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Provisional text

JUDGMENT OF THE COURT (Fourth Chamber)

7 September 2023 (*)

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Right to information in criminal proceedings – Directive 2012/13/EU – Right of access to a lawyer in criminal proceedings – Directive 2013/48/EU – Scope – National legislation which does not refer to the concept of a suspect – Preliminary stage of the criminal proceedings – Coercive measure of personal search and seizure – Retrospective authorisation by the court having jurisdiction – Lack of judicial review of measures to obtain evidence – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union – Effective exercise of the rights of defence of suspects and of accused persons during the judicial review of measures to obtain evidence)

In Case C-209/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), made by decision of 18 March 2022, received at the Court on 18 March 2022, in the criminal proceedings against

AB,

other party:

Rayonna prokuratura Lovech, teritorialno otdelenie Lukovit,

THE COURT (Fourth Chamber),

composed of C. Lycourgos (Rapporteur), President of the Chamber, L.S. Rossi, J.–C. Bonichot, S. Rodin and O. Spineanu-Matei, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Hungarian Government, by M.Z. Fehér and R. Kissné Berta, acting as Agents,
- the Netherlands Government, by M.K. Bulterman and J. Hoogveld, acting as Agents,
- the European Commission, by M. Wasmeier and I. Zaloguin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 23 March 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of 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 2012 L 142, p. 1), 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 2013 L 294, p. 1) and Articles 47 and 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), as well as the principles of lawfulness and effectiveness.

2 The request has been made in criminal proceedings brought against AB for possession of illegal substances, discovered on that person following a personal search, which gave rise to the seizure of those substances.

Legal context

European Union law

Directive 2012/13

3 Recitals 14 and 36 of Directive 2012/13 provide:

‘(14) This Directive ... lays down common minimum standards to be applied in the field of information about rights and about the accusation to be given to persons suspected or accused of having committed a criminal offence, with a view to enhancing mutual trust among Member States. This Directive builds on the rights laid down in the Charter, and in particular Articles 6, 47 and 48 thereof, by building upon Articles 5 and 6 [of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (“the ECHR”)] as interpreted by the European Court of Human Rights. In this Directive, the term “accusation” is used to describe the same concept as the term “charge” used in Article 6(1) ECHR.

...

(36) Suspects or accused persons or their lawyers should have the right to challenge, in accordance with national law, the possible failure or refusal of the competent authorities to provide

information or to disclose certain materials of the case in accordance with this Directive. That right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged.’

4 Article 1 of that directive, entitled ‘Subject matter’, is worded as follows:

‘This Directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in criminal proceedings and to the accusation against them. It also lays down rules concerning the right to information of persons subject to a European Arrest Warrant relating to their rights.’

5 Under the heading ‘Scope’, Article 2 of that directive provides in paragraph 1:

‘This Directive applies from the time persons are made aware by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the criminal offence, including, where applicable, sentencing and the resolution of any appeal.’

6 Article 3 of that directive, entitled ‘Right to information about rights’, states:

‘1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively:

- (a) the right of access to a lawyer;
- (b) any entitlement to free legal advice and the conditions for obtaining such advice;
- (c) the right to be informed of the accusation, in accordance with Article 6;
- (d) the right to interpretation and translation;
- (e) the right to remain silent.

2. Member States shall ensure that the information provided for under paragraph 1 shall be given orally or in writing, in simple and accessible language, taking into account any particular needs of vulnerable suspects or vulnerable accused persons.’

7 Article 8 of Directive 2012/13, entitled ‘Verification and remedies’, provides:

‘1. Member States shall ensure that when information is provided to suspects or accused persons in accordance with Articles 3 to 6 this is noted using the recording procedure specified in the law of the Member State concerned.

2. Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive.’

8 Recitals 12, 20 and 50 of Directive 2013/48 provide:

‘(12) This Directive lays down minimum rules concerning the right of access to a lawyer in criminal proceedings and in proceedings for the execution of a European arrest warrant pursuant to Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [(OJ 2002 L 190, p. 1)] ... and 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. In doing so, it promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48 thereof, by building upon Articles 3, 5, 6 and 8 ECHR, as interpreted by the European Court of Human Rights, which, in its case-law, on an ongoing basis, sets standards on the right of access to a lawyer. That case-law provides, inter alia, that the fairness of proceedings requires that a suspect or accused person be able to obtain the whole range of services specifically associated with legal assistance. In that regard, the lawyers of suspects or accused persons should be able to secure without restriction, the fundamental aspects of the defence.

...

(20) For the purposes of this Directive, questioning does not include preliminary questioning by the police or by another law enforcement authority the purpose of which is to identify the person concerned, to verify the possession of weapons or other similar safety issues or to determine whether an investigation should be started, for example in the course of a road-side check, or during regular random checks when a suspect or accused person has not yet been identified.

...

