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Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2023 (*)

(Reference for a preliminary ruling – Area of freedom, security and justice – Judicial cooperation in criminal matters – Directive 2012/13/EU – Articles 3 and 4 – Obligation for the competent authorities to inform suspects and accused persons promptly of their right to remain silent – Article 8(2) – Right to invoke a breach of that obligation – National legislation prohibiting the trial court from raising such a breach of its own motion – Articles 47 and 48 of the Charter of Fundamental Rights of the European Union)

In Case C-660/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal correctionnel de Villefranche-sur-Saône (Criminal Court, Villefranche-sur-Saône, France), made by decision of 26 October 2021, received at the Court on 29 October 2021, in the criminal proceedings

Procureur de la République

v

K.B.,

F.S.,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, L. Bay Larsen, Vice-President, A. Arabadjiev, C. Lycourgos, E. Regan, M. Safjan (Rapporteur), P.G. Xuereb, L.S. Rossi, D. Gratsias and M.L. Arastey Sahún, Presidents of Chambers, S. Rodin, F. Biltgen, N. Piçarra, I. Ziemele and J. Passer, Judges,

Advocate General: P. Pikamäe,

Registrar: S. Beer, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2022,

after considering the observations submitted on behalf of:

- K.B., by C. Lallich and B. Thellier de Poncheville, avocats,
- F.S., by B. Thellier de Poncheville and S. Windey, avocates,
- the French Government, by A. Daniel and A.-L. Desjonquères, acting as Agents,
- Ireland, by M. Browne, Chief State Solicitor, A. Joyce, M. Lane and J. Quaney, acting as Agents, and by R. Farrell, Senior Counsel, D. Fennelly, Barrister-at-Law, and P. Gallagher, Senior Counsel,
- the European Commission, by A. Azéma and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 January 2023,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3 and 4 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), Article 7 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1) and Article 48 of the Charter of Fundamental Rights of the European Union ('the Charter').

2 The request has been made in criminal proceedings brought against K.B. and F.S. for offences of theft of fuel.

Legal context

European Union law

Directive 2012/13

3 Recitals 3, 4, 10, 14, 19 and 36 of Directive 2012/13 are worded as follows:

‘(3) The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States trust in each other’s criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspects or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition.

(4) Mutual recognition of decisions in criminal matters can operate effectively only in a spirit of trust in which not only judicial authorities but all actors in the criminal process consider decisions of the judicial authorities of other Member States as equivalent to their own, implying not only trust in the adequacy of other Member States’ rules, but also trust that those rules are correctly applied.

...

(10) Common minimum rules should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust. Such common minimum rules should be established in the field of information in criminal proceedings.

...

(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,] as interpreted by the European Court of Human Rights. ...

...

(19) The competent authorities should inform suspects or accused persons promptly of those rights, as they apply under national law, which are essential to safeguarding the fairness of the proceedings, either orally or in writing, as provided for by this Directive. In order to allow the practical and effective exercise of those rights, the information should be provided promptly in the course of the proceedings and at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

...

(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 3 of that directive, headed ‘Right to information about rights’, provides:

‘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.’

5 Article 4 of that directive, headed ‘Letter of Rights on arrest’, provides:

‘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.

2. In addition to the information set out in Article 3, the Letter of Rights referred to in paragraph 1 of this Article shall contain information about the following rights as they apply under national law:

- (a) the right of access to the materials of the case;
- (b) the right to have consular authorities and one person informed;
- (c) the right of access to urgent medical assistance; and
- (d) the maximum number of hours or days suspects or accused persons may be deprived of liberty before being brought before a judicial authority.

3. The Letter of Rights shall also contain basic information about any possibility, under national law, of challenging the lawfulness of the arrest; obtaining a review of the detention; or making a request for provisional release.

4. The Letter of Rights shall be drafted in simple and accessible language. An indicative model Letter of Rights is set out in Annex I.

5. Member States shall ensure that suspects or accused persons receive the Letter of Rights written in a language that they understand. Where a Letter of Rights is not available in the appropriate language, suspects or accused persons shall be informed of their rights orally in a language that they understand. A Letter of Rights in a language that they understand shall then be given to them without undue delay.'

