



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
CAMPOS SÁNCHEZ-BORDONA  
delivered on 10 July 2019<sup>1</sup>

**Case C-467/18**

**Rayonna prokuratura Lom**

**v**  
**EP,**  
**intervener:**  
**HO**

(Request for a preliminary ruling  
from the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria))

(Preliminary ruling — Directives 2012/13/EU, 2013/48/EU and (EU) 2016/343 — Scope — Policing — Pre-trial criminal investigation by the public prosecution service — Special criminal procedure for the adoption of coercive medical measures — Committal to a psychiatric hospital under a non-criminal law — Effective judicial review of observance of the suspect or accused person's right to information and right of access to a lawyer — Presumption of innocence — Vulnerable persons)

1. This reference for a preliminary ruling concerns the application of Directives 2012/13/EU,<sup>2</sup> 2013/48/EU<sup>3</sup> and (EU) 2016/343<sup>4</sup> in criminal proceedings brought against a person who, from the time he was arrested on suspicion of committing a serious crime, showed symptoms of mental disorder and was therefore committed to a psychiatric institution.

2. Those directives lay down 'common minimum rules on the protection of procedural rights of suspects and accused persons [in criminal proceedings]', the aim of which is 'to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters'.<sup>5</sup>

<sup>1</sup> Original language: Spanish.

<sup>2</sup> Directive 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).

<sup>3</sup> Directive 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).

<sup>4</sup> Directive 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 (OJ 2016 L 65, p. 1).

<sup>5</sup> Recital 10 of Directive 2016/343.

3. In the light of that aim, the question could be asked whether the three directives are intended to apply to criminal proceedings in which the judgments cannot reasonably be expected to be the subject of mutual recognition between the Member States. That argument has thus far not been accepted by the Court.<sup>6</sup> Perhaps in the future, in the light of developments in references for preliminary rulings in this particular area, it will be expedient to modify that line of case-law.

## I. Legal framework

### A. EU law

#### 1. Directive 2012/13

4. Article 1 ('Subject matter') reads:

'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. ...'

5. Article 2 ('Scope') provides:

'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 ('Right to information about rights') is worded as follows:

'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;

...

(c) the right to be informed of the accusation, in accordance with Article 6;

...

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.'

<sup>6</sup> In the Opinion of 5 February 2019 in *Moro* (C-646/17, EU:C:2019:95), Advocate General Bobek maintained that 'the applicability of Directive 2012/13 does not require there to be a cross-border dimension in an individual case before the national judge' (point 44). In that connection, the Advocate General argued, inter alia, that the judgment of 5 June 2018 in *Kolev and Others* (C-612/15, EU:C:2018:392) interpreted that directive without there appearing to be 'any discernible cross-border element'. The Court supported that position in the judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489).

7. In accordance with Article 4 ('Letter of Rights on arrest'):

'1. Member States shall ensure that suspects or accused persons who are arrested or detained are provided promptly with a written Letter of Rights. They shall be given an opportunity to read the Letter of Rights and shall be allowed to keep it in their possession throughout the time that they are deprived of liberty.

...'

8. Article 6 ('Right to information about the accusation') states:

'1. Member States shall ensure that suspects or accused persons are provided with information about the criminal act they are suspected or accused of having committed. That information shall be provided promptly and in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

2. Member States shall ensure that suspects or accused persons who are arrested or detained are informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed.

3. Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information is provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person.

4. Member States shall ensure that suspects or accused persons are informed promptly of any changes in the information given in accordance with this Article where this is necessary to safeguard the fairness of the proceedings.'

2. *Directive 2013/48*

9. Pursuant to Article 1 ('Subject matter'):

'This Directive lays down minimum rules concerning the rights of suspects and accused persons in criminal proceedings ... 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. In accordance with Article 2 ('Scope'):

'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.

...

3. This Directive also applies, under the same conditions as provided for in paragraph 1, 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.

...'

11. Pursuant to Article 3 ('The right of access to a lawyer in criminal proceedings'):

'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.

...'

12. Article 12 ('Remedies') is worded as follows:

'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.

...'

13. Article 13 ('Vulnerable persons') provides:

'Member States shall ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this Directive.'

### *3. Directive 2016/343*

14. Pursuant to Article 1 ('Subject matter'):

'This Directive lays down common minimum rules concerning:

- (a) certain aspects of the presumption of innocence in criminal proceedings;
- (b) the right to be present at the trial in criminal proceedings.'

15. Article 2 ('Scope') states:

'This Directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive.'

16. Article 3 ('Presumption of innocence') reads:

'Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.'

17. Article 6 ('Burden of proof') provides:

'1. 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, and to the right of the defence to submit evidence in accordance with the applicable national law.

...'

18. Article 10 ('Remedies') states:

'1. Member States shall ensure that suspects and accused persons have an effective remedy if their rights under this Directive are breached.