(50) Member States should ensure that in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer, or in cases where a derogation from that right was authorised in accordance with this Directive, the rights of the defence and the fairness of the proceedings are respected. In this context, regard should be had to the case-law of the European Court of Human Rights, which has established that the rights of the defence will, in principle, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. This should be without prejudice to the use of statements for other purposes permitted under national law, such as the need to execute urgent investigative acts to avoid the perpetration of other offences or serious adverse consequences for any person or related to an urgent need to prevent substantial jeopardy to criminal proceedings where access to a lawyer or delaying the investigation would irretrievably prejudice the ongoing investigations regarding a serious crime. Further, this should be without prejudice to national rules or systems regarding admissibility of evidence, and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court or a judge, without there being any separate or prior assessment as to admissibility of such evidence.’

9 Article 1 of that directive, entitled ‘Subject matter’, provides:

‘This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings and of persons subject to proceedings pursuant to Framework Decision [2002/584] ... to have access to a lawyer, to have a third party informed of the deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.’

10 Under the heading ‘Scope’, Article 2 of that directive provides in paragraph 1:

‘This Directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty. It applies until the conclusion of the proceedings, which is understood to mean the final determination of the question whether the suspect or accused person has committed the offence, including, where applicable, sentencing and the resolution of any appeal.’

11 Article 3 of that directive is worded as follows:

‘1. Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

2. Suspects or accused persons shall have access to a lawyer without undue delay. In any event, suspects or accused persons shall have access to a lawyer from whichever of the following points in time is the earliest:

- (a) before they are questioned by the police or by another law enforcement or judicial authority;
- (b) upon the carrying out by investigating or other competent authorities of an investigative or other evidence-gathering act in accordance with point (c) of paragraph 3;
- (c) without undue delay after deprivation of liberty;
- (d) where they have been summoned to appear before a court having jurisdiction in criminal matters, in due time before they appear before that court.

3. The right of access to a lawyer shall entail the following:

(a) Member States shall ensure that suspects or accused persons have the right to meet in private and communicate with the lawyer representing them, including prior to questioning by the police or by another law enforcement or judicial authority;

(b) Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned. ...

(c) Member States shall ensure that suspects or accused persons shall have, as a minimum, the right for their lawyer to attend the following investigative or evidence-gathering acts where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned:

- (i) identity parades;
- (ii) confrontations;
- (iii) reconstructions of the scene of a crime.

...

6. In exceptional circumstances and only at the pre-trial stage, Member States may temporarily derogate from the application of the rights provided for in paragraph 3 to the extent justified in the light of the particular circumstances of the case, on the basis of one of the following compelling reasons:

...

(b) where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings.’

12 Under the title ‘Remedies’, Article 12 of Directive 2013/48 provides:

‘1. Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in European arrest warrant proceedings, have an effective remedy under national law in the event of a breach of the rights under this Directive.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 3(6), the rights of the defence and the fairness of the proceedings are respected.’

Bulgarian law

13 In accordance with Article 54 of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure, DV No 86 of 28 October 2005), in the version applicable to the dispute in the main proceedings (‘the Code of Criminal Procedure’), the person accused is the person who, in that capacity, is subject to criminal prosecution under the conditions and in the manner provided for in this code.

14 Under the title ‘Rights of the accused’, Article 55 of that code states:

‘(1) ‘The accused person shall have the following rights: to learn what offence he or she is formally accused of and on the basis of what evidence; to provide or refuse to provide explanations regarding the accusation; to read through the case file, including information obtained by special investigative methods, and obtain the necessary extracts; to present evidence; to participate in the criminal proceedings; to make requests, remarks and objections; to speak last; to lodge an appeal against acts that infringe his or her rights and legitimate interests; and to have a lawyer. The accused person shall have the right to have his or her defence counsel take part during any investigative actions or other procedural actions involving the accused person, unless the accused person has expressly waived that right. ...

(2) The accused person shall have the right to receive general information facilitating the choice of his or her lawyer. He or she is to have the right to communicate freely with his or her defence counsel, to meet that defence counsel in private, to receive advice and other legal assistance, including prior to the start of and during the questioning and any other procedural actions involving the accused person.

...’

15 Article 164 of the same code, entitled ‘Searches’, states:

‘(1) A search of a person in the course of preliminary proceedings, without authorisation from a judge of the court of first instance having jurisdiction or of the court of first instance in whose jurisdiction the act is carried out, shall be authorised:

1. in the event of a deprivation of liberty;
2. where there are sufficient reasons to believe that the persons present during the search of premises concealed objects or documents relevant to the case.

(2) The search shall be conducted by a person of the same sex, in the presence of persons required to attend the proceedings who are of the same sex.

(3) The record of the investigative act shall be presented to the court for approval without delay and within a maximum of 24 hours.’

16 Under the title ‘Preliminary proceedings’, Article 212 of that code states:

‘(1) The preliminary proceedings shall be initiated by order of the public prosecutor.