6 Article 8 of the directive, headed 'Verification and remedies', is worded as follows:

'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.'

Directive 2013/48/EU

7 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) contains an Article 3 headed 'The right of access to a lawyer in criminal proceedings', which provides, in paragraph 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.'

8 Article 9 of that directive, headed 'Waiver', is worded as follows:

'1. Without prejudice to national law requiring the mandatory presence or assistance of a lawyer, Member States shall ensure that, in relation to any waiver of a right referred to in Articles 3 and 10:

(a) the suspect or accused person has been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right concerned and the possible consequences of waiving it; and

(b) the waiver is given voluntarily and unequivocally.

2. The waiver, which can be made in writing or orally, shall be noted, as well as the circumstances under which the waiver was given, using the recording procedure in accordance with the law of the Member State concerned.

3. Member States shall ensure that suspects or accused persons may revoke a waiver subsequently at any point during the criminal proceedings and that they are informed about that possibility. Such a revocation shall have effect from the moment it is made.'

Directive 2016/343

9 Article 7 of Directive 2016/343, headed ‘Right to remain silent and right not to incriminate oneself’, provides:

- ‘1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.
2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.
3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.
4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.
5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.
6. This Article shall not preclude Member States from deciding that, with regard to minor offences, the conduct of the proceedings, or certain stages thereof, may take place in writing or without questioning of the suspect or accused person by the competent authorities in relation to the offence concerned, provided that this complies with the right to a fair trial.’

French law

10 The first paragraph of Article 53 of the code de procédure pénale (French Code of Criminal Procedure) provides:

‘A crime or other offence shall be classified as *in flagrante delicto* where it is in the course of being committed or has just been committed. A crime or other offence shall also be so classified where, at a time very close to the act, the person suspected is pursued by hue and cry, is found in the possession of articles, or has on or about him or her traces or clues so as to give grounds for believing that he or she has taken part in the crime or other offence.’

11 Article 63-1 of that code reads as follows:

‘A person who is placed in custody shall be immediately informed by a senior police officer or, under the latter’s supervision, by a police officer, in a language which the person concerned understands, where appropriate by means of the form provided for in the 13th paragraph:

1° That he or she is being placed in custody, the duration of the detention in custody and of any extension or extensions to which it may be subject;

2° Of the nature and the alleged date and place of the offence which he or she is suspected of having committed or attempted to commit and also of the grounds set out in paragraphs 1 to 6 of Article 62-2 that justify his or her being placed in custody;

3° That he or she has:

- the right to have a relative and his or her employer and also, if he or she is of foreign nationality, the consular authorities of the State of which he or she is a national notified and, where appropriate, to communicate with those persons, in accordance with Article 63-2;
- the right to be examined by a doctor, in accordance with Article 63-3;
- the right to be assisted by a lawyer, in accordance with Articles 63-3-1 to 63-4-3;
- where necessary, the right to be assisted by an interpreter;
- the right to consult, as soon as possible and no later than any extension of the custody, the documents referred to in Article 63-4-1;
- the right to submit observations to the procureur de la République [(Public Prosecutor)] or, where appropriate, to the juge des libertés et de la détention [(liberties and detention judge)], where the latter rules on any extension of the custody, with a view to having the measure terminated. If the person concerned is not brought before the judge, he or she may submit observations orally in the form of a deposition, which shall be communicated to the judge before the judge decides whether to extend the measure;
- the right, at the hearings, after having stated his or her identity, to make statements, to answer the questions put to him or her or to remain silent.

...

A note of the information provided pursuant to this Article shall be placed on the custody record and initialled by the person placed in custody. In the event of a refusal to initial the record, a note to that effect shall be placed on the record.

Pursuant to Article 803-6, a document setting out those rights shall be handed to the person when he or she is notified that he or she is being placed in custody.’

12 As provided in Article 63-4-1 of that code:

‘At his or her request, the lawyer may consult the record produced pursuant to the penultimate subparagraph of Article 63-1 confirming notification of the custodial measure and of the associated rights, the medical certificate issued pursuant to Article 63-3, and the depositions of the person being assisted by the lawyer. The lawyer may not request or take copies thereof. He or she may, however, take notes.

