

Case C-530/23 [Barało]ⁱ**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

17 August 2023

Referring court:

Sąd Rejonowy we Włocławku (Poland)

Date of the decision to refer:

17 August 2023

Criminal proceedings against:

KP

Subject matter of the main proceedings

Criminal proceedings against a person undergoing psychiatric treatment, suspected of possessing narcotic drugs and driving a vehicle under the influence of such drugs.

Subject matter and legal basis of the request

Interpretation of EU law on procedural safeguards relating to access to a lawyer afforded to a vulnerable person – Compatibility of provisions of national law with EU law – Power or obligation to disregard provisions of national law which are incompatible with directives – Direct applicability of a directive – Power or obligation to disregard, in criminal proceedings, evidence obtained in breach of provisions of directives – Obligations of the public prosecutor in the context of effective legal protection – Compatibility with EU law of provisions conferring on the Minister for Justice the power to issue binding instructions to public prosecutors – Article 267 of the Treaty on the Functioning of the European Union

ⁱ This case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

Questions referred for a preliminary ruling

1. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 18, 19, 24 and 27, of 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, in conjunction with Articles 3(2)(a) and (c) and 3(3)(a) 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, interpreted in the light of Sections 6, 7, 11, and 13 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as introducing a directly effective and mandatory rule which makes it impermissible to carry out an act involving the questioning of a vulnerable person without the participation of a defence counsel where the factual conditions for granting legal aid are met, if, at the same time, the authority conducting pre-trial proceedings fails to grant legal aid (including emergency or provisional legal aid) without undue delay and before the person concerned [a vulnerable person in concreto] has been questioned by the police, another law enforcement authority or a judicial authority, or before specific investigative or evidence-gathering acts have been carried out[?]

2. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 18, 19, 24 and 27, of 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, in conjunction with Article 1(2) 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, interpreted in the light of Sections 6, 7, 11, and 13 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, notwithstanding the factual conditions for carrying out immediate identification, be interpreted as meaning that the failure to identify a potential vulnerability or recognise a person as vulnerable and the inability to challenge the assessment of their potential vulnerability and to grant such a person legal aid without undue delay, is not permissible in any event in cases concerning offences punishable by a restriction of liberty and the circumstances of the failure to identify and provide a public defence counsel must be expressly stated in the decision, which is in principle open to challenge, to proceed to questioning in the absence of a lawyer[?]

3. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 18, 19, 24 and 27, of 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, in conjunction with Article 1(2) 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, interpreted in the light of Section 3, paragraph 7, of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as meaning that the failure of a Member State to introduce a presumption of vulnerability in criminal proceedings must be interpreted as preventing a suspect from benefiting from the safeguard laid down in Article 9 of 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, interpreted in the light of Section 11 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, and consequently that the authorities administering justice are obliged to apply the provisions of the directive directly in such a situation[?]

4. If the answer to at least one of Questions 1, 2, or 3 is in the affirmative, are the provisions of the two directives referred to in the questions to be interpreted as precluding provisions of national law such as:

(a) the second sentence of Article 301 of the Code of Criminal Procedure, under which a suspect is to be questioned with the participation of the appointed defence counsel only at his or her request and the failure of the defence counsel to appear for the questioning of the suspect is not to block questioning;

(b) Article 79(1)(3) and (4) of the Code of Criminal Procedure, under which an accused person (suspect) must have a defence counsel in criminal proceedings if there is reasonable doubt as to whether his or her capacity to recognise the significance of the offence or control his or her behavior was not, at the time that offence was committed, disabled or significantly restricted and if there is reasonable doubt as to whether the state of his or her mental health allows him or her to take part in the proceedings or conduct the defence in an independent and reasonable manner[?]

5. Does Article 3(2)(a), in conjunction with Article 3(3)(b), of 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, in conjunction with the principle of the primacy and direct effect of directives, require the authorities conducting pre-trial proceedings, the courts and any State authorities to disregard provisions of national law which are incompatible with the directive, such as those listed in Question 4, and consequently – on account of the expiry of the

implementation period – to replace the abovementioned national rule with the directly effective rules of the directive[?]

6. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 19, 24 and 27, of 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, be interpreted as meaning that in the absence of a decision to grant, or in the event of a failure to grant, legal aid to a vulnerable person or a person who is presumed to be vulnerable under Section 3, paragraph 7, of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (2013/C 378/02), and subsequently on account of the conduct of investigative acts with the participation of such person by a police or other law enforcement authority, including acts which cannot be repeated before the Court, the national court hearing the case in criminal proceedings, and also any other State authorities administering justice (and thus an authority conducting pre-trial proceedings) are obliged to **disregard the provisions of national law which are incompatible with the directive**, such as those referred to in Question 4, and consequently – on account of the expiry of the implementation period – to replace the abovementioned national rule with the directly effective rules of the directive, even where that person, after the investigation (or prosecution) has been completed and the public prosecutor has brought an indictment before the Court, has appointed a defence counsel of his or her choice[?]

7. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 19, 24 and 27, of 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, in conjunction with Article 1(2) 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, interpreted in the light of Sections 6, 7, 11, and 13 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as meaning that **a Member State is obliged to ensure that the vulnerability of a suspect is immediately identified and recognised, and legal aid is granted to suspects or accused persons in criminal proceedings who are presumed to be vulnerable persons, and that that assistance is mandatory even where the competent authority does not ask an independent expert to examine the degree of vulnerability, the needs of the vulnerable person and the appropriateness of any measures taken or envisaged against the vulnerable person until the independent experts' examination has been properly carried out**[?]

8. If the answer to Question 7 is in the affirmative, are the abovementioned provisions of the directive and the Commission recommendation to be interpreted as **precluding national legislation such as Article 79(1)(3) and (4) of the Code of Criminal Procedure**, under which an accused person must have a defence counsel in criminal proceedings **only** if there is reasonable doubt as to whether his or her capacity to recognise the significance of the offence or control his or her behavior was not, at the time that offence was committed, disabled or significantly restricted and if there is reasonable doubt as to whether the state of his or her mental health makes allows him or her to take part in the proceedings or conduct the defence in an independent and reasonable manner[?]

9. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 19, 24 and 27, of 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, in conjunction with Article 1(2) 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, interpreted in the light of Sections 6, 7, 11, and 13 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as meaning that **the competent authorities (public prosecutor's office, police) should, at the latest before the first questioning of a suspect by the police or another competent authority, immediately identify and recognise the vulnerability of the suspect in criminal proceedings and ensure that legal aid or emergency (provisional) aid is granted to him or her and derogate from questioning the suspect until such time as legal aid or emergency is established or emergency (provisional) aid is granted to that person**[?]

10. If the answer to Question 9 is in the affirmative, must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 19, 24 and 27, of 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, in conjunction with Article 1(2) 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, interpreted in the light of Sections 6, 7, 11, and 13 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as imposing on Member States an obligation to set out clearly in their national law the reasons and criteria for any derogation from the immediate identification and recognition of the vulnerability of a suspect in criminal proceedings and to ensure that legal aid or emergency (provisional) aid is granted

to him or her, and any derogations should be proportionate, limited in time and not infringe the principle of a fair trial, and should take the form of a procedural decision authorising a temporary derogation, against which, in principle, the party should have the right to request a judicial review[?]

11. Must the second paragraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, in conjunction with Articles 3(2)(a) and 3(3)(b) 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, in conjunction with Article 1(2) and recital 27, and in conjunction with Article 8 of 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, be interpreted as meaning that where the judicial authority does not grant legal aid and specify the reasons for deciding not to grant legal aid to a person who is presumed to be vulnerable (in accordance with Recommendations 7 and 11 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings), such a person has a right to an effective remedy, and the arrangement in national procedural law set out in Article 344a of the Code of Criminal Procedure, requiring that the case be referred back to the public prosecutor for the purpose of:

- (a) the authority conducting pre-trial proceedings identifying and recognising the vulnerability of the suspect in criminal proceedings;
- (b) enabling the suspect to consult his or her defence counsel before questioning;
- (c) questioning the suspect in the presence of defence counsel with audiovisual recording of the questioning itself; and
- (d) enabling the defence counsel to familiarise him or herself with the case file and submit any requests for evidence by the vulnerable person and a lawyer appointed officially or a lawyer appointed by the suspect;

should be regarded as such?

12. Must Article 4 of the Charter of Fundamental Rights of the European Union, in conjunction with Articles 6(1) and 2 of the Treaty on European Union and Article 6(3) of the Treaty on European Union, in conjunction with Article 3 of the Convention for the protection of human rights and fundamental freedoms, done in Rome on 4 November 1950, as subsequently amended by Protocols Nos 3, 5 and 8 and supplemented by Protocol No 2, in conjunction with the presumption of vulnerability under Recommendation 7 of Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, be interpreted as meaning that the questioning of

a suspect by a police officer or other person authorised to carry out an investigative act under psychiatric hospital conditions without regard to the state of uncertainty and under conditions of particularly limited freedom to state views and specific mental vulnerability, and in the absence of a lawyer, constitutes inhuman treatment and as such completely disqualifies such a procedural act of questioning as contrary to the fundamental rights of the European Union[?]

13. If the answer to Question 12 is in the affirmative, must the provisions referred to in Question 12 be interpreted as empowering (or obliging) a national court hearing a case in criminal proceedings – coming within the scope of 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, in conjunction with Recommendation 7 of the Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings and the scope 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 –, and also any other criminal authorities carrying out procedural acts in the case, to **disregard provisions of national law which are incompatible with the directive**, including in particular Article 168a of the Code of Criminal Procedure, and consequently – on account of the expiry of the implementation period – to replace the abovementioned national rule with the directly effective rules of the directive, even where that person, after the investigation (or prosecution) has been completed and the public prosecutor has brought an indictment before the Court, has appointed a defence counsel of his or her choice[?]