2. Without prejudice to national rules and systems on the admissibility of evidence, Member States shall ensure that, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of the right to remain silent or the right not to incriminate oneself, the rights of the defence and the fairness of the proceedings are respected.'

## **B. Bulgarian law**

### *1. Nakazatelen kodeks (Criminal Code)*

19. Article 33 provides that a person who acts while in a state of insanity which prevents him from understanding the nature or significance of his acts, or from controlling his behaviour, is not criminally responsible.<sup>7</sup>

20. In accordance with Article 89, a person who has committed an act that is dangerous to society while he is not in a criminally responsible state can be committed for compulsory treatment in a specialist psychiatric hospital.

### *2. Nakazatelno protsesualen kodeks (Code of Criminal Procedure; 'NPK')*

21. Article 24(1) provides that a prosecution is not to be brought or that a prosecution which has been commenced must be discontinued if the acts committed do not constitute an offence.

22. Article 46 governs the duties of the public prosecution service in criminal proceedings. It provides that the public prosecution service is responsible for conducting the prosecution and directing the pre-trial investigation.

23. Article 70 concerns the procedure for committal of the person accused who may suffer a mental illness to a psychiatric hospital for the purposes of being examined. The decision on committal is adopted by the judicial authority at the request of the public prosecution service, following a pre-trial procedure in which the participation of a defence counsel is compulsory.

<sup>7</sup> <https://www.legislationline.org/documents/section/criminal-codes/country/39/Bulgaria/show>

24. Article 94(1), point 2, and (3) provides that, where the accused suffers from a mental disorder, a defence counsel must participate in the criminal proceedings, and stipulates that the court must appoint a lawyer as defence counsel.

25. Article 242(2), in the chapter dealing with the role of the public prosecution service at the end of the pre-trial criminal investigation, provides that the public prosecution service must review whether the accused's procedural rights were respected during the investigation. If those rights were not respected, the public prosecution service must require the rectification of any defects or rectify those defects itself.

26. Article 243(1), point 1, provides that the public prosecution service is to discontinue the prosecution in the circumstances referred to in Article 24(1) (that is, where the facts do not constitute an offence).

27. Under Article 247, relating to preparation for the trial, the trial commences with the indictment from the public prosecution service.

28. In accordance with Article 248, the Judge-Rapporteur is responsible, amongst other tasks, for verifying whether the accused's rights were respected during the pre-trial investigation stage (paragraph 2, point 3). In the event that they were not, the Judge-Rapporteur must state which infringements have been identified and remit the case to the public prosecution service for rectification of the infringements under Article 242(2).

29. Article 427 heads the section dealing with the application of the compulsory medical measures referred to in Article 89 of the Criminal Code. It is for the public prosecution service to propose and the court of first instance to order those measures, and there is the possibility of an appeal to a higher court.

30. Articles 428 to 431 govern the procedure for the adoption of compulsory medical measures, which includes a hearing attended by the public prosecution service and defence counsel for the person concerned.

### *3. Zakon za zdraveto (Health Law)*

31. Under Article 155 of the Health Law, persons with mental disorders who require special treatment (defined in Article 146) are to be made subject to committal and compulsory treatment where, owing to their illness, they may commit an offence and they represent a danger to, or a serious threat to the health of, their family members, persons close to them or society.

32. Article 156 et seq. concern the procedure for deciding on committal, in which the decision is to be made by the court of first instance for the place of residence of the person concerned. It is essential that there is a request from the public prosecution service, expert psychiatric evidence, and a hearing attended by the person concerned (if his state of health permits), his defence counsel and the psychiatrist.

33. Article 165(1) provides for the supplementary application of the NPK.

## **II. Facts of the case and questions referred for a preliminary ruling**

34. In the early morning of 26 August 2015, a dead body with signs of violence was found on the road in the town of Medkovets (Lom, Bulgaria).

35. When police officers arrived at the victim's home at around 06.00, they found her son, EP, with blood stains on his legs. It was concluded from his answers to initial questioning, in which he admitted having committed the crime,<sup>8</sup> that EP had a mental disorder and he was therefore detained and taken to the psychiatric unit at Lom Hospital.

36. On 26 August 2015, a visual inspection of the crime scene was conducted and witnesses were interviewed. The witnesses stated that EP suffered from a mental illness and had been committed on a number of occasions. Expert psychiatric evidence determined that EP suffered from paranoid schizophrenia and that, between 25 and 26 August 2015, he was in a state of prolonged altered consciousness and therefore was not able to comprehend the seriousness and significance of his acts.

37. On 12 September 2015, the Rayonen sad Lom (District Court, Lom, Bulgaria) ordered that EP be admitted to a psychiatric hospital, in accordance with the procedure laid down in the Health Law. That situation continued at least until the date of the request for a preliminary ruling.