The person placed in custody may also consult the documents referred to in the first paragraph of this Article or a copy thereof.’

13 Article 73 of that code provides:

‘Where a crime or other offence committed *in flagrante delicto* is punishable by imprisonment, any person shall be entitled to apprehend the perpetrator and to take him or her to the nearest senior police officer.

When the person is presented to the senior police officer, it shall not be mandatory to take him or her into custody, if the conditions for that measure under this Code are met, where he or she is not required to remain at the disposal of the investigators and he or she has been informed that he or she may leave the police or *gendarmerie* station at any time. This paragraph shall not be applicable, however, if the person has been taken to the senior police officer under compulsion by the police force.’

14 The first and sixth paragraphs of Article 385 of the Code of Criminal Procedure provide:

‘The criminal court shall have jurisdiction to rule on any invalidity in the proceedings before it except where those proceedings are brought by the investigating judge or the investigating chamber.

...

In all cases, pleas of procedural invalidity must be put forward before any defence on the merits.’

The main proceedings and the question referred for a preliminary ruling

15 On the evening of 22 March 2021, K.B. and F.S. were questioned by police officers because of their suspicious presence in a company’s car park. The officers noted that the fuel tank of a heavy goods vehicle parked there was open and that there were some jerry cans nearby. At 22.25, the officers arrested and handcuffed K.B. and F.S., who were attempting to keep out of sight, and immediately initiated an on-the-spot investigation for theft of fuel under the first paragraph of Article 53 of the Code of Criminal Procedure.

16 After questioning K.B. and F.S., without, however, having notified them of the rights provided for in Article 63-1 of the Code of Criminal Procedure, the police officers notified a senior police officer who asked that the two suspects be immediately produced in order to be placed in custody in accordance with Article 73 *in fine* of the Code of Criminal Procedure.

17 The police officers disregarded that advice and called on another senior police officer who attended the scene at 22.40 and searched the two suspects’ vehicle, instead of placing them in custody, notifying them of those rights and informing the Public Prosecutor as required by French law. That search revealed incriminating evidence, such as stoppers, a funnel and an electric pump. The senior police officer asked K.B. and F.S. certain questions, which they answered.

18 At 22.50, the Public Prosecutor was advised that F.S. and K.B. were being placed in custody; they were informed of their rights, including the right to remain silent, at 23.00 and 23.06, respectively.

19 The tribunal correctionnel de Villefranche-sur-Saône (Criminal Court, Villefranche-sur-Saône, France), before which criminal proceedings were brought against K.B. and F.S. for offences of theft of fuel and which is the referring court, notes that, in this case, certain investigative acts were carried out, and certain self-incriminating statements taken, before K.B. and F.S. were informed of their rights, contrary to Article 63-1 of the Code of Criminal Procedure, which transposes Articles 3 and 4 of Directive 2012/13. Owing to the delay in placing them in custody, informing the Public Prosecutor and informing them of their rights, in particular the right to remain silent, the referring court considers that the right not to incriminate oneself was infringed. In those circumstances, the vehicle search, the suspects’ detention in custody and all the consequential acts should, in principle, be annulled, in accordance with the case-law of the Cour de cassation (Court of Cassation, France).

20 Against that background, it is apparent from the file before the Court that, under Article 385 of the Code of Criminal Procedure, pleas of procedural invalidity, such as breach of the obligation laid down in Article 63-1 of that code to inform a person of the right to remain silent at the time when that person is placed in custody, must be raised by the person concerned or that person's lawyer before any defence on the merits. It is also apparent from that file that K.B. and F.S. were assisted by a lawyer, but that neither the lawyer nor K.B. and F.S. raised a plea of invalidity, within the meaning of Article 385 of that code, alleging breach of that obligation, before putting forward a defence on the merits.