(2) The preliminary proceedings shall be deemed to be initiated by the drawing up of a record of the first investigative act, where an inspection including a finding, search of premises, seizure or examination of witnesses is carried out, where the immediate performance of those acts constitutes the only opportunity to collect and preserve evidence, as well as where a search is carried out in accordance with Article 164.

(3) The investigating authority that has carried out an act referred to in subparagraph 2 shall inform the public prosecutor without delay and within a maximum of 24 hours.’

17 Article 219 of that code, entitled ‘Formal accusation and submission of the order’, provides:

‘(1) Where sufficient evidence has been gathered of the guilt of a person for having committed an offence under ordinary law and where there are no grounds for the termination of criminal proceedings, the investigating authority shall report to the public prosecutor and formally accuse the person by issuing an order to that effect.

(2) The investigating authority may also formally accuse the person by drawing up a record of the first investigative act in respect of him or her; it shall report this to the public prosecutor.

(3) The accusation order and the record referred to in subparagraph 2 shall state:

1. the date and place of issue;
2. the issuing authority;
3. the full name of the person accused, the offence of which he or she has been accused and its legal classification;
4. the evidence on which the accusation is based, provided that this indication is not likely to impede the investigation;
5. the restriction of liberty, if imposed;

6. the rights of the accused resulting from Article 55, including his or her right to refuse to provide explanations and his or her right to have a lawyer commissioned or appointed.

...

(8) Until the investigating authority has fulfilled its obligations under subparagraphs 1 to 7, it may not carry out investigative acts involving the participation of the accused person.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 On 8 February 2022, three police officers from the Rayonno upravlenye Lukovit (District police station, Lukovit, Bulgaria) stopped and checked a vehicle driven by IJ in which AB and KL were also present.

19 Before the driver of the vehicle was tested for drugs and alcohol, AB and KL told police officers that they had narcotic substances in their possession. That information was sent orally to the police investigator at the Lukovit district police station, who made a record of those statements, as oral reporting of a criminal offence.

20 As the result of the drug and alcohol test performed on the driver was positive, one of the police officers conducted an inspection of the vehicle.

21 In addition, AB was subjected to a personal search and, as such, a record 'of search and seizure carried out in an emergency and subject to retrospective approval by the court' was drawn up. The fact that that search was carried out without the prior authorisation of a judge was based, in that record, on the existence of 'sufficient evidence of the possession of objects prohibited by law, referred to in a record concerning the oral report of a criminal offence'.

22 During that search, a narcotic substance was found in AB's possession. The examining police officer then informed the public prosecutor of the Rayonna prokuratura Lovech, teritorialno otdelenie Lukovit (Lovech District Public Prosecutor's Office, Lukovit Division, Bulgaria) on that day of the results of that search and stated that it had been carried out in the context of 'preliminary proceedings', within the meaning of Article 212 of the Code of Criminal Procedure, initiated by the Lukovit District police station.

23 Also in the context of those preliminary proceedings, but after the search was carried out, during a hearing at the police station, AB was asked to provide written explanations. He then indicated that the substances found in his possession were drugs intended for his personal consumption.

24 On 9 February 2022, the public prosecutor of the Rayonna prokuratura Lovech, teritorialno otdelenie Lukovit (Lovech District Public Prosecutor's Office, Lukovit Division), submitted an application, on the basis of Article 164(3) of the Code of Criminal Procedure, to the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), the referring court, for approval of the record in respect of the personal search carried out in respect of AB and the subsequent seizure that took place. The dispute in the main proceedings concerns that application for retrospective approval of that search and seizure.

25 The referring court has doubts as to whether the judicial review provided for in national law on coercive evidence management measures during the preliminary stage of criminal proceedings

constitutes a sufficient guarantee of respect for the rights of suspects and accused persons, as provided for in Directives 2012/13 and 2013/48.

26 In particular, first, that court states that national law does not contain a clear rule on the scope of judicial review of coercive measures to obtain evidence in the context of preliminary proceedings and that, according to the case-law of national courts, the control of the property search, personal search and seizure shall be based on their formal legality. In that regard, it notes that the European Court of Human Rights has repeatedly condemned the Republic of Bulgaria for infringing Articles 3 and 8 ECHR.

27 Next, the referring court states that Bulgarian law does not recognise the concept of ‘suspect’ referred to in those directives, but only that of an ‘accused person’. The latter classification requires a decision on the part of the public prosecutor or the investigating authority. However, there is a well-established practice of the police and the public prosecutor’s office of delaying the time from which the person concerned is considered to be an ‘accused person’, which, in effect, has the consequence of circumventing the obligations relating to respect for the rights of defence of that person.

28 Lastly, it would appear, both from academic legal writing and from national case-law, that the court having jurisdiction, even if it is convinced that the rights of defence of the person concerned have not been respected, cannot review the formal accusation of that person as this would undermine the constitutional prerogative of the public prosecutor to initiate proceedings in criminal matters. In such a case, the court supervising the coercive measures of the preliminary proceedings would have no option but to accept the investigative action if it was carried out as a matter of urgency, even if this entails an infringement of the rights of the defence.