14. Must Articles 2(1)(b), 4(5) and 9, in conjunction with recitals 19, 24 and 27, of 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, in conjunction with Articles 3(2)(a), (b) and (c) and 3(3)(b) 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, in conjunction with the second subparagraph of Article 19(1) TEU and the principle of effectiveness in European Union law, be interpreted as meaning that the public prosecutor, when acting at the pre-trial stage in criminal proceedings, is obliged to act in full compliance with the requirements of Directive 2016/1919 having direct effect and thus to ensure that a suspect or accused person covered by the protection of the above directive in the proceedings is afforded effective legal protection 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 (that is to say also a stay in a psychiatric hospital) and, if necessary, the public prosecutor is obliged to disregard any orders of superior prosecutors if he or she is satisfied that complying with them would prejudice the effective protection of a suspect presumed to be vulnerable, including that person's right to a fair trial or to any other right conferred on him or her by Directive 2016/1919, in conjunction with Directive 2013/48/EU[?]

15. If the answer to Question 14 is in the affirmative, must the second subparagraph of Article 19(1) TEU laying down the principle of effective legal protection, in conjunction with Article 2 TEU, in conjunction with the principle of respect for the rule of law, as interpreted in the case-law of the Court of Justice (see judgment of 27 May 2019 in Case C-508/18), and the principle of judicial independence established in second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights, as interpreted in the case-law of the Court of Justice (see judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses*, C-64/16, EU:C:2018:117), be interpreted as meaning that **those principles, in view of the possibility of the Public Prosecutor General or higher-ranking public prosecutors issuing binding instructions to lower-level prosecutors obliging lower-ranking prosecutors to disregard directly effective EU rules or impede the application thereof, preclude national legislation stating that the prosecutor's office is to be directly dependant on an executive authority, that is to say the Minister for Justice, and also preclude the existence of national rules which limit the independence of the public prosecutor in the application of EU law**, in particular:

a/ Articles 1(2), 3(1)(1) and (3), 7(1) to (6) and (8), and 13(1) and (2) of the Ustawa z dnia 28 stycznia 2016 roku Prawo o prokuraturze (Law of 28 January 2016 on the Public Prosecutor's Office), which state that the Minister for Justice, who is also the Public Prosecutor General and the highest authority of the public prosecutor's office, has the right to issue instructions which are binding on lower-ranking public prosecutors also to the extent that they restrict or impede the direct application of EU law[?]

Provisions of international law cited

European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'): Articles 3 and 6(3)(b) and (c)

Provisions of European Union law cited

1. Treaty on European Union: Articles 2, 6, 9, and 19(1).
2. Charter of Fundamental Rights of the European Union: Articles 4 and 47.
3. 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; ‘Directive 2016/1919’): recitals 18, 19, 24, and 27; Articles 2(1)(b) and (c) and (2), 4(5), 8 and 9.
4. Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings (OJ 2013 C 378, p. 8; ‘Commission Recommendation’): recitals 1, 6, 7, 11 and 13; paragraphs 4, 7, 11 and 13.
5. 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; ‘Directive 2013/48’): recitals 50 and 51; Article 3.

Provisions of national law cited

1. Constitution of the Republic of Poland: Articles 7, 9, and 42(2).
2. Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Law of 6 June 1997 establishing the Criminal Code) (‘the Criminal Code’): Articles 1(1) and 31(1) and (2).
3. Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 establishing the Code of Criminal Procedure) (‘the Code of Criminal Procedure’): Articles 6, 7, 16, 71, 79(1)(3) and (4), 79(3), 81(1), 81a(2) and (3), 137, 147(1), (2) and (2b), 168a, 171(1), (5) and (7), 175(1), 245(1), 298(1), 300(1) and (4), 301, 313(1), 321, 326(1) and (2), 344a(1) and (2), 437(1) and (2), and 463(1).
4. Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the system of the ordinary courts), Dz.U. 2001, No 98, item 1070, as amended (‘Law on the system of the ordinary courts’): Articles 9, 9a, and 53 c.
5. Ustawa z dnia 28 stycznia 2016 r. – Prawo o prokuraturze (Law of 28 January 2016 on the Public Prosecutor’s Office), Dz. U. 2016, item 176, as amended: Articles 1, 3, 7, 13, and 106.

Case-law of the European Court of Human Rights in Strasbourg

1. Judgment of 27 November 2008 in *Salduz v. Turkey* (ECLI:CE:ECHR:2008:1127JUD003639102) – paragraphs 50, 51, 54, 55, 60, 62 and 72;
2. Judgment of 31 March 2009 in *Plonka v. Poland* (ECLI:CE:ECHR:2009:0331JUD002031002) – paragraphs 34, 35, 41 and 42;
3. Judgment of 13 September 2016 in *Ibrahim and Others v. United Kingdom* (ECLI:CE:ECHR:2016:0913JUD005054108) – paragraphs 249, 253 to 255, 257, 258, 261 and 271 to 274;
4. Judgment of 9 November 2018 in *Beuze v. Belgium* (ECLI:CE:ECHR:2018:1109JUD007140910).

