Case C-400/23

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:

29 June 2023

Referring court:

Sofiyski gradski sad (Bulgaria)

Date of the decision to refer:

29 June 2023

Defendant:

VB

Subject matter of the main proceedings

Criminal proceedings conducted in the absence of the accused person

Subject matter and legal basis of the request

Request pursuant to subparagraph (b) of the first paragraph of Article 267 TFEU

Questions referred for a preliminary ruling

1.1. Must the second sentence of Article 8(4) of Directive (EU) 2016/343 be interpreted as meaning that a person who is convicted *in absentia*, when the situations provided for in Article 8(2) do not apply, and is given a custodial sentence, must be informed of the decision convicting him or her when he or she is apprehended for the purpose of the execution of the sentence?

1.2. What is the content of the requirement that a person be 'informed of the decision' pursuant to the second sentence of Article 8(4) of Directive (EU) 2016/343, and does it mean that a copy of that decision must be served?

1.3. If the answers to Questions 1.1. and 1.2. are in the negative, does the second sentence of Article 8(4) of Directive (EU) 2016/343 preclude a national court from deciding to ensure that a copy of that decision is served?

2.1. Is national legislation which – in the event that a criminal charge is examined and a judicial decision convicting an accused person is handed down in the absence of that person, without the conditions laid down in Article 8(2) of the directive being met – lays down no procedures for informing the person convicted *in absentia* of his or her right to a new trial with his or her participation, and, in particular, such information is not provided when the person convicted *in absentia* is detained, compatible with the second sentence of Article 8(4) of Directive (EU) 2016/343?

2.2. Is it relevant that the national legislation – Article 423 of the Code of Criminal Procedure (NPK) – stipulates that the person convicted *in absentia* is to be informed of his or her right to a new trial, but only after that person has made a request for that conviction to be overturned and for a new trial to be held with his or her participation, in that he or she is to be provided with the information in the form of a judicial decision in response to that request?

2.3. If that is not the case, are the requirements laid down in the second sentence of Article 8(4) and Article 10(1) of Directive (EU) 2016/343 met if the court examining a criminal charge and handing down a decision convicting the accused person *in absentia*, when the situations provided for in Article 8(2) of the directive do not apply, sets out in its decision that person's right to a new trial or other legal remedy and requires the persons detaining the convicted person to serve him or her with a copy of that decision?

2.4. If that is the case, does the second sentence of Article 8(4) of Directive (EU) 2016/343 preclude a court which hands down a decision convicting an accused person *in absentia*, when the situations provided for in Article 8(2) of the directive do not apply, from deciding to set out in its decision that person's right to a new trial or to another legal remedy under Article 9 of the directive, and from requiring the persons detaining the convicted person to serve him or her with a copy of that decision?

3. What are the first and the last possible points in time at which the court must determine whether the criminal proceedings are being conducted in the absence of the accused person without the conditions laid down Article 8(2) of Directive (EU) 2016/343 being met and must take measures to ensure that information is provided in accordance with the second sentence of Article 8(4) of the directive?

4. Are the views of the prosecution and the defence counsel for the absent accused person to be taken into account in the decision referred to in Question 3 above?

5.1. Does the expression 'the possibility to challenge the decision' in the second sentence of Article 8(4) of Directive (EU) 2016/343 refer to a right of appeal

within the appeal period or does it refer to the challenging of a judicial decision that has become final?

5.2. What should be the content of the information to be provided in accordance with the second sentence of Article 8(4) of Directive (EU) 2016/343 to a person who has been convicted *in absentia*, without the conditions laid down in paragraph 2 being met, about 'the possibility to challenge the decision and [about] the right to a new trial or to another legal remedy, in accordance with Article 9': should it concern the right to obtain such a legal remedy, if he or she challenges his or her conviction *in absentia*, or the right to make such a request, the merits of which are to be assessed at a later stage?

