (2) of Directive 2016/343, which states that even in the case of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself there is no mandatory exclusion of this evidence. What Directive 2016/343 demands in the process of assessing the admissibility or probative value of such evidence is only the respect for the rights of the defence and the fairness of the proceedings. A similar approach has been adopted in Directive 2013/48. Article 12 (2) of this Directive utilises the same formula as Article 10 (2) of Directive 2016/343 stating that the rights of the defence and the fairness of the proceedings should be respected while assessing evidence obtained in breach of the right to a lawyer. As a consequence, the systemic interpretation of Article 3 of Directive 2016/343 referring to proving guilt "according to the law" cannot be understood as in any way limiting the margin of appreciation left for domestic authorities in assessing evidence in criminal proceedings, including evidence obtained in violation of the law.

The second overinterpretation concerns the definition of *in dubio pro reo* expressed in Article 6 (2) of Directive 2016/343. According to this provision, Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted. This formula differs slightly from the wording of the *in dubio pro reo* principle expressed in Article 5 § 2 CPC, which provides that doubts that cannot be eliminated shall be resolved in favour of the accused. The well-established interpretation of this provision is that the application of Article 5 § 2 CPC comes into play only if a court made a correct assessment of relevant evidence, that is presented a reasoning fitting within the boundaries of logic, scientific knowledge and life experience, even if the outcome is unfavourable to the accused. If after such an assessment more than one explanation as to the facts of the case can be presented, Article 5 § 2 CPC obliges the court to choose an option that is more favourable to the accused. However, it has to be underlined that the doubts which Article 5 § 2 CPC refers to are not subjective doubts of the parties to proceedings but objective doubts the court is faced with. Only in such a case does the court decide doubts to the benefit of the accused.[19] It should also be emphasised that Polish criminal

[18] See more on the ECtHR approach to this issue: W. Jasiński, *Admissibility of Evidence Obtained by Torture and Inhuman or Degrading Treatment: Does the European Court of Human Rights Offer a Coherent and Convincing Approach?*, "European Journal of Crime, Criminal Law and Criminal Justice" 2021, vol. 29(2), pp. 127–153.

[19] See, e.g., J. Kosonoga, [in:] *Kodeks postępowania karnego*, vol. 1: *Komentarz do art. 1–166*, eds. R.A. Stefański, S. Zabłocki, Warszawa 2017, pp. 113–114 and case law cited therein.

procedure is a mixture of adversarial and inquisitorial models. Therefore, the role of the court is not limited to hearing the arguments of the parties. The court is also obliged to conduct evidence *ex officio* in order to secure the finding of truth, even if the parties fail to provide necessary evidence.[20]

The comparison of the wording of Article 5 § 2 CPC coupled with its interpretation and Article 6 (2) of Directive 2016/343 indicates that there clearly is a difference in the scope of doubts that are relevant for the operation of the *in dubio pro reo* principle. Clearly "any doubt" does not equate to "doubts that cannot be eliminated". Based on this difference some legal scholars[21] and the Polish Ombudsman[22] argued that the EU law modified the established understanding of the *in dubio pro reo* principle expressed in Article 5 § 2 CPC and Article 6 (2) of Directive 2016/343 shall be applied directly in Poland. In a broader sense, it can be said that this standpoint implies that Article 6 (2) of Directive 2016/343 shifted Polish criminal trials into a more adversarial position. The same view has also been expressed by the Court of Appeal in Wroclaw, which stated that in accordance with Article 6 (2) of Directive 2016/343, "any doubts about the guilt of the accused must be resolved in his or her favour, including when the court is assessing whether to acquit the person in question. Thus, all doubts about guilt, and not only those that cannot be eliminated".[23]

The understanding of the *in dubio pro reo* principle presented above cannot be accepted, as it overinterprets the literal wording of Article 6 (2) of Directive 2016/343 and neglects the context in which this provision functions. This context is explained in Recital 23, which explicitly acknowledges remarkable differences between models of criminal proceedings adopted in EU Member States, particularly in relation to the court's role in evidentiary proceedings. Moreover, the recital clearly indicates that "Member States which do not have an adversarial system should be able to maintain their current system provided that it complies with this Directive and with other relevant provisions of Union and international law". The same approach stems from the wording of Article 6 (1) of Directive 2016/343, which provides that while EU Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, this shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence in accordance with the applicable national law. Taking the

[20] Article 2 and Article 366 § 1 CPC provide that the court's ruling shall be based on true factual findings and the role of the court is to establish them.

[21] J. Kluza, *Dyrektywa Unii Europejskiej w sprawie domniemania niewinności a regulacje kodeksu postępowania karnego*, [in:] *Doświadczenie, dyskurs, akademia*, ed. A. Ścibior, Kraków 2020, pp. 41–53; W. Gontarski, *Ciężar dowodu i in dubio pro reo w prawie Unii Europejskiej*, "Studia Prawnoustrojowe" 2018, no. 42, pp. 161–171.

[22] Rzecznik Praw Obywatelskich, *op. cit*.

