

# ECJ Clarifies Rights of Suspects in the Event of Personal Search and Seizure

## News

**Thomas Wahl**

On 7 September 2023, the [ECJ ruled](#) on the scope of Directives 2012/13 on the right to information in criminal proceedings and (EU) 2013/48 on the right of access to a lawyer in criminal proceedings when persons are subjected to a strip search for drug possession and the seizure of illegal substances or assets. The case at issue concerned Bulgarian criminal procedure law and practice ([Case C-209/22, \*AB v Rayonna prokuratura Lovech\*](#)).

### Background of the case

In the main proceedings, the referring District Court of Lukovit (Bulgaria) had to rule on the approval of these measures, which Bulgarian police officers carried out against AB following a vehicle check. The referring court had doubts as to the compatibility of Bulgarian criminal procedure law with the aforementioned directives. First, under Bulgarian law, the rights under the directives are granted only to "accused persons" and not to "suspects", so that in police and prosecutorial practice the obligations to safeguard the rights of the defense are generally not complied with until the person concerned is not formally regarded as an "accused person". Secondly, the Bulgarian courts' right of review in pre-trial proceedings is limited to formal legality; a violation of Arts. 47 and 48 of the Charter and the rights guaranteed in the directives cannot be examined here according to Bulgarian case law. If Bulgarian law violates EU law, the question arises for the referring court as to what consequences it can draw from this for its decision in the preliminary investigation proceedings.

### ECJ's decision on the applicability of the Directives

In a first step, the ECJ affirms the applicability of the two Directives 2012/13 and 2013/48 to the present case. The scope of application coincides and presupposes that two elements are required: (1) Suspicion on the part of the competent authorities that the person concerned has committed a criminal offence and (2) information in this regard is provided to the person by "official notification or otherwise". The ECJ considers the conduct of the strip search and seizure to be based not only on the fact that the person has been suspected of a criminal offence, but also that the person concerned has been implicitly informed of the suspicion of a criminal offense. The requirements for the application of the directives are therefore fulfilled. The fact that national law does not recognise the concept of "suspect" and that that person has not been officially informed that he or she is an "accused person" is irrelevant in that regard.

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## Requirements for judicial review

With regard to the question of the limited scope of review, the judges in Luxembourg point out that the directives grant the Member States a certain margin of discretion to determine the specific procedures with regard to the modalities and timing of asserting violations of rights. The legal remedy must merely be effective. The Member States are not obliged to create new legal remedies (unless no legal remedy exists that would make it possible to ensure, even indirectly, respect for the rights that individuals derive from EU law).

Accordingly, EU law does not preclude national case law according to which the court that, under the applicable national law, is seized of an application for *ex post* authorization of a strip search and the resulting seizure of illegal substances, carried out in the course of the preliminary stage of criminal proceedings, is not empowered to examine whether the rights of the suspect or accused person guaranteed by those directives have been respected. However, that person must subsequently be able to have any infringement of the rights under those directives established before the criminal court and that court must then be obliged to draw conclusions from such infringements, in particular with regard to the inadmissibility or probative value of the evidence obtained in those circumstances.

## Access to a lawyer

Lastly, the ECJ addresses the question of whether legal counsel should have been present during the strip search and seizure of illegal goods in accordance with the obligations under the Directive. The ECJ concludes from the principle rules in Art. 3(2) and Art. 3(3) of Directive 2013/48 that the strip search and seizure, which in the present case also occurred as a result of a roadside check, are not actually contexts in which the person concerned could have had the right of access to a lawyer. However, the Bulgarian court had to examine whether the presence of a lawyer was objectively necessary for the suspect to be able to exercise his defense rights practically and effectively.

## Put in focus

The ECJ has had to decide several times on the compatibility of Bulgarian criminal procedure law with the guarantees enshrined in the EU's procedural rights directives. In May 2023, the ECJ already had to deal with the missing concept of "suspect" under Bulgarian law and [indicated](#) that procedural rules on information to detained persons are incompatible with Directive 2012/13. In this judgment, the ECJ made clarifications on the applicability of the Directives as well. As in the present judgment, the ECJ emphasised that national authorities cannot circumvent the obligations deriving from the procedural rights directives if they do not formally recognise a person as suspect or "accused person". In essence, this line of argument strengthens the position of persons suspected of a criminal offence to be informed of their procedural rights and to have access to a lawyer at the earliest stages of criminal proceedings.

In November 2021, the ECJ ruled that Bulgaria cannot issue European Investigation Orders as long as it does not provide for legal remedies against coercive investigative measures (→ [eucrim 4/2021, 228-229](#)).

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