6. What is meant by the expression 'another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed' in the first sentence of Article 9 of Directive (EU) 2016/343?

7. Is a provision of national law – Article 423(3) of the NPK – which requires the appearance in person of the person convicted *in absentia* as a prerequisite for consideration of his or her request for a new trial and for its approval compatible with Article 8(4) and Article 9 of Directive (EU) 2016/343?

8. Are the second sentence of Article 8(4) and Article 9 of Directive 2016/343 applicable to persons who are acquitted?

Provisions of European Union law relied on

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; 'Directive 2016/343' or 'the directive')

Provisions of national law relied on

Nakazatelen kodeks (Criminal Code; 'the NK')

Nakazatelno-protsesualen kodeks (Code of Criminal Procedure; 'the NPK')

Succinct presentation of the facts and procedure in the main proceedings

1 VB was charged with having participated, together with a certain number of other persons, in a criminal organisation which sought to enrich itself through the cultivation and distribution of drugs; with having possessed weapons, an offence punishable under Article 321(3)(2) of the NK, in conjunction with Article 321(2) thereof; with having possessed – in complicity with other persons – drugs and drug precursors in three cases, an offence punishable under Article 354a(2) and

(1) of the NK, in connection with Article 20(2) thereof; and with having possessed firearms and ammunition without the requisite permit, an offence punishable under Article 339(1) of the NK, in connection with Article 20(2) thereof. Custodial sentences are provided for in respect of each of those offences, from 3 to 10 years for the first, from 3 to 10 years and from 5 to 15 years for the second, and from 2 to 8 years for the third.

2 The criminal proceedings have been conducted in the absence of VB from the outset. To date, he has not been formally informed of the charges against him. In addition, he has not been informed that the charges have been brought before the court, or informed of the date and place of the trial and the consequences of non-appearance.

3 The reason for this is that it has not been possible to locate him. In the course of the preliminary investigation, he had fled immediately before the police operation to arrest the suspects. He was also the subject of a European arrest warrant, but could not be located. He was therefore not informed of the charges against him. In the trial phase, he was again placed on the wanted list, but was not located.

4 During the pre-trial and trial phases, he was represented by three court-appointed lawyers. None of them has ever seen him or been in contact with him or his relatives.

5 The case is still pending. There is a certain likelihood that VB will be given a custodial sentence which he would actually have to serve. However, there is also a likelihood that he will be found not guilty and acquitted.

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

6 **Reasoning on which Question 1.1. is based:** Under the first sentence of Article 8(4) of Directive 2016/343, it is possible to conduct criminal proceedings in the absence of the accused person, even if the conditions laid down in the second sentence are not met. However, the second sentence lays down the condition that when that person is informed of the decision and when he or she is or has been apprehended [TN: The Bulgarian language version of the second sentence is ambiguous in that it uses the expression ‘по-специално когато лицето е задържано’, which can be translated as ‘in particular when the person is apprehended’, but also as ‘in particular where the person has been apprehended/taken into custody’], he or she is also to be informed about his or her right to a new trial. The question arises whether that person – when he or she is in custody for the purpose of enforcing the custodial sentence imposed on him or her – must necessarily also be informed of the decision convicting him or her.

7 It is possible to interpret that provision as not imposing an obligation to provide such information in so far as it states only ‘when … informed of the decision’. The condition is laid down that only if a possible event occurs – ‘при …’ (in English ‘when’, in French ‘lorsque’) – namely information about the decision is

provided, does the obligation on the Member States to inform the person sentenced *in absentia* of the legal remedies against the proceedings *in absentia* arise.

8 That interpretation can be justified by the alternative 'when … informed of the decision' or 'when they are apprehended'. In particular, apprehension automatically entails the obligation to provide information about the legal remedies against proceedings *in absentia*. It is therefore by no means necessary for a person who is already in custody to be informed of the decision convicting him or her.