Succinct presentation of the facts and procedure in the main proceedings

- 1 Criminal proceedings before the referring court are pending against K. P., who is accused:
 - (a) on 22 July 2022, acting contrary to the Ustawa o przeciwdziałaniu narkomanii (Law on combating drug addiction), of possessing a narcotic drug in the form of cannabis in a gross amount of 8.50 grams and a psychotropic substance in the form of amphetamine in a gross amount of 33.83 grams, that is to say an offence under Article 62(1) of the Law of 29 July 2005 on combating drug addiction;
 - (b) on 21 July 2022 at about 23.55, being under the influence of a substance having a similar effect to alcohol and having amphetamine in his blood in a concentration of 156.2 ng/ml, of driving a passenger vehicle, that is to say an offence under Article 178a(1) of the Criminal Code.
- 2 K.P. was stopped at 00.05 by police officers who, a moment earlier just before midnight, had become interested in the technical condition of the vehicle which he was driving but, after speaking to K.P., drove off. At the moment prior to being stopped, K.P. was outside the vehicle, was nervous, and spoke in a confused manner. When requested by the police officers, he handed over the plastic bags in his possession containing white powder and a dried green substance. After being stopped, he was taken to hospital, where blood was taken from him to be tested for narcotic drugs.
- 3 On the morning of 22 July 2022, a search of K.P.'s home was carried out in his absence. Without K.P.'s participation an analysis of the video surveillance of the streets on which he may have driven was also carried out in the further course of the proceedings.

- 4 An examination by testing equipment showed that the substances handed over by K.P. were cannabis and amphetamine, respectively. At 12.15 on 22 July 2022, he was charged with an offence under Article 62(1) of the Law on combating drug addiction.
- 5 K.P. was instructed about the right to be assisted by a defence counsel of his choice and the possibility of being assisted by a public defence counsel on account of his financial situation. He was also instructed about the right to make statements, remain silent, and refuse to respond to questions. The record of the questioning made no mention of present or past mental disturbances.
- 6 K.P. completely denied having committed the alleged offence. He remained silent and refused to sign the record or familiarise himself with the case file at the end of the investigation. The questioning was not recorded in audiovisual form. No defence counsel participated in the questioning. The investigating authority did not ask the court to appoint a defence counsel. K.P. was released from detention at 12.31 on 22 July 2022.
- 7 An examination of the blood taken showed an amphetamine concentration (156.2 ng/ml) classified by the expert as a state of 'being under the influence of a substance having a similar effect to alcohol'.
- 8 In August 2022, a police officer issued an order supplementing the charges with an offence under Article 178a(1) of the Code of Criminal Procedure, which, however, was not immediately read out to K.P. The psychiatric doctor interviewed testified that the severity of the symptoms of mental illness prevented K.P. from taking part in the judicial acts.
- 9 The medical records obtained by the public prosecutor show that K. P. had been in psychiatric hospitals several times since 2021, including on 22 July 2022 and between 8 August and 30 September 2022, on account of mental and psychotic disorders.
- 10 The order setting out supplementary charges was read to K.P. on 14 October and he was interviewed without defence counsel being present under psychiatric hospital conditions. He was given identical instructions as during the first questioning. The act of questioning was not recorded in audiovisual form. K.P. denied committing the alleged offences and remained silent, but did request to be acquainted with the case file at the end of the investigation and given the grounds for the charges in writing. Those grounds were served on his mother on 27 October 2022.
- 11 K.P. left the psychiatric hospital on 20 October 2022. On 23 November 2022, an expert issued an opinion on the substances handed over K. P. when he was stopped.
- 12 On 2 December 2022, K.P. reported to the police for the purpose of familiarising himself with the file, but declined to do so. At that time, he did not have a defence

counsel of his choice or one officially appointed. He did not make any requests for evidence.

- 13 On 15 December, the indictment against K.P., drawn up by a police officer and approved by the public prosecutor, was lodged with the Sąd Rejonowy we Włocławku (District Court, Włocławek). On 17 January 2023, the authorisation which K.P. had granted to a lawyer to defend him was submitted.
- 14 By order of 28 February 2023, the court, pursuant to Article 344a(1) of the Code of Criminal Procedure, referred the case to the prosecutor of the District Prosecutor's Office in Włocławek for the purpose of supplementing the investigation by questioning K.P. in the presence of a defence counsel and obtaining expert psychiatrists' opinions as to K.P.'s mental health at the time of the offences and during the proceedings.
- 15 On 3 March 2023, an appeal against that order was lodged by the prosecutor, arguing that the evidence did not need to be supplemented and that the medical records obtained did not provide grounds for K.P. to be examined by experts to determine the state of his mental health.
- 16 On 29 March 2023, the Sąd Okręgowy we Włocławku (Regional Court, Włocławek) set aside the order of 28 February 2023 and referred the case back to the Sąd Rejonowy we Włocławku.
- 17 The referring court notes that the superior of the District Prosecutor in Włocławek, who is a party to the proceedings in the case against K.P. as a public prosecutor, is the Public Prosecutor General, who is also the Minister for Justice, with the Public Prosecutor General directing the activities of the prosecutor's office personally or through subordinates, issuing orders, guidelines and instructions.