29 In that regard, the referring court states that, even if national law does not recognise the concept of a ‘suspect’, Article 219(2) of the Code of Criminal Procedure could, in principle, guarantee the rights of defence of persons for whom there is insufficient evidence of their guilt, but who, due to the need to carry out investigative actions with their participation, will be formally ‘accused’ and will therefore be able to benefit from the rights set out in Article 55 of the Code of Criminal Procedure, which meet the requirements of Directives 2012/13 and 2013/48.

30 However, according to the referring court, that procedural provision is not clear. It is also applied in an ambiguous and contradictory manner, or is not applied at all. According to the referring court, there is no doubt that, in the present case, AB has the status of a person ‘accused of an offence’ within the meaning of the ECHR, as interpreted by the case-law of the European Court of Human Rights, independently of the legal characterisation of his situation under national law. However, by virtue of that law, a person may only benefit from his or her rights of defence if he or she has been formally ‘accused’, which depends on the will of the authority conducting the investigation under the supervision of the public prosecutor.

31 In that regard, the referring court believes that the failure to provide information and to allow access to a lawyer at an early stage of the criminal proceedings constitutes an irremediable procedural defect, liable to vitiate the fair and equitable nature of the subsequent criminal proceedings as a whole.

32 In those circumstances, the Rayonen sad Lukovit (District Court, Lukovit) decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

- (1) Do factual situations in which coercive measures in the form of personal search and seizure were carried out against a natural person believed by the police to be in possession of narcotics during the investigation of an offence relating to the possession of narcotics come within the scope of [Directives 2013/48 and 2012/13]?
- (2) If the first question is answered in the affirmative, what is the status of such a person within the meaning of [those] directives if national law does not recognise the legal concept of “suspect” and the person has not been formally “accused” by official notification, and must such a person be granted the right to information and access to legal counsel?
- (3) Do the principle of legality and the prohibition of arbitrary actions allow a national provision such as Article 219(2) of the Code of Criminal Procedure, which provides that the investigating authority may formally accuse a person in the record of the first investigative act against him or her, if national law does not recognise the legal concept of “suspect” and the rights of [the] defence under national law arise only from the time at which the person is formally “accused”, which in turn is at the discretion of the investigating authority, and does such a national procedure impair the effective exercise and the essence of the right of access to a lawyer under Article 3(3)(b) of [Directive 2013/48]?
- (4) Does the principle of practical effectiveness of EU law permit a national practice under which the judicial review of coercive measures to obtain evidence, including personal search and seizure during criminal investigation proceedings, does not allow for a review of whether a sufficiently serious breach has been committed of the fundamental rights of suspects and accused persons guaranteed by Articles 47 and 48 of [the Charter, and by Directives 2013/48 and 2012/13]?
- (5) Does the principle of the rule of law permit national legislation and case-law according to which the court is not authorised to review the act of formally accusing a person, when it is precisely and exclusively this formal act that determines whether a natural person is granted the rights of [the] defence when coercive measures are taken against that person for purposes of investigation?

Consideration of the questions referred

The first and second questions

33 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 2(1) of Directive 2012/13 and Article 2(1) of Directive 2013/48 must be interpreted as meaning that those directives apply to a situation in which a person, in respect of whom there is information that he or she is in possession of illegal substances, is the subject of a personal search and seizure of those substances, even though national law does not recognise the concept of ‘suspect’ referred to in those directives, and that person has not been officially informed that he or she is an ‘accused person’.

34 The purpose of both Directive 2012/13 and Directive 2013/48 is to establish minimum rules on certain rights of suspects and accused persons in criminal proceedings. Directive 2012/13 concerns more specifically the right to information about rights and Directive 2013/48 relates to the right to have access to a lawyer, the right to inform a third party of the deprivation of liberty, and the right of persons deprived of liberty to communicate with third parties and the right to communicate with consular authorities. Furthermore, it is clear from the recitals of those directives that they are based to that end on the rights set out in, inter alia, Articles 47 and 48 of the Charter and seek to promote those rights with regard to suspects or accused persons in criminal proceedings

(see, to that effect, judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraphs 36 and 37).

35 As regards the scope of Directive 2012/13, the Court has previously held that it follows from Article 1 and Article 2(1) of that directive that it merely defines rules concerning the right to information of suspects or accused persons relating to their rights in criminal proceedings and to the accusation made against them as soon as a person has been informed by the competent authorities that he or she is suspected or accused of having committed a criminal offence (order 6 September 2022, *Delgaz Grid*, C-95/22, EU:C:2022:697, paragraph 25).

36 As regards the scope of Directive 2013/48, Article 2(1) provides that that directive applies to suspects or accused persons in criminal proceedings from the time when they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence, and irrespective of whether they are deprived of liberty.