[23] Judgment of the Court of Appeal in Wroclaw of 15 May 2019, II AKa 131/19, LEX no. 2704602; judgment of the Court of Appeal in Wroclaw of 13 July 2022, II AKa 492/21, LEX no. 3455548.

above into account, it is not against the adopted EU law to oblige the court to actively participate in evidence proceedings as well as clarify arising doubts as to the factual findings. As a consequence, the *in dubio pro reo* principle, even though it refers to "any" doubt, should be understood as encompassing any doubt, but within the procedural framework of eliminating such doubts. The latter is different in adversarial systems, where in general any doubt refers to doubts that arise from the analysis of evidence presented by the parties and inquisitorial systems, where the court is obliged to pursue the truth and, if possible, clarify the existing doubts using its *ex officio* powers to conduct evidence, and only after this activity turns out to be futile is "any" existing doubt decided in favour of the accused person. The latter view has been confirmed by the Supreme Court and some of the appellate courts in Poland.[24]

CONCLUSIONS

Polish law, unlike in the case of Directive 2013/48 for example, is generally in compliance with the provisions of Directive 2016/343. Moreover, in most cases the transposition of its provisions was not even necessary, as the regulations equivalent to these in Directive 2016/343 were already present in Polish law. However, important gaps concerning the right not to incriminate oneself need to be filled. First, the arrested suspect should be offered clear and comprehensive information about his or her right to silence and right not to incriminate oneself. Second, Polish law should also offer comprehensive protection for all suspects, in the EU law's meaning, not only to persons who were officially charged according to relevant domestic provisions. In order to implement these changes, the CPC needs amendments. While in the first case the introduction of a Miranda-like warning would be enough, the amendment needed to offer better protection of the right to defence to all suspects is much more complex. In this case, however, a big part of the work has already been done by the Criminal Law Codification Commission, which operated between 2013 and 2016[25] and proposed desired amendments of the CPC's provisions. From the perspective discussed here the changes in the questioning of suspects before the formal presentation of charges are necessary, allowing them to fully enjoy the right to silence and the right not to incriminate oneself, as well as offer them the assistance of a lawyer and full protection of the attorney–client privilege.

[24] See judgment of the Supreme Court of 4 January 2023, I KK 463/22, LEX no. 3454403; judgment of the Court of Appeal in Katowice of 30 October 2019, II AKa 483/19, LEX no. 2977534.

[25] Criminal Law Codification Commission published an opinion regarding the implementation of the Directive 2013/48/EU. See Ministerstwo Sprawiedliwości, *Opinie Komisji Kodyfikacyjnej Prawa Karnego*, https://www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego (access: 9.9.2024).

A slightly different approach is needed in relation to public references to guilt made by state officials and the public or in-court presentation of suspects and accused. While the legal provisions regarding these issues in Poland are, excluding Article 12 (2) to (5) of the Prosecution Service Act, generally not problematic, there is definitely much room for raising awareness of the criminal justice authorities and other public authorities in relation to effective protection of the presumption of innocence. This can be achieved, e.g., by offering training programmes or any other similar measures. Additional legislative steps can also be analysed, especially in the field of rules on the application of measures of physical restraint. The provisions in force in Poland are very general and there is space to further specify them. However, one has to keep in mind that at the very end, the awareness and sensitivity of public officials is a key factor which cannot be achieved solely by the implementation of legal rules. Moreover, these rules, if they are to allow case-specific factors to be taken into account, have to offer at least some margin of appreciation. Precise and detailed legal framework in the discussed case is therefore rather unattainable.[26]

Last but not least, the noticeable overinterpretation of some of the provisions of Directive 2016/343 also confirms the need to raise awareness of the EU law standards regarding suspects' rights within the domestic criminal justice authorities. General and often vague provisions of EU law which are to be implemented in domestic legal orders raise controversies and demand careful interpretation. This can be achieved only if the law enforcement officers, prosecutor, judges and other criminal justice system agents are offered professional support and the possibility of engaging in a fruitful dialogue with academics and civil society stakeholders.

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[26] What can be observed is that the transposition of standards from Articles 4 and 5 of Directive 2016/343 into domestic legal systems poses problems in many EU Member States. See Report from the Commission to the European Parliament and the Council on the implementation of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, COM/2021/144 final.

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ABSTRAKT

Dyrektywa Parlamentu Europejskiego i Rady (UE) 2016/343 z dnia 9 marca 2016 r. w sprawie wzmocnienia niektórych aspektów domniemania niewinności i prawa do obecności na rozprawie w postępowaniu karnym jest jednym z kluczowych instrumentów prawnych przyjętych przez Unię Europejską w celu wzmocnienia praw podejrzanych w postępowaniu karnym. Termin jej transpozycji został wyznaczony na dzień 1 kwietnia 2018 r. W polskim porządku prawnym nie wprowadzono jednak żadnych zmian zmierzających wprost do transpozycji dyrektywy 2016/343. Jedynym działaniem podjętym przez ustawodawcę było dodanie w 2019 r. przypisu do Kodeksu postępowania karnego, wskazującego, że implementuje on unormowania dyrektywy 2016/343. Implementacja ta może być jednak kwestionowana. Dlatego celem niniejszego artykułu jest analiza, czy polskie prawo jest zgodne z dyrektywą 2016/343, a także jak transpozycja unijnego standardu dotyczącego domniemania niewinności funkcjonuje w praktyce. Z jednej strony omówiono wadliwości polskich regulacji prawnych i praktyki prawnej, z drugiej zaś uwagę skupiono również na innym, bardziej zaskakującym wpływie dyrektywy 2016/343 na rodzimy porządek normatywny, jakim jest nadinterpretacja niektórych jej przepisów zarówno w praktyce sądowej, jak i w doktrynie. Analizę kończą propozycje zmian, które należałoby przyjąć w celu pełnego wdrożenia unijnego standardu dotyczącego domniemania niewinności jako jednego z fundamentów współczesnego prawa karnego.

Słowa kluczowe: dyrektywa 2016/343; domniemanie niewinności; *in dubio pro reo*; prawo do nieobciążania się; rzetelny proces