38. On 7 July 2016, the Okrazhna prokuratura Montana (Public Prosecutor's Office, Montana (Bulgaria)), stayed the criminal proceedings against EP, on the grounds that 'the alleged guilty party has been committed for compulsory treatment, as a result of which he continues to lack the proper legal standing'.

39. The Apelativna prokuratura Sofia (Public Prosecutor's Office attached to the Appeal Court, Sofia, Bulgaria), as the higher-ranking office, ordered the Public Prosecutor's Office, Montana, to resume the criminal proceedings on the ground that there was no basis for the stay of proceedings; the proceedings resumed on 29 December 2017.

40. On 1 March 2018, the Public Prosecutor's Office, Montana, discontinued the proceedings on the ground that 'the offence in question was a premeditated act committed by EP in the absence of criminal responsibility', for which reason compulsory medical treatment measures should be ordered.

41. The decision of the Public Prosecutor's Office was served only on the victim's daughter and acquired the force of *res judicata* on 10 March 2018.

42. The Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), ruling on the issue of refusal to take jurisdiction between the Rayonen sad Lom (District Court, Lom) and Rayonen sad Lukovit (District Court, Lukovit, Bulgaria), decided that it fell to the District Court, Lukovit, to resolve the criminal proceedings concerning EP's committal under the NPK.

43. Against that background, the Rayonen sad Lukovit (District Court, Lukovit) has referred the following questions to the Court of Justice for a preliminary ruling:

- '(1) Do the present proceedings for an order for the adoption of compulsory medical measures constituting a form of State compulsion in relation to persons who, according to the findings of the Public Prosecutor's Office, have committed an act representing a danger to the general public, fall within the scope of Directive 2012/13 on the right to information in criminal proceedings and Directive 2013/48 on the right of access to a lawyer in criminal proceedings?
- (2) Do the Bulgarian procedural provisions governing the special procedure for an order for the adoption of compulsory medical measures provided for in Article 427 et seq. of the NPK (Nakazatелно-protsesualen kodeks) (Code of Civil Procedure, Bulgaria), under which the court is not empowered to refer the proceedings back to the Public Prosecutor's Office with the instruction to rectify the procedural errors committed in the course of the pre-trial procedure,

<sup>8</sup> According to the police officers, EP told them that he had killed his mother because she had betrayed him to the Serbian mafia. When asked why he had taken her body into the street, he replied that it was so it would not be stinking in his garden.

but can either grant the application for an order for the adoption of compulsory medical measures or reject it, constitute an effective remedy, within the meaning of Article 12 of Directive 2013/48 and Article 8 of Directive 2012/13 in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, which confers on persons the right to challenge before a court any infringements of their rights which may have been committed in the course of the pre-trial procedure?

- (3) Are Directive 2012/13 and Directive 2013/48 applicable to (pre-trial) criminal proceedings in the case where the national law, that is to say the Code of Criminal Procedure, does not recognise the legal concept of ‘suspect’ and the Public Prosecutor’s Office does not formally regard the person in question as a defendant during the pre-trial procedure, since, on the assumption that the intentional, unlawful homicide forming the subject of the investigations was committed by that person in the absence of criminal responsibility, it institutes criminal proceedings without informing the person concerned and applies to the court for an order for the adoption of compulsory medical measures against that person?
- (4) Is a person in relation to whom compulsory treatment has been applied for to be regarded as being ‘suspected’ within the meaning of Article 2(1) of Directive 2012/13 and Article 2(3) of Directive 2013/48 in the case where, in the course of the first inspection of the crime scene and the initial investigative measures at the home of the victim and her son, a police officer, after identifying traces of blood on the son’s body, questioned him about his reasons for killing his mother and taking her body out into the street and, after the son had answered those questions, handcuffed him? If so, must the person in question be provided with information pursuant to Article 3(1) in conjunction with (2) of Directive 2012/13 even at that stage, and how are the particular needs of that person to be taken into account, pursuant to paragraph 2, when information is provided to him in such circumstances, that is to say where the police officer was aware that the person in question suffered from a mental disorder?
- (5) Are national rules such as those at issue, which effectively allow a person to be deprived of his liberty by being committed to a psychiatric hospital under a procedure provided for in the *Zakon za zdraveto* (Health Law) (a precautionary compulsory measure ordered where there is evidence that the person concerned suffers from a mental illness and is at risk of committing a criminal offence, but not where an offence has already been committed), compatible with Article 3 of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence, in the case where the real reason for initiating the procedure is the offence on account of which criminal proceedings have been brought against the person committed for treatment, and does this circumvent the right, on arrest, to a fair trial which must satisfy the conditions laid down in Article 5(4) of the ECHR, that is to say a trial in which the court is empowered to review not only compliance with the rules of procedure but also the suspicion justifying the arrest and the lawfulness of the objective pursued by that measure, the court being obliged to carry out such a review in the case where the person in question was arrested under the procedure laid down in the Code of Criminal Procedure?
- (6) Does the concept of the presumption of innocence in Article 3 of Directive 2016/343 also include the presumption that persons lacking criminal responsibility did not commit the offence representing a danger to the general public of which they are accused by the Public Prosecutor’s Office, until such time as proof to the contrary is adduced in accordance with the rules of procedure (in criminal proceedings, with due regard for the rights of the defence)?