37 In that regard, the Court has already held that the wording of Article 2(1) of Directive 2013/48, in particular the words ‘are made aware by the competent authorities of a Member State, by official notification or otherwise’, indicates that, for the purposes of determining whether Directive 2013/48 is applicable, information received from the competent authorities of a Member State by the person concerned is sufficient, in whatever form that information is communicated, the means by which such information reaches that person being irrelevant (see, to that effect, judgment of 12 March 2020, *VW (Right of access to a lawyer in the event of non-appearance)*, C-659/18, EU:C:2020:201, paragraphs 25 and 26).

38 Since the respective scopes of Directives 2012/13 and 2013/48 are defined in almost identical terms in Article 2 of each of those directives, it must be held that, in principle, they are indissociable. That finding is consistent with the common objective of the two directives of ensuring the protection of the rights of suspects or accused persons in criminal proceedings. It follows, as the Advocate General observed in point 38 of his Opinion, that the additional clarification in Article 2 of the most recent of the two directives, namely Directive 2013/48, according to which information may be transmitted ‘by official notification or otherwise’, must be regarded as applicable to Directive 2012/13.

39 It follows from those findings, first, that two elements are required in order for a situation to fall within the scope of those directives. It is thus necessary, first, that the competent national authorities have suspicions that the person concerned has committed a criminal offence or that that person is being prosecuted for a criminal offence and, secondly, that information in that regard be provided to that person by those authorities by means of an official notification or otherwise.

40 For the purposes of the application of Directives 2012/13 and 2013/48, those authorities must therefore ensure that the person concerned is aware that he or she is suspected of having committed a criminal offence or is being prosecuted for that offence.

41 Secondly, it should be noted that, in order to ensure the proper conduct of a criminal investigation, the competent national authorities must have a certain discretion to choose the time at which they inform the person concerned that he or she is suspected of having committed a criminal offence or has been accused of such, provided, however, that there is no undue delay in the provision of that information, which would prevent the person concerned from effectively exercising his or her rights of defence, which Directives 2012/13 and 2013/48 are intended to protect.

42 In the present case, the referring court states that the subject matter of the main proceedings concerns an application from the public prosecutor of the Rayonna prokuratura Lovech, teritorialno otdelenie Lukovit (Lovech District Public Prosecutor's Office, Lukovit Division), seeking retrospective approval of a search on AB's person and the seizure of the illicit substances discovered during that search. That seizure was ordered and carried out following the admission by that person to police officers that he was in possession of such substances.

43 Where a person, such as AB, makes such admissions to police officers, he or she is liable to be regarded as a suspect in respect of a criminal offence. When, drawing conclusions from that admission, those agents carry out the personal search of the person concerned and seize what he or she has stated to be in possession, those acts, first, establish that that person is now suspected by a competent authority and, secondly, inform, implicitly but necessarily, that person of that suspicion. In such circumstances, the two conditions for the application of Directives 2012/13 and 2013/48 appear to be satisfied.

44 In that regard, it appears irrelevant, for the purposes of the application of those directives, first, that the law of the Member State concerned does not provide that a person can have the status of 'suspect' and, secondly, that AB has not been officially informed that he is an 'accused person'. The scope of Directives 2012/13 and 2013/48 must be interpreted uniformly in all the Member States and cannot therefore depend on the varying meanings that the laws of those States give to the concepts of 'suspect' and 'accused person' or on the conditions under which those statuses are acquired in accordance with those laws.

45 Therefore, the answer to the first and second questions is that Article 2(1) of Directive 2012/13 and Article 2(1) of Directive 2013/48 must be interpreted as meaning that those directives apply to a situation in which a person, in respect of whom there is information to the effect that he is in possession of illicit substances, is subject to a personal search and seizure of those substances. The fact that national law does not recognise the concept of 'suspect' and that that person has not been officially informed that he or she is an 'accused person' is irrelevant in that regard.

The fourth question

46 By its fourth question, which it is appropriate to deal with before the third question, the referring court asks, in essence, whether Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48, read in the light of Articles 47 and 48 of the Charter, must be interpreted as precluding national case-law according to which a court before which an application is made, under the applicable national law, for retrospective authorisation of a personal search and the seizure of unlawful substances which followed it, carried out at the preliminary stage of criminal proceedings, does not have jurisdiction to examine whether the rights of the suspect or accused person, guaranteed by those directives, were respected on that occasion.

47 In the present case, the referring court states that, while, in accordance with Article 164(3) of the Code of Criminal Procedure, the personal search carried out as part of the preliminary stage of the criminal proceedings must be subject to retrospective judicial review, that review shall, according to the relevant national case-law, only focus on the formal requirements on which the lawfulness of that measure and of the seizure resulting therefrom relies, and does not allow the court having jurisdiction to examine compliance with the rights guaranteed by Directives 2013/48 and 2012/13.