9 However, it is also possible to interpret it as meaning that such information must necessarily be provided since it is a condition for a person who has been convicted, when the situations referred to in Article 8(2) of the directive do not apply, to be able to decide, in full knowledge of the facts, whether or not to make use of the remedies against his or her conviction *in absentia*. The expression 'in particular when they are apprehended' would therefore have to be interpreted as meaning that the apprehended convicted person must necessarily be informed of the decision convicting him or her.

10 The question therefore arises whether the expression 'по-специално когат …' (in English 'in particular when', in French 'en particulier au moment de') refers (1) to providing information on the legal remedies against the proceedings *in absentia* – that is to say that the information is provided when the person is apprehended, or (2) to informing the person concerned of the decision convicting him or her *in absentia* – that is to say he or she is informed of that decision when he or she is detained. In the second case, the provision of information on the legal remedies is directly linked to the provision of information on the decision on the conviction and not to the apprehension of the person.

11 The question also arises as to the conjunction 'и' (in English 'also', in French 'également'), that is to say whether it means not only that the information about the decision is something clear and unambiguous, but also that the information about legal remedies against the proceedings *in absentia* – together with the information about the decision – must be provided.

12 The referring court takes the second view. For the effective exercise of the legal remedies against the proceedings *in absentia*, it is necessary that the convicted person is aware of the reasons for his or her conviction – only then can he or she assess whether to make use of the legal remedies and how to formulate his or her arguments. The very nature of the requirement relating the effectiveness of legal remedies under the first paragraph of Article 47 of the Charter means that such information must be provided.

13 **Reasoning on which Question 1.2. is based**. The question as to the nature of that information also arises. Is it sufficient that the convicted person was detained and taken into custody to conclude that he or she was informed of the decision? That

is the case in so far as every detention is the consequence of a conviction and a person must know, as soon as he or she is detained, that he or she has been convicted as a result of a judicial decision.

14 Or is the information duly provided instead if the person taken into custody has access to the elements of the judicial decision by which he or she was convicted – for example the operative part, which sets out in general terms the offence for which he or she has been convicted, the legal classification, the custodial sentence imposed, and the length thereof? That may be the case in so far as that information is sufficient for her to learn of his or her conviction.

15 Or is it necessary for him or her to be provided with a copy of the entire judicial decision convicting him or her? That may be the case in so far as a person convicted *in absentia* and taken into custody in execution of the custodial sentence imposed on him or her can only then make an informed decision as to whether and how to pursue legal remedies against that conviction if he or she is made aware of the full text of the judicial decision.

16 Or must the person convicted *in absentia* – if he or she makes a relevant request – additionally be granted access to all the case files (for him or her or his or her lawyer)? That may be the case in so far as actual and effective information about the decision is provided if the person convicted *in absentia* not only has a copy of that decision but also has knowledge of the factual and legal context in which it was taken – and that requires access to the case files. A judicial decision cannot be properly understood if it is read on its own and in isolation from the documents from the proceedings. It may therefore not be possible to make effective use of the remedies against that decision if access to the documents from the proceedings is not granted.

17 **Reasoning on which Question 1.3. is based**: It is possible that the Court of Justice's answer to the first two questions will be in the negative. The referring court nevertheless considers it necessary to ensure that VB, following the imposition of any custodial sentence, receives a copy of the judgment on the conviction when he or she is detained. The question therefore arises as to whether EU law precludes that.

18 It may be, in particular, that the arguments on which the Court of Justice bases an answer in the negative to the first two questions are such as to lead to the conclusion that the referring court is prohibited from taking measures to ensure that such information is provided because that would result in an infringement of EU law.

19 If the Court of Justice concludes that there is no such prohibition, the referring court has an interest in obtaining a substantive answer to the first two questions, even if it is not required to ensure that the person convicted *in absentia* is informed in the future (judgment of 8 June 2023, Joined Cases C-430/22 and C-468/22, EU:C:2023:458).