21 Furthermore, the referring court states that the Cour de cassation (Court of Cassation) has interpreted Article 385 of the Code of Criminal Procedure as meaning that trial courts are prohibited from raising of their own motion a plea of invalidity of the procedure, apart from lack of jurisdiction, since the accused person, who has the right to be assisted by a lawyer when he or she appears or is represented before a trial court, can plead such invalidity before mounting any defence on the merits, and, moreover, can do so on appeal if he or she did not appear or was not represented at first instance. Consequently, thus interpreted, Article 385 of the Code of Criminal Procedure would preclude the referring court from raising of its own motion the breach of the obligation referred to in the preceding paragraph of the present judgment.

22 In that context, the referring court queries whether the prohibition under Article 385 of that code, preventing it from raising of its own motion a breach of an obligation laid down by EU law, such as the obligation, laid down in Articles 3 and 4 of Directive 2012/13, to inform suspects and accused persons promptly of their right to remain silent, is compatible with EU law.

23 In that regard, it recalls that the application of EU law by national courts of their own motion falls, in the absence of EU rules governing procedural matters, within the procedural autonomy of the Member States, within the limits of the principles of equivalence and effectiveness. In the judgment of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437), the Court had ruled that EU law precludes application of a domestic procedural rule whose effect is to prevent the national court, seised of a matter falling within its jurisdiction, from considering of its own motion whether a measure of domestic law is compatible with a provision of EU law when the latter provision has not been invoked by the litigant within a certain period.

24 The referring court refers, moreover, to the Court's case-law in the area of unfair terms, where the Court has found that the national court is under an obligation to examine of its own motion an infringement of certain provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), on the ground that such an examination makes it possible to achieve the results prescribed by that directive. That case-law thus recognises the national court's status as an authority of a Member State as well as its corresponding duty as a fully fledged actor in the transposition procedure for directives, in a specific context where one party to the proceedings is in a weaker position. That reasoning relating to consumers could be transposed to the accused in a criminal matter, particularly as he or she is not necessarily assisted by a lawyer in enforcing his or her rights.

25 In those circumstances, the tribunal correctionnel de Villefranche-sur-Saône (Criminal Court, Villefranche-sur-Saône) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Articles 3 (Right to information about rights) and 4 (Letter of Rights on arrest) of [Directive 2012/13] and Article 7 (Right to remain silent) of [Directive 2016/343], in conjunction with Article 48 (Presumption of innocence and right of defence) of the [Charter] be interpreted as

precluding the prohibition on the national court raising of its own motion a violation of the rights of the defence as guaranteed by those directives, more specifically in so far as it is prohibited from raising of its own motion, with a view to the annulment of the procedure, a failure to give notification of the right to remain silent at the time of the arrest or a late notification of the right to remain silent?’

Consideration of the question referred

26 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, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 31).

27 The fact that a national court has, formally speaking, worded a question referred for a preliminary ruling with reference to certain provisions of EU law does not prevent the Court from providing the national court with all the points of interpretation which may be of assistance in adjudicating on the case pending before it, whether or not that court has referred to them in its questions. In that regard, it is for the Court to extract from all the information provided by the national court, in particular from the grounds of the decision referring the questions, the points of EU law which require interpretation, having regard to the subject matter of the dispute (judgment of 22 December 2022, *Ministre de la Transition écologique and Premier ministre (Liability of the State for air pollution)*, C-61/21, EU:C:2022:1015, paragraph 34 and the case-law cited).

28 In the present case, it must be observed, first, that the question referred for a preliminary ruling concerns, inter alia, Article 7 of Directive 2016/343, paragraph 1 of which provides that Member States must ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.

29 However, it must be noted that the request for a preliminary ruling was formulated in circumstances in which the information relating to the right to remain silent was given late to the persons concerned, since, as is apparent from paragraphs 16 to 19 of the present judgment, questions were put to them by police officers and a senior police officer, and self-incriminating statements were taken by those officers before that information was given to the persons concerned. The request therefore concerns the inferences which the trial court may have to draw from the lateness of that information when that has not been invoked by those individuals or their lawyer within the period prescribed by the law of the Member State concerned. However, the obligation imposed on the competent authorities to provide suspects or accused persons promptly with information and a Letter of Rights relating, inter alia, to the right to remain silent, and similarly the obligation for Member States to ensure that a failure or refusal to provide such information or letters can be challenged, are specifically governed by Directive 2012/13, in particular, with regard to the first obligation, by Articles 3 and 4 thereof and, with regard to the second obligation, by Article 8(2). Consequently, as the Advocate General noted in essence in points 31 to 35 of his Opinion, it is in the light of that directive alone that the question referred for a preliminary ruling should be answered.