- (7) Do national rules which confer on the adjudicating court different powers in relation to the examination as to the lawfulness of the pre-trial procedure which it must carry out *ex officio*, depending on whether:
- (a) the court examines an indictment from the Public Prosecutor's Office in which the latter maintains that a particular mentally healthy person has committed intentional, unlawful homicide (Article 249(1) in conjunction with (4) of the Code of Criminal Procedure), or
  - (b) the court examines an application from the Public Prosecutor's Office in which the latter maintains that the person concerned has committed intentional, unlawful homicide but that act does not constitute a criminal offence because the perpetrator suffers from a mental disorder, and by which it seeks a court order for the imposition by the State of compulsory treatment,

afford vulnerable persons an effective remedy as stipulated in Article 13 in conjunction with Article 12 of Directive 2013/48 and Article 8(2) in conjunction with Article 3(2) of Directive 2012/13, and are the different powers available to the court depending on the nature of the procedure, the latter being itself dictated by whether the mental health of the person identified as the perpetrator is such as to render him criminally responsible, compatible with the principle of non-discrimination laid down in Article 21(1) of the Charter?’

### III. Procedure before the Court of Justice

44. The request for a preliminary ruling was received at the Court of Justice on 17 July 2018, together with the request that it be dealt with under the urgent procedure, which the Court did not grant.

45. Written observations were lodged by EP, the Czech and Netherlands governments, and the Commission. It was not considered necessary to hold a hearing.

### IV. Assessment

#### A. Preliminary considerations

46. The Court's task when replying to questions referred for a preliminary ruling is to provide the referring court with an interpretation of the provisions of EU law which may be helpful to it when deciding on the case. However, it is not for the Court to offer a view on the factual circumstances or on the conduct of the competent national authorities throughout the criminal or other proceedings which preceded the reference for a preliminary ruling.

47. Nor is the Court, in the context of its task of interpreting EU law, required to establish whether, in a particular situation, there has been compliance with the provisions of one or other of the directives applicable to criminal proceedings<sup>9</sup> and whether or not any infringements of the relevant rights occurred in practice.<sup>10</sup>

<sup>9</sup> Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 81).

<sup>10</sup> The referring court states in its order (paragraphs 17 and 18) that the Varhoven kasatsionen sad (Supreme Court of Cassation) was made aware that EP had not been informed of his rights, or of the accusation against him, or of the right to appoint a defence counsel and to challenge the decision of the public prosecution service. The referring court further states that the Varhoven kasatsionen sad (Supreme Court of Cassation) 'declared, without stating reasons for that assessment, that the Judge-Rapporteur's arguments in relation to the restrictions of [EP's] right of defence were unfounded'.

48. The directives of which the referring court requires an interpretation lay down rules on the conduct of the competent authorities to safeguard the rights of suspects and accused persons in criminal proceedings, from a threefold perspective: (i) suspects and accused persons must receive information about their procedural rights and the accusation against them (Directive 2012/13); (ii) they may have access to a lawyer and a third party, with whom they may communicate, must be informed that they have been deprived of liberty (Directive 2013/48); and (iii) they enjoy the presumption of innocence (Directive 2016/343).

49. Since those three directives are concerned solely with criminal proceedings, they are not applicable to committals to psychiatric institutions ordered on strictly medical grounds under laws governing public health. Such committals must, of course, be subject to judicial review because a person's liberty is at issue, but that does not mean that the procedures in which they are ordered are criminal in nature.

50. According to the information in the case file, two types of intervention occurred concurrently in this case:

- that relating to the application of the Health Law (Article 155 et seq.), pursuant to which the Rayonen sad Lom (District Court, Lom) decided at the outset that EP should be admitted to a psychiatric hospital;
- that corresponding to the criminal proceedings instituted by the public prosecution service; following the discontinuance of those proceedings, the referring court (the Rayonen sad Lukovit (District Court, Lukovit)) is required to give a final decision on committal under the NPK. The three directives cited above apply only in these proceedings.

51. Therefore, the questions relating to application of the directives to the proceedings under the Health Law must be excluded from the Court of Justice's reply. That law permits the committal of persons with psychiatric disorders who, as a result of those disorders, *may* commit an offence and represent a danger to their families, other persons and society or pose a serious threat to their health.