20 **Reasoning on which Question 2.1. is based**: National law allows the examination of criminal charges in the absence of the accused person, when neither of the cases mentioned in Article 8(2) of the directive applies. For that case, it provides for a special mechanism for safeguarding the right to be present in person – Article 423 of the NPK. That mechanism comes into force as soon as the conviction *in absentia* has become final. Its starting point is the request by the person convicted *in absentia* for the proceedings to be reopened on the ground that the case was heard and ruled on in his or her absence. That request is the subject of a special judicial procedure. In its decision as to the merits, the court either recognises or refuses the right to have proceedings reopened; in the former case, it reopens the proceedings, which are then held again with the participation of the accused person.

21 In that situation, the question arises whether that national legislation is compatible with the mechanism laid down in Article 8(4) and Article 9 of Directive 2016/343. That question arises in so far as national law lays down no procedures for informing an accused person his or right to a new trial with his or her participation after his or her conviction *in absentia*. In practice, he or she does not receive that information even when he or she is detained or when the judgment convicting him or her is notified, if that notification is made on the initiative of the convicted person.

22 **Reasoning on which Question 2.2. is based**: It should be noted that national law does lay down a right to be provided with the information referred to in Article 8(4) of Directive 2016/343, but at a later stage. National law lays down a mechanism for providing information to the person convicted *in absentia* on whether or not he or she has a right to a new trial.

23 In order for the person convicted *in absentia* to be provided with that information, it is in particular necessary that he or she first requests that the judgment delivered *in absentia* be overturned and that a new hearing be held with his or her participation. After the court has examined the merits of that request, it takes a decision. By that decision, the court either recognises or refuses the right to a new trial, by either overturning the judgment delivered *in absentia* and ordering a new trial to be held with the participation of the accused person, or by refusing the request. In that way, the person convicted *in absentia*, after being informed of the court's decision on his or her request for a new trial, is informed whether or not the main proceedings in which he or she was convicted *in absentia* were held under such conditions that he or she is entitled to a new trial.

24 The question arises whether that national legislation correctly transposes Article 8(4) and Article 9 of Directive 2016/343 in the light of the requirement to provide an effective remedy against the proceedings *in absentia* laid down in Article 10(1) of the directive and the first paragraph of Article 47 of the Charter. In accordance with the second sentence of Article 8(4) of the directive, the information on the right to a new trial must be provided at an earlier stage, namely when the person convicted is informed of the decision and/or when he or she is

detained. The reason for this is that that information must have practical effect, that is to say the convicted person must be able to assess whether he or she wishes to make use of his or her right to a new trial or consent to his or her conviction (see judgment of 19 September 2019, C-467/18, EU:C:2019:765, first sentence of paragraph 50). If the information on the right to a new trial is provided only after the court has ruled on the request for a new trial, that information no longer constitutes a legal remedy within the meaning of the directive.

25 **Reasoning on which Question 2.3 is based**: It is possible that the Court of Justice will answer the above two questions in the negative and decide that the Bulgarian legislation is not compatible with the directive.

26 The referring court therefore seeks to ascertain whether it can continue the examination of the case in VB's absence by taking certain measures to safeguard his right under the second sentence of Article 8(4) of the directive to be informed, which are sufficiently effective within the meaning of Article 10(1) thereof. The second sentence of Article 8(4) of the directive states that the 'Member States' are to 'ensure' a certain level of safeguard – in the present case, to provide information. That guarantee can therefore be provided not only by the national legislature, but also by the national court applying its own law accordingly in order to achieve a result that is compatible with EU law.

27 The Court of Justice has already noted that the conditions for examining a criminal case in the absence of the accused person under Article 8(2) to (4) and the right to a new trial under Article 9 of Directive 2016/343 have direct effect (judgment of 19 May 2022, C-569/20, EU:C:2022:401, paragraph 28). The referring court can therefore directly assess whether the criminal proceedings against VB fall under one of the cases set out in Article 8(2) of the directive. As stated above, the referring court holds that – at least at the time of the submission of the reference for a preliminary ruling – it does not fall thereunder.