48 It must be noted that, under Article 8(2) of Directive 2012/13, Member States are to ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with the

procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with that directive.

49 Having regard to the importance of the right to an effective remedy, protected by Article 47 of the Charter, and to the clear, unconditional and precise wording of Article 8(2) of Directive 2012/13, the latter provision precludes any national measure which impedes the exercise of effective remedies in the event of a breach of the rights protected by that directive (judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 57).

50 The same interpretation must be given to Article 12 of Directive 2013/48, pursuant to which ‘suspects or accused persons in criminal proceedings ... have an effective remedy under national law in the event of a breach of the rights under this Directive’ (judgment of 19 September 2019, *Rayonna prokuratura Lom*, C-467/18, EU:C:2019:765, paragraph 58).

51 It follows that Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48 require Member States to ensure respect for the right to a fair trial and the rights of the defence, enshrined, respectively, in Article 47 and Article 48(2) of the Charter, by providing for an effective remedy enabling any suspect or accused person to bring an action before a court responsible for examining whether his or her rights under those directives have been infringed.

52 That being the case, Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48 provide that the right to challenge possible infringements of those rights is granted, respectively, in accordance with ‘procedures in national law’ and ‘national law’. Those provisions therefore do not determine the manner in which infringements of those rights may be alleged or the point, in the course of criminal proceedings, at which such allegations may be made, thus leaving Member States a certain margin of discretion in determining the specific procedures that will be applicable in that regard.

53 The intention of the EU legislature to recognise such discretion is confirmed by the recitals of Directives 2012/13 and 2013/48. First, according to recital 36 of Directive 2012/13 the right to challenge the possible failure or refusal of the competent authorities to provide information or to disclose certain materials of the case in accordance with this directive ‘does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure in which such failure or refusal may be challenged’. Secondly, recital 50 of Directive 2013/48 states, in essence, that the obligation for Member States to ensure that the rights of the defence and the fairness of the proceedings are respected should be without prejudice to national rules or systems regarding admissibility of evidence and should not prevent Member States from maintaining a system whereby all existing evidence can be adduced before a court, ‘without there being any separate or prior assessment as to admissibility of such evidence.’

54 Moreover, Articles 47 and 48 of the Charter do not preclude Member States from being thus not required to establish independent actions that suspects or accused persons may bring in order to defend the rights conferred on them by Directives 2012/13 and 2013/48. According to settled case-law, EU law, including the provisions of the Charter, does not have the effect of requiring Member States to establish remedies other than those established by national law, unless it is apparent from the overall scheme of the national legal system in question that no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law (see, to that effect, judgment of 21 December 2021, *Randstad Italia*, C-497/20, EU:C:2021:1037, paragraph 62 and the case-law cited).

55 It follows that EU law does not preclude a Member State from limiting the judicial review of coercive measures to obtain evidence of a criminal offence to their formal lawfulness if, subsequently, as part of the criminal proceedings, the court hearing the substance of the case is in a position to verify that the rights of the accused person, referred to in Directives 2012/13 and 2013/48, read in the light of Article 47 and Article 48(2) of the Charter, have been respected.

56 In the present case, the referring court states that it follows from settled national case-law that information gathered from persons who have been interviewed as witnesses about their own actions cannot be used as evidence, since those persons are in fact suspects.

57 As the Advocate General pointed out, in essence, in point 72 of his Opinion, that case-law appears, at least in certain cases, to allow for the exclusion of information and evidence obtained in breach of the requirements of EU law, in this case Article 3 of Directive 2012/13, concerning the communication to the suspect of his or her rights, and Article 3 of Directive 2013/48, on access to a lawyer.

58 However, it is not possible, solely on the basis of the documents before the Court, to determine whether, in the present case, the relevant national provisions comply with the requirements referred to in paragraph 55 of this judgment. It is for the referring court to ensure, to that end, that, where, in criminal proceedings, the accused or charged person reports irregularities in the procedure, relating to infringements of the rights arising from one of those two directives, the court adjudicating on the substance of the case is still in a position to find those irregularities and is required to draw all the consequences resulting from those infringements, in particular as regards the inadmissibility or the probative value of the evidence obtained in those circumstances.

59 In the event that the court adjudicating on the substance of the case does not have the option to make that finding and draw the consequences from those infringements, it is necessary to recall the Court's settled case-law to the effect that, in order to ensure the effectiveness of all provisions of EU law, the primacy principle requires, inter alia, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law (judgment of 8 March 2022, *Bezirkshauptmannschaft Hartberg-Fürstenfeld (Direct effect)*, C-205/20, EU:C:2022:168, paragraph 35 and the case-law cited).