52. It is a procedure for which jurisdiction rests with the judicial authority which, following an evidence-gathering stage, will decide, should it be considered appropriate, that the person concerned is to be admitted to a psychiatric unit for extendable periods of time. It is not, therefore, in the nature of criminal proceedings and, accordingly, does not come within the subject matter of any of the directives referred to (Article 1 of each directive, which defines their subject matter, limits it to criminal proceedings).

53. The referring court argues that national practice enables the committal to a psychiatric hospital, under the Health Law, of a person who has committed a crime while in a state of insanity, without following the usual stages of criminal proceedings.<sup>11</sup> Even if that were the case, what is important for the present purposes is that the procedure under the Health Law is not a procedure governed by criminal law. If, in any event, the procedure is used in the wrong way, the remedies for that *de facto* failure must be found in national law.<sup>12</sup>

54. My analysis will not correspond to the text of the nine questions referred for a preliminary ruling, the subject matter of which, moreover, overlaps. I prefer to examine each of the directives separately in order to draw from their interpretation the criteria which may assist the referring court.

<sup>11</sup> It is for the national court to interpret national law, but the Health Law appears to provide sufficient safeguards, since there are *inter partes* proceedings and final judgment is given by a court like the referring court.

<sup>12</sup> According to the order for reference, the NPK governs pre-trial custody and the equivalent preventive detention of persons in a state of insanity (Article 70), meaning that use of the procedure under the Health Law could conceal a misuse of judicial power. However, I stress that the solution to that hypothetical misuse of power must be found in national law, as a means of resolving a possible conflict of jurisdiction between national courts.

## ***B. The effect of Directive 2012/13***

### *1. The rights that must be respected*

55. Directive 2012/13 contains provisions intended to safeguard certain rights of suspects and accused persons in criminal proceedings. In particular, suspects and accused persons are granted the right to be informed promptly about certain procedural rights and the right to be informed about the accusation against them.

56. A *suspect* is defined as a person who is notified ('made aware') by the competent authority that there is evidence of his participation in a criminal offence (Article 2(1) of Directive 2012/13).

57. In addition to the status of suspect, there is also that of a person who has been *arrested or detained*. Articles 4 and 6(2) of Directive 2012/13 refer specifically to that situation and require Member States to ensure that anyone in that position is 'provided promptly with a written Letter of Rights' (Article 4) and is informed of the reasons for his arrest or detention (Article 6).

58. The concept of *accused person* is given a higher status because it means that the competent authority (in general, the public prosecution service) has already formulated a specific charge, accusing that person of being the perpetrator of a criminal offence.

59. Naturally, it is for the authority involved at each stage of the procedure to safeguard those rights. In particular, that must be so where, in a criminal context,<sup>13</sup> the police force makes an arrest<sup>14</sup> or where the public prosecution service formulates the charge.

60. In accordance with Article 2(1) of Directive 2012/13, that directive applies until the conclusion of the proceedings. That 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'.

61. That wording covers the situation where criminal proceedings do not end with a sentence, in the strict sense, but rather with a precautionary measure consisting of the compulsory admission to a psychiatric hospital or similar institution of a person who has been found to lack criminal responsibility as a result of his mental disorder.

62. In fact, in a closely related area, Article 1(b) of Framework Decision 2008/909/JHA<sup>15</sup> defines 'sentence' as 'any custodial sentence or any measure involving deprivation of liberty imposed for a limited or unlimited period of time on account of a criminal offence on the basis of criminal proceedings'. More specifically, Article 9(1)(k) of that framework decision refers to where 'the sentence imposed includes a measure of psychiatric or health care'.

63. Against that background, an analysis of the national procedural rules in conjunction with Directive 2012/13 enables a reply to be given to the referring court.

<sup>13</sup> It should be noted that the police are responsible for commencing and handling procedures relating to administrative offences concerning, for example, public safety or order in public places. Those procedures are not necessarily criminal.

<sup>14</sup> Recitals 19 and 28 of Directive 2012/13 state that suspects and accused person must be provided with information 'at the latest before their first official interview by the *police*'. Recital 22 refers explicitly to that information in relation to a person '... deprived of liberty by the intervention of *law enforcement authorities* in the context of criminal proceedings'. No italics in the original.

<sup>15</sup> Council Framework Decision of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ 2008 L 327, p. 27).

64. Under the NPK, in addition to acquittal, criminal proceedings can end with the imposition of a sentence (under the ordinary procedure) or a compulsory medical measure (under the special procedure laid down in Article 427 et seq.). The response to the offence committed, that is, the sentence, becomes a measure for committal to a psychiatric hospital where the perpetrator of the offence lacked criminal responsibility as a result of his mental state when he committed that offence.

65. For the purpose of imposing both a sentence and a coercive medical measure as a consequence of the offence,<sup>16</sup> national law provides that there must be genuine criminal proceedings, which means that the rights protected by Directive 2012/13 must be respected during those proceedings. I do not believe that the safeguards laid down in that directive can be excluded in either situation.