30 Secondly, it is clear from recital 14 of Directive 2012/13 that it is based on the rights set out, inter alia, in Articles 47 and 48 of the Charter and seeks 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, paragraph 37).

31 However, while the question referred for a preliminary ruling refers only to Article 48 of the Charter relating to the presumption of innocence and right of defence, it must be recalled that the Court has previously ruled that the right to remain silent is safeguarded not only by that article but also by the second paragraph of Article 47 of the Charter relating to the right to a fair hearing (see, to that effect, judgment of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, paragraph 45). Therefore, that question must also be examined in the light of the latter provision of the Charter.

32 In those circumstances, the referring court must be considered to be asking, in essence, whether Articles 3 and 4 and Article 8(2) of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter, must be interpreted as meaning that they preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities, under Articles 3 and 4 of that directive, to inform suspects or accused persons promptly of their right to remain silent.

33 In that regard, it should be recalled that, under Article 3(1)(e) and (2) and Article 4(1) and (2) of Directive 2012/13, Member States must ensure that suspects or accused persons are provided promptly with oral or written information and, where those persons are arrested or detained, with a written Letter of Rights concerning, inter alia, the right to remain silent, in order to allow for that right to be exercised effectively. Those provisions thus lay down an obligation, for the competent authorities of the Member States, to inform suspects or accused persons promptly of that right, although it should be made clear that, irrespective of the possibly stricter nature of that obligation in relation to suspects or accused persons who have been arrested or detained, it is apparent from recital 19 of that directive that, in any event, the information referred to above must be provided at the latest before the first official interview of the suspect or accused person by the police or by another competent authority.

34 In the present case, the referring court found, in essence, that K.B. and F.S., who were arrested *in flagrante delicto* and should therefore, as persons arrested and suspected of having committed a criminal offence, have been informed promptly of their right to remain silent under the national law transposing the provisions of Directive 2012/13 referred to in the preceding paragraph, were belatedly informed of that right, that is to say, only after questions had been put to them by police officers and a senior police officer and self-incriminating statements had been taken by those officers.

35 In that context, it should be borne in mind that, under Article 8(2) of Directive 2012/13, Member States must 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 that directive.

36 That provision is particularly intended to be applied in a situation in which information about the right to remain silent has been given late. In view of the fact that Article 3(1) and Article 4(1) of that directive require suspects or accused persons to be informed promptly of their right to remain silent, information in that respect that is provided without the requisite promptness cannot be regarded as having been provided 'in accordance' with that directive. Accordingly, under Article 8(2) of that directive, suspects or accused persons or their lawyers must be able to challenge that failure of communication.

37 In that respect, it must be noted that, having regard to the importance of the right to an effective remedy, protected by the first paragraph of Article 47 of the Charter, Article 8(2) of Directive 2012/13 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).

38 However, in referring to ‘procedures in national law’, that provision of Directive 2012/13 specifies neither the procedure under and time limits within which suspects and accused persons, and their lawyers, if any, may invoke a breach of the obligation to inform such suspects and accused persons promptly of their right to remain silent, nor the possible procedural consequences of a failure to invoke such a breach, such as the power, for the trial court in a criminal case, to raise such a breach of its own motion with a view to the annulment of the procedure. The leeway thus given to the Member States to establish that procedure and those consequences is further confirmed by recital 36 of that directive, according to which 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 that 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.

39 It must therefore be held that Directive 2012/13 does not set out rules governing the possibility of the trial court in a criminal case being entitled to raise of its own motion, with a view to the annulment of the procedure, a breach of the obligation to inform such suspects or accused persons promptly of their right to remain silent.