Succinct presentation of the reasoning in the request for a preliminary ruling

Reasoning for Questions 1, 2, 3, 5, 6, 7, 9 and 10

- 18 The case before the referring court concerns a suspect/accused person who has been treated in psychiatric wards in several hospitals in the past. In the acts relating to the pre-trial proceedings, from the first questioning to the indictment, he was not provided with a defence counsel. His needs as a person presumed to be vulnerable were not identified and he was not given the opportunity to challenge the assessment in that respect. He was also questioned while on a psychiatric hospital ward. The acts relating to the questioning were not recorded in audiovisual form. No specialist opinion on the suspect's mental health was obtained, that is to say it was not established whether he was able to recognise the significance of the offence or control his behaviour at the time it was committed, and whether he was in any way able to participate the proceedings and conduct his defence in an independent and reasonable manner.

- 19 Thus, the suspect was deprived of the minimum standards of protection to which he is entitled under Directives 2016/1919 and 2013/48 because those directives were not implemented correctly and comprehensively in the Polish legal order.
- 20 The referring court notes that, with regard to vulnerable persons (and persons who have previously been diagnosed with mental disorders should certainly be regarded as such), Directive 2016/1919 reinforces the nature of the provisions of Directive 2013/48 as a safeguard. That means that, with regard to such persons, the authorities conducting pre-trial proceedings are not only obliged to recognise the particular situation of the suspect and assess it properly in accordance with the requirements of Directive 2016/1919, but also to ensure that such persons, in accordance with Directive 2013/48, have access to a lawyer at such time and in such a way that they can genuinely and effectively exercise their rights of defence prior to their questioning by the police or other law enforcement or judicial authorities and at the time when the law enforcement or other competent authorities are carrying out investigative or other evidence-gathering acts.
- 21 The provisions of national criminal procedural law do not specify when and in what form the identification (and also preliminary assessment) of the suspect's needs should take place or set out *a priori* arrangements for provisional (emergency) legal aid for the suspect. Under Article 79(1)(3) and (4) of the Code of Criminal Procedure, the accused person must have a defence counsel in criminal proceedings if there is reasonable doubt as to whether his or her capacity to recognise the significance of the offence or control his or her behavior was not, at the time the offence was committed, disabled or significantly restricted (subparagraph 3) and if there is reasonable doubt as to whether the state of his or her mental health allows him or her to take part in the proceedings or conduct the defence in an independent and reasonable manner (subparagraph 4). However, the listed cases of mandatory defence are in no way supported by the requirement established by national procedural rules that such a situation should be immediately identified and assessed by the authority conducting pre-trial proceedings, and under Article 79(3) of the Code of Criminal Procedure, in the cases referred to in Article 79(1)(3) and (4) of the Code of Criminal Procedure, the participation of the defence counsel is in principle mandatory only at the stage of proceedings before the court.
- 22 On the other hand, carrying out the act of identifying and granting even emergency legal aid to a suspect, in particular before the first questioning in pre-trial proceedings, is – in view of the referring court – a requirement laid down by Directives 2016/1919 and 2013/48. However, that requirement is not implemented in the Polish legal order. Recognising the direct effect of the abovementioned directives in that respect would enable the act of identifying and granting at least emergency legal aid to the suspect to be carried out prior to the first questioning and his or her rights as a suspect to be exercised in full. It is precisely during the first questioning that the person being questioned is most vulnerable and susceptible to pressure.

- 23 Polish criminal law also does not ensure that the questioning of the person to whom Directive 2016/1919 and the Commission recommendations apply is recorded. The referring court is aware that the recommendations are non-binding acts (soft law), but they do have an informative and clarifying function vis-à-vis the provisions of both directives. The national courts are obliged to take account of recommendations issued by the European Union authorities wherever they may shed light on the interpretation of other provisions of EU law. The recommendation concerning the making of an audiovisual recording is intended to strengthen the procedural safeguards for the suspect by, inter alia, making it possible to examine whether the law enforcement authorities have, without undue delay, made an assessment of whether there are grounds for granting legal aid (albeit on an emergency basis). Such a preliminary assessment should also be reflected in the form of a procedural act. That does not necessarily involve a decision open to challenge, but it must be amendable to review.
- 24 Although the possibility of making an audiovisual recording of a suspect's questioning is provided for in Article 147(1) of the Code of Criminal Procedure, it does not set out the situation of the pre-trial questioning of a suspect who should be presumed to be vulnerable. In practice, such recordings are not made at that stage of the proceedings. The absence of such recording does not allow for *ex post* assessment of whether any attempt was made to identify and assess the suspect's particular needs and whether he or she was able to understand the instructions.
- 25 Under Article 2(1) of Directive 2016/1919, the right to request the appointment of a public defence counsel materialises at the time of deprivation of liberty, that is to say detention (subparagraph (a)) or the conduct of certain evidence-gathering acts in which the suspect may or must participate (subparagraph (c)), that is to say also at the pre-trial stage, prior to questioning by the police or other authority or prior to the conduct of investigative or evidence-gathering acts.
- 26 The referring court points out that in Polish procedural law there is no mechanism to counteract omissions or remedy an omission of a law enforcement agency in that respect. That absence often undermines the suspect's rights of defence.
- 27 In the view of this court, on account of expiry the period for implementing Directive 2016/1919 (on 25 May 2019) and the expiry of the period for implementing Directive 2013/48 (27 November 2016), the rights arising from those directives should apply directly to citizens in vertical relationships. However, the relevant presumptions of the directives are disregarded in the pre-trial proceedings.
- 28 In the view of the referring court, the main problem with the failure to implement Directive 2016/1919 and Directive 2013/48 and the failure to implement the Commission recommendation is safeguarding the rights of defence for persons who are presumed to be vulnerable and who should already benefit from legal aid from the moment the suspicion of an offence is levelled against them. Without