60 If it is not possible to interpret national law in conformity with EU law, and in view of the fact that, as is apparent from paragraphs 49 to 51 of the present judgment, Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48 have direct effect, the principle of primacy places the national court which is called upon within the exercise of its jurisdiction to apply those provisions of EU law under a duty to give full effect to the requirements resulting from those provisions in the dispute before it, if necessary disapplying of its own motion any national legislation, even if adopted subsequently, which is contrary to those provisions, and it is not necessary for that court to request or await the prior setting aside of that national legislation by legislative or other constitutional means (see, to that effect, judgment of 28 October 2022, *Generalstaatsanwaltschaft München (Extradition and ne bis in idem)*, C-435/22 PPU, EU:C:2022:852, paragraph 108 and the case-law cited).

61 In the light of the foregoing considerations, the answer to the fourth question is that Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48, read in the light of Articles 47 and 48 of the Charter, must be interpreted as not precluding national case-law according to which a court seised, under the applicable national law, of an application for retrospective authorisation of a personal search and the subsequent seizure of illegal substances, carried out during the preliminary stage of criminal proceedings, does not have jurisdiction to examine whether

the rights of the suspect or accused person, guaranteed by those directives, were respected on that occasion, provided, first, that that person is able subsequently to establish, before the court hearing the substance of the case, any infringement of the rights arising from those directives, and, secondly, that that court is then required to draw conclusions from such an infringement, in particular as regards the inadmissibility or the probative value of the evidence obtained in those circumstances.

The third question

62 The third question referred for a preliminary ruling concerns the principles of legality and of the prohibition of the arbitrary exercise of power and Article 3(3)(b) of Directive 2013/48, in the context of national legislation under which only persons formally ‘accused’ obtain the benefit of the rights deriving from that directive, while the time of this formal accusation is left to the discretion of the investigating authority.

63 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, first, the Court may have to reformulate the questions referred to it (see, to that effect, order of 24 March 2023, *Direktor na Teritorialno podelenie na Natsionalnia osiguritelni institut-Veliko Tarnovo*, C-30/22, EU:C:2023:259, paragraph 33 and the case-law cited).

64 Secondly, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision to make the reference, the points of EU law which require interpretation in view of the subject matter of the dispute in the main proceedings (see, to that effect, judgment of 1 August 2022, *TL (Absence of an interpreter and of translation)*, C-242/22 PPU, EU:C:2022:611, paragraph 37 and the case-law cited).

65 It follows from the request for a preliminary ruling that the dispute in the main proceedings concerns an application for the retrospective approval, by a court, of a personal search and the subsequent seizure of illegal goods, carried out during the preliminary stage of criminal proceedings and that, in order to give a useful answer to the third question, it is necessary, in actual fact, to examine, in such a situation, the scope and nature of the right of access to a lawyer, provided for in Article 3 of Directive 2013/48.

66 Therefore, it must be held that, by that question, the referring court asks, in essence, whether Article 3 of Directive 2013/48 must be interpreted as precluding national legislation which provides that a suspect or accused person may be subject, during the preliminary stage of criminal proceedings, to a personal search and the seizure of unlawful goods, without that person having the right of access to a lawyer.

67 In accordance with Article 1, Directive 2013/48 lays down minimum rules concerning, inter alia, the right of suspects and accused persons in criminal proceedings to have access to a lawyer and to have a third party informed of the deprivation of liberty.

68 In that regard, Article 3(1) of that directive requires the Member States to ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively.

69 That rule of principle is set out in Article 3(2) of that directive, which provides that it must be possible to obtain such access ‘without undue delay’ and, in any event, from the occurrence of the first of the four specific events listed in points (a) to (d) of paragraph 2.

70 In addition, Article 3(3)(c) of Directive 2013/48 provides that suspects or accused persons are to have, as a minimum, the right for their lawyer to attend the investigative or evidence-gathering acts referred to in that provision, where those acts are provided for under national law and if the suspect or accused person is required or permitted to attend the act concerned.

71 It should be noted that personal searches and the seizure of illicit substances are not among the events mentioned in Article 3(2)(a) to (d) and (3)(c) of that directive.

72 In particular, as regards, first, the right of suspects or accused persons, provided for in Article 3(2)(a) of Directive 2013/48, to have access to a lawyer before being questioned by the police or by another law enforcement or judicial authority, it should be noted that it is apparent from recital 20 of Directive 2013/48 that, according to the intention of the EU legislature, the preliminary questions raised by the police aimed, inter alia, at establishing whether an investigation should be opened, for example during a roadside check, do not constitute ‘questioning’ within the meaning of that directive and, therefore, are not covered by Article 3(2)(a), as conferring, in any event, the right of access to a lawyer on suspects and accused persons.

73 As regards, secondly, the right of suspects or accused persons, provided for in Article 3(2)(c) of Directive 2013/48, to have access to a lawyer ‘without undue delay’ from the time of deprivation of liberty, it should be noted that that right does not necessarily mean that access to a lawyer must take place immediately, that is to say, at the very moment of that deprivation of liberty.

