

ECJ: National Prohibitions to Examine Violations of the Duty to Inform Suspects of their Right to Remain Silent Possible

Simon Haupt

EU law does not preclude national legislation which prohibits the trial court in a criminal case from raising of its own motion a breach of the obligation imposed on the competent authorities to inform suspects or accused persons promptly of their right to remain silent with a view to the annulment of the procedure. However, those suspects or accused persons must not have been deprived of a practical and effective opportunity to have access to a lawyer. On 22 June 2023, this [reply was given](#) by the ECJ to a reference for preliminary ruling from the *tribunal correctionnel de Villefranche-sur-Saône* (Criminal Court, Villefranche-sur-Saône, France). The case is referred to as *C-660/21 (Procureur de la République v K.B. and F.S.)*.

Background of the case

On 22 March 2021, two individuals were arrested by police officers whilst stealing fuel. During the criminal proceedings brought against them, the court found that certain investigative acts and self-incriminating statements were taken from them before they were informed of their rights, including the right to remain silent, which is in violation of the national law transposing Arts. 3 and 4 of [Directive 2012/13](#).

Due to the delay in informing them of their rights, the Criminal Court, Villefranche-sur-Saône, ruled that their right not to incriminate themselves had been violated. As a consequence, the court considered annulling the vehicle search, the suspects' detention in custody, and all the related acts. However, in French criminal law, pleas of procedural invalidity, such as the breach of the right to be informed of the right to remain silent when placed in custody, must be raised by the individuals or their lawyer before presenting any defense on the merits. Neither the suspects nor their lawyer had raised such a plea before their defense in the case at hand.

The referring court sought guidance from the ECJ on whether the prohibition of French courts raising, on their own motion, a breach of the obligation to inform suspects and accused persons promptly of their right to remain silent, is compatible with EU law.

The ECJ's ruling

The Court recalled that the right to remain silent is safeguarded not only by Art. 48 CFR, relating to the presumption of innocence and right of defense, but also by Art. 47(2) CFR, relating to the right to a fair hearing. Directive 2012/13/EU is based on the mentioned fundamental rights guarantees and imposes an

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obligation on Member States to inform suspects or accused persons promptly of their rights, including the right to remain silent, before the first official interview with the police or another competent authority.

The ECJ emphasized that, when implementing the Directive, Member States must ensure that the right to an effective remedy and a fair hearing, as laid down in the Charter, are respected. Besides this, Member States have some leeway to establish that procedure. The Court found that, if suspects have practically and effectively had the right of access to a lawyer, if necessary having obtained legal aid, have had a right of access to their file and the right to invoke that breach within a reasonable period of time, national provisions for courts in a criminal case to challenge breaches are within this leeway. Therefore, it is possible to limit the time within which such a breach may be invoked. Moreover, if the suspect or his/her lawyer waive that opportunity, they must bear the possible consequences of that waiver.

The ECJ concluded that national prohibitions, such as the French one in question, do not violate Directive 2012/13 as well as Arts. 47(2) and 48 CFR, but left open the question whether there had been a procedural shortcoming. This is a matter falling to the domestic courts to assess. In consequence, French courts are still prevented from raising of their own motion a breach of the obligation to inform suspects promptly of their right to remain silent after the presentation of a defense on the merits.

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