40 It must nevertheless be recalled that, when implementing Article 3(1)(e), Article 4(1) and Article 8(2) of Directive 2012/13, the Member States must, in accordance with Article 51(1) of the Charter, ensure that the requirements arising both from the right to an effective remedy and the right to a fair hearing laid down in the first and second paragraphs of Article 47 of the Charter, and the rights of defence laid down in Article 48(2) of the Charter, to which specific expression is given by those provisions of Directive 2012/13, are respected (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 42).

41 It should be added that, in accordance with Article 52(3) of the Charter, the rights contained therein have the same meaning and scope as the corresponding rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (‘ECHR’), which does not preclude EU law from affording more extensive protection. When interpreting the rights guaranteed by the first and second paragraphs of Article 47 and Article 48(2) of the Charter, the Court must, therefore, take account of the corresponding rights guaranteed by Articles 6 and 13 ECHR, as interpreted by the European Court of Human Rights, as the minimum threshold of protection (see, to that effect, judgments of 2 February 2021, *Consob*, C-481/19, EU:C:2021:84, paragraph 37 and the case-law cited, and of 9 March 2023, *Intermarché Casino Achats v Commission*, C-693/20 P, EU:C:2023:172, paragraphs 41 to 43). Recital 14 of Directive 2012/13 expressly mentions, moreover, the fact that that directive builds upon, inter alia, Article 6, as interpreted by that court.

42 In that regard, and subject to verification by the referring court, it must be noted that, as is clear from the explanations given by the French Government in its written observations and at the hearing, French criminal law, in particular Article 63-1(3), Article 63-4-1 and Article 385 of the Code of Criminal Procedure, allows suspects or accused persons and also their lawyers, if any, to invoke by any plea and at any time, between their being placed in custody and the submission of the defence on the merits, any breach of the obligation to inform suspects or accused persons promptly

of their right to remain silent, an obligation that stems from Articles 3 and 4 of Directive 2012/13, and it should be made clear that both suspects and accused persons as well as their lawyers have a right of access to the file and, in particular, to the record of notification of the custodial measure and the associated rights.

43 It is open to the Member States, by virtue of the leeway given to them by Directive 2012/13, to limit the time within which such a breach may be invoked to the stage preceding submission of the defence on the merits. In particular, the prohibition on the trial court raising that breach of its own motion with a view to the annulment of the procedure must be regarded as respecting, in principle, the right to an effective remedy and the right to a fair hearing enshrined in the first and second paragraphs of Article 47 of the Charter, as well as the rights of defence enshrined in Article 48(2) of the Charter, as long as the suspects, the accused persons or their lawyers had a practical and effective opportunity to invoke the breach concerned and had a reasonable period of time within which to do so as well as access to the file.

44 However, in order to ensure that the right to remain silent has practical effect, it must be made clear that that conclusion applies only in so far as, throughout the period within which those persons could invoke an infringement of Article 3(1)(e) and Article 4(1) of Directive 2012/13, they – practically and effectively – had the right of access to a lawyer, as laid down in Article 3 of Directive 2013/48 and as facilitated by the system of legal aid provided for by Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016 L 297, p. 1).

45 That interpretation of those provisions of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter, is supported by the case-law of the European Court of Human Rights on Article 6 ECHR, that court having previously held that the particularly vulnerable position of the accused at the investigation stage for the preparation of the criminal proceeding can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself or herself (ECtHR, 27 November 2008, *Salduz v. Turkey*, CE:ECHR:2008:1127JUD003639102, § 54).

46 The fact that suspects and accused persons must be offered a practical and effective opportunity under national law to consult a lawyer does not however preclude them, if they waive that opportunity, from having, in principle, to bear the possible consequences of that waiver where it has been given in accordance with the conditions laid down in Article 9 of Directive 2013/48. In particular, under paragraph 1 of that provision, the suspect or accused person must have been provided, orally or in writing, with clear and sufficient information in simple and understandable language about the content of the right of access to a lawyer and the possible consequences of waiving it, and the waiver must be given voluntarily and unequivocally.