74 In that regard, it is apparent from the case-law of the European Court of Human Rights on Article 6 ECHR, to which recital 12 of Directive 2013/48 refers, that, as regards the right of access of a lawyer, within the meaning of Article 6(3)(c) of that directive, a search carried out during a roadside check, which gave rise to self-incriminating statements, does not reveal any significant restriction on the freedom of action of the person concerned, which might be sufficient to make legal assistance mandatory at that stage of the proceedings (see, to that effect, ECtHR, 18 February 2010, *Zaichenko v. Russia*, CE:ECHR:2010:0218JUD003966002, §§ 47 and 48).

75 In general, in order to determine whether the lack of access to a lawyer during a personal search and seizure of illegal goods deprived the suspect or accused person of the right guaranteed in Article 3 of Directive 2013/48, it is necessary to have regard to the provisions of paragraph 1 of that article, which requires an examination of whether that access was granted within a period of time and in accordance with procedures enabling the suspect or accused person to exercise his or her rights of defence practically and effectively.

76 In the present case, it is for the court having jurisdiction, in accordance with national law, to carry out the necessary checks, taking account of all the relevant circumstances in that regard. More specifically, it will be for that court to ascertain whether the presence of a lawyer at the time of the personal search of AB and the subsequent seizure of illegal substances was objectively necessary for the purposes of effectively safeguarding that person’s rights of defence.

77 It should be noted in that regard that, subject to verification by the relevant national court, the measures to which AB was subject do not appear, in principle, to have been carried out in such a context that, at the time when they took place, the person concerned should have had the right of access to a lawyer within the meaning of Article 3 of Directive 2013/48.

78 It follows from the foregoing considerations that Article 3 of Directive 2013/48 must be interpreted as not precluding national legislation that provides that a suspect or accused person may, during the preliminary stage of criminal proceedings, be subject to a personal search and the seizure of illicit goods, without that person having the right of access to a lawyer, provided that it follows from the examination of all the relevant circumstances that such access is not necessary in order for that person to be able to exercise his or her rights of defence practically and effectively.

The fifth question

79 By its fifth question, the referring court asks whether the principles of the rule of law must be interpreted as precluding national legislation and case-law according to which the national court is not authorised to review the act of formally accusing a person, even where that formal act determines whether that person is to be granted the rights of the defence when coercive measures are taken against him or her.

80 It that regard, it must be borne in mind that, according to the Court's settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court and the national courts by means of which the former provides the latter with the criteria for the interpretation of EU law which they need in order to decide the dispute before them (order of 27 March 2023, *Belgische Staat*, C-34/22, EU:C:2023:263, paragraph 43 and the case-law cited).

81 Since the order for reference serves as the basis for these proceedings before the Court, it is essential that the referring court provide a minimum explanation of the reasons for the choice of the provisions of EU law which it seeks to have interpreted and of the link which it establishes between those provisions and the national legislation applicable to the main proceedings (see, to that effect, order of 27 March 2023, *Belgische Staat*, C-34/22, EU:C:2023:263, paragraph 44 and the case-law cited).

82 In the present case, the fifth question refers generally to the 'principles of the rule of law', without the request for a preliminary ruling containing, moreover, a statement of the reasons which prompted the referring court to inquire, in the context of that question, as to the interpretation of those 'principles', so that the Court cannot assess to what extent an answer to that question is necessary to enable that referring court to give its decision in the dispute in the main proceedings.

83 It follows that the fifth question is inadmissible.

Costs

84 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. Article 2(1) of Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, and Article 2(1) of 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,

must be interpreted as meaning that those directives apply to a situation in which a person, in respect of whom there is information to the effect that he or she is in possession of illicit substances, is subject to a personal search and seizure of those substances. The fact that national law does not recognise the concept of ‘suspect’ and that that person has not been officially informed that he or she is an ‘accused person’ is irrelevant in that regard.

2. Article 8(2) of Directive 2012/13 and Article 12(1) of Directive 2013/48, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union,

must be interpreted as not precluding national case-law according to which a court seised, under the applicable national law, of an application for retrospective authorisation of a personal search and the subsequent seizure of illegal substances, carried out during the preliminary stage of criminal proceedings, does not have jurisdiction to examine whether the rights of the suspect or accused person, guaranteed by those directives, were respected on that occasion, provided, first, that that person is able subsequently to establish, before the court hearing the substance of the case, any infringement of the rights arising from those directives, and, secondly, that that court is then required to draw conclusions from such an infringement, in particular as regards the inadmissibility or the probative value of the evidence obtained in those circumstances.

3. Article 3 of Directive 2013/48

must be interpreted as not precluding national legislation that provides that a suspect or accused person may, during the preliminary stage of criminal proceedings, be subject to a personal search and the seizure of illicit goods, without that person having the right of access to a lawyer, provided that it follows from the examination of all the relevant circumstances that such access is not necessary in order for that person to be able to exercise his or her rights of defence practically and effectively.

[Signatures]

* Language of the case: Bulgarian.