66. The fact that the prescribed information which must be provided to the suspect or accused person regarding his rights may be subject to certain modifications on account of the suspect or accused person's psychiatric state is another matter. In the case of certain mental disorders, it would be pointless to give the person concerned a printed sheet setting out his rights because that person would not be capable of understanding them, and both that formality and notification of the charges against him must be carried out vis-à-vis his defence counsel because, as I shall now explain, the right of access to a lawyer is absolutely irreplaceable.

67. Under Article 3(2) of Directive 2012/13, in the case of 'vulnerable persons', the information on the rights of suspects and accused persons must be provided with regard for their condition. That term covers persons suffering from serious mental disorders, who may have virtually no understanding of the information.

68. The aim of that precaution is to enable such information to be received and assimilated by the recipient. That is made clear in the 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings',<sup>17</sup> which, when explaining 'Measure E' ('Special Safeguards for Suspected or Accused Persons who are Vulnerable'), states that, 'in order to safeguard the fairness of the proceedings, it is important that special attention is shown to suspected or accused persons who cannot understand or follow the content or the meaning of the proceedings, owing, for example, to their age, mental or physical condition'.<sup>18</sup>

69. Where a mentally ill person is suffering from a severe psychiatric disability (as appears to be the situation in this case), communication of the information may necessitate the assistance of a third person acting on the former's behalf.<sup>19</sup> In any event, it is for national law to determine the appropriate solutions to supplement the capacity of persons who are incapable of acting on their own behalf.<sup>20</sup>

## *2. Remedies for the protection of those rights*

70. Under Article 8(2) of Directive 2012/13, there must be a guarantee that suspects or accused persons who have not been provided with the information required (for the purposes of that directive) are able to challenge that failure 'in accordance with procedures in national law'.

<sup>16</sup> As I have already stated, I am leaving aside the non-criminal procedure governed by the Health Law.

<sup>17</sup> Council Resolution of 30 November 2009 (OJ 2009 C 295, p. 1).

<sup>18</sup> The ECtHR, in the judgment of 30 January 2001, *Vaudelle v. France*, CE:ECHR:2001:0130JUD003568397, § 65, held that, where the person concerned suffers from a mental disorder, the authorities should take additional steps to enable that person to be informed in detail about the nature and cause of the accusation against him.

<sup>19</sup> See points 9 and 10 of Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (OJ 2013 C 378, p. 8), which uses the term 'appropriate adult'.

<sup>20</sup> The NPK reflects this logic: if the degree of disability nullifies understanding, a lawyer should be appointed immediately so that, while also planning the defence, he can ensure that the other rights are duly respected. Article 94(1), subparagraph 2, provides that the participation of a lawyer in criminal proceedings is compulsory where the accused suffers from a physical or mental disability which prevents him from defending himself. In that case, Article 94(3) provides that the court concerned must appoint a lawyer as defence counsel.

71. The referring court states that, unlike in ordinary proceedings, it is not possible for it to examine, in the special proceedings to order the committal of persons who lack criminal responsibility (Article 427 et seq. of the NPK), whether there have been infringements of rights during the pre-trial investigation conducted by the public prosecution service.

72. According to that court, if the public prosecution service's investigation concludes with a decision to discontinue the proceedings because the accused lacks criminal responsibility, that leaves the way open for the court itself to approve the committal. At that point, any previous infringements of rights during the pre-trial investigation might come to light, but the referring court would not have jurisdiction to examine whether the defects identified should be remedied (for example, by ordering restoration of the *status quo* before the pre-trial investigation stage). According to the referring court, all it can do is agree to the committal or refuse to allow it.

73. The referring court doubts whether, in those circumstances, the right to access effective remedies is observed, for the purposes of Article 8(2) of Directive 2012/13, in order to challenge the failure or refusal of the competent authority to provide the suspect or accused person with the required information.

74. Although it is for the referring court to interpret its own law, it does not appear to be possible to preclude an appeal (based on Article 243(3) of the NPK) against the decision of the public prosecution service to discontinue the proceedings, where the (special) procedure governed by Article 427 et seq. of that code was subsequently initiated. That appeal could be based on the infringement of the suspect or accused person's rights during the stage prior to the decision of the court which, at the request of the public prosecution service, is required to rule on whether the suspect or accused person should be committed. Therefore, the possibility of a challenge within the meaning of Article 8 of Directive 2012/13 would remain open.