legal aid, a person referred to in Directive 2016/1919 may be unaware of what he or she is entitled to and to what extent.

- 29 Under Article 31(1) and (2) of the Polish Criminal Code, anyone who, due to mental illness, mental disability or other mental disturbance, was unable at the time of the offence to recognise its significance or control his or her behaviour does not commit an offence, and if at the time of the offence the capacity to recognise the significance of the offence or control his or her behaviour was significantly restricted, the court may apply exceptional mitigation of the penalty. In the view of the referring court, a situation where the lack of identification at the pre-trial stage results in the filing of an indictment against such a person in court is impermissible.
- 30 Under EU law, in criminal proceedings, suspects and accused persons who are potentially vulnerable on account of doubts as to their mental and physical state must have a lawyer (legal aid) in accordance with national law (Article 79(1)(3) and (4) of the Criminal Procedure Code) and Directive 2013/48 and Directive 2016/1919. According to recital 19 of Directive 2016/1919, the State is obliged to grant the person concerned legal aid without undue delay and at the latest before the first questioning. If that is not possible, the institutions conducting pre-trial proceedings should at least grant emergency or provisional legal aid before questioning or an evidence-gathering act.
- 31 On the other hand, the provisions of the Polish Code of Criminal Procedure govern to limited extent the issues related to the actual and effective access to mandatory defence and do not govern at all the issue relating to the presence of a suspect's lawyer before the first question and during acts involving the suspect even in the case of mandatory defence.
- 32 The necessity, under Article 313(1) of the Code of Criminal Procedure, to question a suspect without delay after the decision bring charges has been read out to him, in the absence of a legal bases allowing for even emergency or provisional legal aid to be granted, is contrary to the right of access to a lawyer 'before questioning' which arises from the directives in question. Article 301 of the Code of Criminal Procedure states that in pre-trial proceedings, a suspect is to be questioned with the participation of a defence counsel only at his or her request, and failure of the defence counsel to appear does not block questioning.
- 33 In order to ensure the effectiveness of EU law in relation to the circumstances of the present case, the referring court relies on the principle of direct effect of unimplemented or incorrectly implemented EU directives. In the view of the referring court, the provisions of Directive 2016/800 cited in Questions 1, 2, 3, 5, 6, 7, 9 and 10, in conjunction with the Commission recommendation and the provisions of Directive 2013/48, which also apply to suspects, are clear and precise and give rise to no doubts regarding interpretation. In that regard, they are unconditional in nature. As a result, the referring court seeks confirmation that the above provisions meet the criteria relating to direct effect.

Reasoning for Questions 4 and 8

- 34 The referring court states that, in its view, there is a conflict between rules of domestic law (the Code of Criminal Procedure) and EU law. The referring court seeks to establish that, on account of the failure correctly to implement EU law and in view of the direct effect of the provisions of the directives to the extent indicated above, the courts – and all other State authorities administering justice at every stage thereof – are obliged to disregard provisions of national law which are in conflict with EU law. The procedural rules currently in force in Poland not only do not contain sufficiently precise solutions which ensure that the person concerned has the full set of rights set out in Directives 2016/800 and 2013/48 but even contain rules which prevent procedural provisions from being interpreted in conformity with EU law.
- 35 Article 79(3) of the Code of Criminal Procedure stipulates that the participation of a defence counsel is mandatory only at the trial and in those hearings in which the participation of the accused person is mandatory.
- 36 Article 301 of the Code of Criminal Procedure stipulates that a suspect is to be questioned with the participation of a defence counsel only at the request of the suspect himself or herself, and at the same time, the failure of the defence counsel to appear (regardless of the reason for the failure to do so) is not to block questioning. Therefore, the questioning of a suspect (or even a person under suspicion) who is potentially vulnerable, without making contact with a defence counsel possible and ensuring his or her participation in an act, does not constitute an infringement of the rules contained in the Code of Criminal Procedure. Polish criminal law is also silent on the issue of granting emergency or provisional aid at the stage of identifying the needs of the suspect. It is commonly accepted in pre-trial proceedings that the prosecutor applies to the court for the appointment of a public defence counsel for the suspect only after a specialist opinion has been obtained, while in this case the suspect has already been questioned initially and charged.
- 37 The general nature of Article 301 of the Code of Criminal Procedure results, in the view of the referring court, in a lack of specification of the obligation to question the suspect with the participation of a defence counsel, which it lays down. While – as in the case against K.P – the prosecutor collects further information about the suspect's state of health, the evidence-gathering acts take place in parallel without the participation of a lawyer. All the most important acts in the pre-trial proceedings take place in such a situation vis-à-vis the suspect without the participation of a defence counsel.
- 38 The provisions of Polish criminal procedural law, to the extent set out above, either disregard the provisions of the directives or are contrary to them. Consequently, the referring court considers that it is essential that both the courts and all the State authorities administering justice disregard provisions of national law which preclude the effective application of EU law in the case at issue.