47 The consideration mentioned in paragraph 44 of the present judgment is not called into question by the fact that Article 8(2) of Directive 2012/13 provides that a breach of the obligation to inform suspects or accused persons promptly of their right to remain silent must be capable of being invoked by the suspect or the accused person ‘or’ by their lawyers. That coordinating conjunction must be understood as meaning that those suspects or accused persons have to assert such a breach themselves only where they have properly waived the possibility of being assisted by a lawyer – in which case the validity of that waiver must be verified by a court – or where they prefer to raise that breach by themselves rather than through their lawyers.

48 In addition, it must further be noted that, under the case-law of the European Court of Human Rights, where a procedural defect has been identified, it falls to the domestic courts to carry out the assessment as to whether that procedural shortcoming has been remedied in the course of the ensuing proceedings, the lack of an assessment to that effect in itself being *prima facie* incompatible with the requirements of a fair trial according to Article 6 ECHR (ECtHR, 28 January 2020, *Mehmet Zeki Çelebi v. Turkey*, CE:ECHR:2020:0128JUD002758207, § 51). Thus, where a suspect has not been informed in due time of the privilege against self-incrimination and the right to remain silent, it is necessary to assess whether, notwithstanding this failure, the criminal proceedings as a whole can be considered fair, taking into account a series of factors, including whether the statements taken without such information having been given formed an integral or significant part of the probative evidence, and the strength of the other evidence in the case (see, to that effect, ECtHR, 13 September 2016, *Ibrahim and Others v. The United Kingdom*, CE:ECHR:2016:0913JUD005054108, §§ 273 and 274).

49 It follows from the above that national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities, under Articles 3 and 4 of Directive 2012/13, to inform suspects or accused persons promptly of their right to remain silent cannot be considered to undermine Articles 47 and 48 of the Charter where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer in accordance with Article 3 of Directive 2013/48, if necessary having obtained legal aid as provided in Directive 2016/1919, and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time, in accordance with Article 8(2) of Directive 2012/13.

50 That conclusion is not called into question by the case-law invoked by the referring court that is mentioned in paragraphs 23 and 24 of the present judgment.

51 In fact, first, in the case giving rise to the judgment of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437), national law conferred on the national court the power to consider of its own motion the question whether a measure of domestic law was compatible with a provision of EU law. However, owing to the fact that the period within which that assessment could be made of the court's own motion had already expired when the hearing was held, the referring court found that it no longer had that power. By contrast, the case in the main proceedings concerns the question whether EU law requires that the national court be recognised as having the power to raise a breach of EU law of its own motion when that is prohibited by national law.

52 As regards, secondly, the case-law of the Court of Justice in the field of unfair terms, it must be pointed out that the legal relationships involved in a consumer protection context differ from those in criminal proceedings, such as those involved in the main proceedings and recalled in paragraph 45 of the present judgment, to such an extent that the principles established in the field of unfair terms cannot simply be applied to procedural safeguards in criminal proceedings.

53 In the light of all of the foregoing reasons, the answer to the question raised is that Articles 3 and 4 and Article 8(2) of Directive 2012/13, read in the light of Articles 47 and 48 of the Charter, must be interpreted as meaning that they do not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities, under Articles 3 and 4 of that directive, to inform suspects or accused persons promptly of their right to remain silent, where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer in accordance with Article 3 of Directive 2013/48, if

necessary having obtained legal aid as provided in Directive 2016/1919, and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time, in accordance with Article 8(2) of Directive 2012/13.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Grand Chamber) hereby rules:

Articles 3 and 4 and Article 8(2) 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, read in the light of Articles 47 and 48 of the Charter of Fundamental Rights of the European Union,

must be interpreted as meaning that they do not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion, with a view to the annulment of the procedure, a breach of the obligation imposed on the competent authorities, under Articles 3 and 4 of that directive, to inform suspects or accused persons promptly of their right to remain silent, where those suspects or accused persons have not been deprived of a practical and effective opportunity to have access to a lawyer in accordance with Article 3 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, if necessary having obtained legal aid as provided in Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, and where they, like their lawyers, if any, have had a right of access to their file and the right to invoke that breach within a reasonable period of time, in accordance with Article 8(2) of Directive 2012/13.

[Signatures]

* Language of the case: French.