75. The referring court seems to accept that approach when it states, in paragraph 62 of the order for reference, that if Article 427 et seq. of the NPK do not guarantee an effective remedy, it 'could apply by analogy the procedural guarantee available for proceedings dealt with under the ordinary procedure'.<sup>21</sup>

76. If such an interpretation were not possible, the Bulgarian procedural rules, as described by the referring court,<sup>22</sup> might not guarantee the right to an effective remedy provided for in Article 8 of Directive 2012/13, since no court would have the power to examine whether, in the stage prior to that referred to in Article 427 et seq. of the NPK, the rights protected by that directive were observed. In that situation, the implications (where appropriate, the restoration of the *status quo* in order to rectify the defects committed) of those infringements would have to be determined under national law, if they have a serious effect on the procedural guarantees of the person concerned.

77. Lastly, it should be borne in mind that, in the proceedings governed by Article 427 et seq. of the NPK, the defence counsel of the person concerned must be present at the hearing which must be held before the court that will decide whether that person should be committed.<sup>23</sup> Naturally, at that hearing, the lawyer may, in defence of his client, put forward all the grounds of opposition to the committal, including those derived from any irregularities committed by the competent authorities during the pre-trial investigation stage of the criminal proceedings.

<sup>21</sup> That interpretation would not be impossible under Bulgarian law: in fact, the Health Law, which is, in principle, further removed from the rules governing ordinary proceedings than the special procedure for committal, provides in Article 165(1) for the supplementary application of the NPK.

<sup>22</sup> The Bulgarian Government and the public prosecution service declined to take part in these preliminary ruling proceedings and therefore the presentation of national law and its interpretation is restricted to that provided by the referring court.

<sup>23</sup> Article 430(2) and (3). The person whose committal is sought may also appear at that hearing unless his state of health prevents this.

### C. The effect of Directive 2013/48

#### 1. The rights that must be respected

78. Directive 2013/48 ensures that, in criminal proceedings, suspects and accused persons have the right of access to a lawyer and the right to have a third party informed of their deprivation of liberty and to communicate with that third party.

79. As regards the definitions of suspect, accused person and competent authorities in the context of Directive 2013/48, I refer to the considerations set out in relation to Directive 2012/13. In particular, Directive 2013/48 refers expressly to ‘the police or ... another law enforcement authority’ when, in Article 2(3), it extends the conditions for application of the right of access to a lawyer to persons who were not initially suspects or accused persons but ‘who, in the course of questioning by the police or by another law enforcement authority, become suspects or accused persons’.<sup>24</sup>

80. Since, as I have already pointed out, the NPK refers to genuine criminal proceedings which may conclude with the imposition of a compulsory medical measure (in accordance with the special procedure under Article 427 et seq. thereof), a person made subject to those proceedings must be guaranteed access to a lawyer and the other rights referred to in Directive 2013/48.

81. In contrast to Directive 2012/13, in the case of serious offences the mental state of a suspect or accused person is not a lawful basis for modifying his right of access to a lawyer.<sup>25</sup> Rather, that person’s mental state is the basis for strengthening the right of access to a lawyer in the case of a serious offence because, for example, the suspect or accused person will not be capable of lawfully waiving the right to have a lawyer present (Article 9 of Directive 2013/48).

82. Since, as I have also observed, a person suffering from a mental disorder must be treated as *vulnerable* — for the present purposes, under Article 13 of Directive 2013/48 — Member States must give priority to the right of access to a lawyer when taking into account that person’s particular needs.

83. According to the information in the case file, the NPK adheres to that objective because, where the degree of incapacity is such that it nullifies understanding, a lawyer must be appointed immediately so that, while planning the defence, he can also ensure that the other rights of the vulnerable person are duly observed. Article 94(1), subparagraph 2, further provides that the involvement of a defence counsel in criminal proceedings is compulsory where the accused person suffers from a physical or mental disability which makes it impossible for him to defend himself. In that situation, Article 94(3) provides that the court seised must appoint a lawyer as defence counsel.

84. Accordingly, it does not appear that the Bulgarian legislation whose compatibility with Directive 2013/48 is called into question by the referring court does conflict with that directive, in so far as far as the safeguarding of the rights to be protected is concerned. The fact that the statutory requirements were not complied with in a particular case is a different matter.

#### 2. Remedies

85. If, however, those rights have been infringed, the considerations I set out regarding the remedies for challenging infringements of Directive 2012/13 are applicable, *mutatis mutandis*, to Directive 2013/48.

<sup>24</sup> The ECtHR also took that view in its judgment of 10 November 2016, *Kuripka v. Ukraine*, CE:ECHR:2016:1110JUD000791807.

<sup>25</sup> In respect of minor offences, Article 2(4) of Directive 2013/48 allows certain limitations, such that the safeguards it lays down apply only to proceedings before a court having jurisdiction in criminal matters.

#### **D. The effect of Directive 2016/343**

86. Directive 2016/343 strengthens, in criminal proceedings, certain aspects of the presumption of innocence and of the right of natural persons who are suspects or accused persons to be present at the trial.

87. The Member States were not obliged to comply with Directive 2016/343 until 1 April 2018.<sup>26</sup> Accordingly, that directive cannot be relied on as a provision of EU law to be applied to criminal proceedings which ended before that date.