However, where the application of a conforming interpretation is sufficient, both the courts and the other authorities of the State administering justice are obliged to use that instrument.

- 39 The referring court further notes the possible conflict between recital 27 of Directive 2016/1919 and Article 344a of the Code of Criminal Procedure, which allows the case to be referred to the public prosecutor for the purpose of supplementing the prosecution or investigation if the case file points to significant deficiencies in the proceedings, in particular the need to search for evidence, and the court carrying out the necessary acts would cause significant difficulties. However, it places emphasis on the lack of evidence in the file, whilst remaining silent on the infringement of the suspect's procedural safeguards.

Reasoning for Questions 11, 12 and 13

- 40 Questions 11, 12 and 13, as intended by the referring court, seek to establish an effective remedy to ensure that suspects in the criminal proceedings pending before the referring court eliminate the effects of the infringement of their rights under Directive 2016/1919 and, by way of complement, Directive 2013/48. The need to introduce such a remedy arises from Article 8 of Directive 2016/1919 and Article 12 of Directive 2013/48.
- 41 Directive 2013/48 and Directive 2016/1919, with regard to the right to the assistance of a lawyer the consequences of an infringement of that right, refer to the current case-law of the European Court of Human Rights ('the ECtHR') and therefore point to the need to comply with ECtHR standards in that regard.
- 42 The referring court notes in particular the judgments of the ECtHR in *Ibrahim and Beuze*, concluding that the case-law of the ECtHR indicates the unacceptability of the procedural use of evidence from accused persons' statements made at the initial stage of criminal proceedings where the right to the assistance of a defence counsel is not afforded and there is inadequate knowledge of the consequences of making statements.
- 43 In the light of the case-law of the ECtHR, an infringement of the rights of the defence therefore constitutes a serious ground for disregarding evidence obtained in the circumstances of such an infringement. Such an approach in the light of Polish national law is, however, precluded by Article 168a of the Code of Criminal Procedure, under which evidence may not be declared inadmissible solely on the ground that it was obtained in breach of the rules of procedure or by means of an offence referred to in Article 1(1) of the Criminal Code (conditions for criminal liability), unless the evidence was obtained in connection with the performance of official duties by a public official, as a result of: murder, intentional bodily injury or deprivation of liberty. While it is true that the European legislature, in Directive 2013/48/EU, did not introduce a general prohibition on the use of evidence obtained in a manner that infringes the right of access to a lawyer, it nevertheless laid down a requirement that the evaluation

thereof be carried out in a specific manner, taking into account the need to guarantee the accused person/suspect a fair trial.

- 44 For that reason, the referring court considers that the provisions of Directive 2013/48 on effective remedy imply that the court should disregard Article 168a of the Code of Criminal Procedure when assessing the statements of a suspect/accused person who has not been afforded the right to be assisted by a defence counsel, and declare the act thus carried out impermissible. Subsequently, the court should seek to remove the inadmissible procedural act from the evidence and repeat the act so that the conduct thereof is lawful in terms of the right to the presence of defence counsel. In order to achieve that result, the court should, in such a situation, resort to the arrangement of returning the case back to the pre-trial stage (Article 344a of the Code of Criminal Procedure), obliging the prosecutor to remove the infringements.
- 45 The referring court points out that in the present case there have been a number of infringements of the suspect's rights (questioning without the participation of a defence counsel and, moreover, twice in situations raising doubts as to the suspect's capacity to understand the significance of the acts carried out with him and to maintain his freedom to state views, including in a psychiatric hospital), the elimination of which is not possible at the trial stage, and their existence significantly affects the assessment of the lawfulness of the manner in which the evidence gathered in this case was submitted.
- 46 The referring court thus regards the arrangement set out in Article 344a of the Code of Criminal Procedure as the only effective and available remedy in the Polish criminal procedure, as referred to in Article 12 of Directive 2013/48, which is actually able to bring about elimination of infringements of the pre-trial proceedings with regard to the suspect's rights of defence at that stage of the proceedings.