88. According to the order for reference and the subsequent clarifications from the referring court, the criminal proceedings in this case were definitively discontinued on 1 March 2018, prior to the public prosecution service's request for committal. That decision should have determined the established facts, the accused's involvement and his status as lacking criminal responsibility.

89. Therefore, the vagaries of those proceedings cannot, *ratione temporis*, be examined in the light of Directive 2016/343. To that extent, nor is it possible to rely on Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter'), because it is not apparent that, before 1 April 2018, there were any criteria which would have made it possible to apply EU law, for the purposes of Article 51(1) of the Charter.

90. The fact remains that, as the judgment of the referring court is still pending in the special procedure for the committal of EP, Directive 2016/343 is applicable to that procedure with effect from 1 April 2018. However, the questions referred by that court do not in fact concern its own involvement in that procedure, but rather that of the competent authorities (in particular, the prosecution service) throughout the criminal proceedings which concluded on 1 March 2018.

91. Accordingly, I believe that the reply to this part of the reference for a preliminary ruling should be confined to stating that Directive 2016/343 is not applicable to criminal proceedings concluded before 1 April 2018. However, in case the Court does not take that view, I shall set out my opinion in that regard.

92. In accordance with Article 2 of Directive 2016/343, the presumption of innocence protected by that directive applies 'at all stages of the criminal proceedings ... until the decision on the final determination of whether that person has committed the criminal offence concerned has become definitive'.

93. I have no doubt that, if Directive 2016/343 were applicable *ratione temporis*, its provisions should have been complied with during criminal proceedings against any suspect or accused person, including where symptoms of mental disorder existed. The fact that it is the public prosecution service which leads the investigation in the criminal proceedings in no way precludes the requirement that Directive 2016/343 must be complied with during that pre-trial stage of the criminal proceedings.

94. It must be stressed that the presumption of innocence protected by Directive 2016/343 applies at all stages of all criminal proceedings for serious offences.<sup>27</sup> For those purposes, it is irrelevant that a person whose perpetration of an offence is the subject of such proceedings suffers from a mental illness which results in a finding that he lacks criminal responsibility at the end of those proceedings.

<sup>26</sup> Article 14(1) of Directive 2016/343.

<sup>27</sup> Article 7(6) includes certain differentiations in respect of minor offences.

95. At any event, it should be noted that, just as the presumption of innocence does not necessarily preclude pre-trial custody, nor does it preclude the admission to a psychiatric hospital of anyone suspected of having committed an offence in a state of insanity. Furthermore, as Article 4 of Directive 2016/343 provides, it does not preclude ‘preliminary decisions of a procedural nature, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence’.

## **V. Summary by reference to the questions referred for a preliminary ruling**

96. I believe that the questions submitted by the referring court can be answered on the basis of the foregoing considerations:

- as regards Directives 2012/13 and 2013/48, those considerations relate to the subject matter of questions 1 to 4 inclusive and question 7(a);
- as regards Directive 2016/343, the considerations relate to questions 5 and 6.

97. Question 7 has a sub-question in which the referring court refers to Article 21 of the Charter and asks whether the principle of non-discrimination precludes a court from having different powers depending on whether or not the accused is mentally healthy. Since, in my view, the condition of a person with a mental health disorder is not comparable to that of a person who is in full possession of his or her faculties, it is not possible to talk about discrimination due to the fact that specific procedural rules are laid down for the former. That does not prevent the safeguards which must be observed in accordance with the directives cited from applying to both types of person, as I have explained.

## **VI. Conclusion**

98. On those grounds, I propose that the Court of Justice reply as follows to the Rayonen sad Lukovit (District Court, Lukovit, Bulgaria):

- (1) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings must be interpreted as meaning that it applies to all stages of such proceedings, from the moment when a person is made aware by the authorities that he is suspected of committing a criminal offence, including where that person suffers from a mental disorder.
- (2) 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 is applicable, at the times laid down in its articles, to suspects and accused persons who have a mental disorder.
3. The rights protected by Directives 2012/13 and 2013/48 must be observed, where the provisions of those directives so require, during criminal investigations by the police, during the pre-trial investigation by the public prosecution service and during a special procedure concerning the application of coercive medical measures for offences committed by persons who lack criminal responsibility as a result of their mental state, such as the procedure governed by Article 427 et seq. of the Nakazatelno protsesualen kodeks (Code of Criminal Procedure).

4. 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 not applicable to criminal proceedings which came to a definitive conclusion before 1 April 2018.
5. A procedure to order, on medical grounds, the committal to a psychiatric hospital of persons who suffer from a mental illness, such as the procedure governed by Article 155 et seq. of the *Zakon za zdraveto* (Health Law), does not fall within the scope of Directives 2012/13, 2013/48 and 2016/343.