Reasoning for Questions 14 and 15

- 47 The referring court seeks to ascertain whether the public prosecutor is obliged to recognise the direct effect of the provisions of that directive after the period for its transposition has expired. The referring court takes the position that during pre-trial proceedings Polish law enforcement authorities do not recognise such an effect and base their adopted decisions solely on the wording of Polish legislation, which discounts the relevance of Directive 2016/1919 in the Polish legal order.
- 48 Once the pre-trial proceedings are completed and the indictment has been submitted to the court, the public prosecutor is a party to the proceedings. However, until that point, he or she is the authority conducting the proceedings and thus administering justice in the wider sense. He or she may bring charges and file an indictment against a person, but may also discontinue proceedings. Under Article 6 of the Law on the Public Prosecutor's Office, the public prosecutor is obliged to take the actions set out in laws, guided by the principle of impartiality

and equal treatment of all citizens. A duty to ensure compliance with EU law must be deduced from that. However, in pre-trial proceedings involving persons covered by the protection set out in Directive 2016/1919, which has not been fully implemented, there are infringements of rights.

- 49 Referring to the case-law of the Court of Justice, inter alia the judgment of 27 May 2019, *OG and PI* (Public Prosecutor's Offices in Lübeck and Zwickau), C-508/18 and C-82/19 PPU, EU:C:2019:456, the referring court takes the view that the attribute of independence must also characterise the pre-trial authorities wherever they apply EU law. The referring court points out that, as a result, in that judgment, the Court of Justice criticised severely those situations in which the guarantee of the fundamental rights of the European Union is entrusted to a body to which binding direction can be given by an executive authority (the Minister for Justice), pointing out that this is incompatible with the principle of guaranteeing the right to effective legal protection.
- 50 However, in the Polish criminal law system, superior prosecutors of a district prosecutor and the Public Prosecutor General (who is also the Minister for Justice, that is to say an executive authority), may at any time and in any case decide that the district prosecutor should adopt a legal classification of the offence committed which is different from the original one, request the application of a preventive measure in the form of provisional arrest, apply preventive measures of a non-custodial nature, issue an indictment or discontinue the proceedings, or to disregard the direct effect of a provision of a directive which has not been transposed in the Polish legal order within the prescribed time limit.
- 51 Under Article 1(2) of the Law on the Public Prosecutor's Office, the Minister for Justice holds the office of Prosecutor General and, under Article 13(2) thereof, is the superior of the public prosecutors attached to the ordinary courts. He has the power to issue orders, guidelines and instructions (Article 13(1) of the Law on the Public Prosecutor's Office), and a public prosecutor attached to the ordinary courts is obliged to carry out the order or instruction issued, or even the guidelines of the superior.
- 52 The independence of public prosecutors provides an individual with a guarantee that the authority will uphold the rule of law. It is a guarantee of the right to a fair and impartial trial. On the other hand, in the current legal order in the Republic of Poland, a *de facto* politician, that is to say the Minister for Justice who is also the Public Prosecutor General, can influence the course of any criminal proceedings and even indirectly (through the so-called 'deterrent effect') influence the decisions of the court, and *a fortiori* the prosecutors of subordinate public prosecutor's offices.
- 53 In the context of producing a so-called 'deterrent effect' on prosecutors, the referring court refers to Article 106(3) of the Law on the Public Prosecutor's Office, which allows a public prosecutor to be seconded, without his or her consent, to a public prosecutor's office having its seat at the place where the

seconded person resides, or to a public prosecutor's office at the place the public prosecutor's office is located, which is the place of employment of the seconded person, for a period of 12 months in the course of a year. Such secondments should be exceptional, but, between 4 March 2016 and 31 December 2019, at least 60 public prosecutors were transferred to lower-level courts as a particular disciplinary punishment. Another – equally severe – form of particular disciplinary punishment is the secondment of a public prosecutor to another public prosecutor's office located outside his or her place of work or residence for up to six months without his or her consent. The referring court takes the position that the exertion of influence (the application of a deterrent effect) on an authority administering justice may be dictated by the fact that the authority is not applying EU law directly.

- 54 An interpretation by the Court of Justice in this regard is necessary in order to clarify whether the rules of EU law must be interpreted as precluding rules of national law under which it is possible to exert pressure on authorities administering justice in such a way as to restrict or eliminate the direct application of EU law by those authorities and, in particular, as precluding national rules which deter a judge or public prosecutor from negating the effects of such national law in order to guarantee the full effect of provisions of EU law. In the absence of an answer to those questions, there is a serious risk, irrespective of the answers to Questions 1 to 12, that the judgment will not be enforceable under national law on account of the existence in the national legal order of mechanisms of a repressive nature (the demotion or transfer referred to) and intervening nature (guidelines and instructions), which may effectively prevent it.
- 55 Pursuant to Article 105(1) of the Rules of Procedure of the Court of Justice, the Sąd Rejonowy we Włocławku requests application of an expedited procedure.