28 One of the principles of the national procedure is to inform the accused person of his or her rights and to give him or her the opportunity to exercise them. Since VB has a directly applicable right to a new trial under Article 9 of Directive 2016/343, it follows that the referring court is required (under national law) to take the necessary measures to ensure that he is informed of those rights in accordance with the second sentence of Article 8(4) of the directive, and in a sufficiently effective manner to enable him to make use of that information (Article 10(1) of the directive).

29 There is a likelihood in this case that a judicial decision will be taken against VB by which he is found guilty and given a custodial sentence. Unless new circumstances arise, this will take place in his absence and under conditions other than those set out in Article 8(2) of Directive 2016/343. It follows that VB will be able to pursue a legal remedy against that conviction *in absentia*, which is directly available to him under European Union law (Article 9 of the directive).

30 The question therefore arises whether the referring court ensures compliance with the requirement laid down in the second sentence of Article 8(4) of Directive 2016/343 to ensure that information on the right under Article 9 of the directive be provided if it (1) expressly states those circumstances, including the right to a new trial or other legal remedy, in its decision and, in addition, (2) requires those persons who detain VB, who has been convicted *in absentia*, at a later date to serve him with a copy of that judicial decision. Furthermore, the question arises whether that way of ensuring that information is provided in accordance with the second sentence of Article 8(4) of the directive is sufficiently effective within the meaning of Article 10(1) of the directive.

31 **Reasoning on which Question 2.4. is based**: It is possible that the Court of Justice will find that the national legislation is fully consistent with EU law, for example because the national legal remedy under Article 423 of the NPK is equivalent to the legal remedy under Articles 8(2) to (4) and 9 of Directive 2016/343 or constitutes a sufficient legal remedy even if it is not.

32 In that situation, it appears unnecessary for the referring court to make any effort to ensure that VB, having been detained for the purpose of executing the custodial sentence imposed on him in his absence, is also informed already at that time of his right to a new trial under Article 8(4) of the directive, in conjunction with Article 9 thereof.

33 The referring court nevertheless considers it necessary to take measures to ensure that the person convicted is duly informed of his or her right to a new trial. The question is therefore whether or not this is prohibited by EU law, in particular whether the referring court would infringe the law if it were to take the measures referred to in the question in order to ensure that the person convicted *in absentia* is informed of his or her right to a new trial under Article 9 of Directive 2016/343 and such action would in that respect is incompatible with the system for safeguarding the right to be present in person established by the directive, and also with other provisions of EU law, and must therefore necessarily not be taken.

34 **Reasoning on which Question 3 is based**: It follows from the above answers that EU law allows a national court considering the case in the absence of the accused person, where the conditions laid down Article 8(2) of Directive 2016/343 are not met, to take measures to ensure that the person convicted *in absentia* is informed of the legal remedies against the conviction *in absentia*, or at least does not prohibit it from doing so.

35 The third question seeks to ascertain the point in the course of the criminal proceedings at which the referring court must (1) determine that the criminal proceedings held in the absence of the accused person do not fall under the conditions laid down in Article 8(2) of Directive 2016/343 and that it is therefore necessary to ensure that information is provided in accordance with the second sentence of Article 8(4) of that directive and, in addition, (2) implement that guarantee, that is to say, establish and apply a mechanism by which that

information is provided at the time of the detention of the person convicted *in absentia* and/or the notification of the decision delivered *in absentia*.

36 In accordance with the second sentence of Article 8(4) of Directive 2016/343, it is necessary to guarantee that a person who has been convicted *in absentia*, without the conditions laid down in Article 8(2) of the directive being met, is informed of the legal remedies against the proceedings *in absentia* which are available to him or her under Article 9 of the directive. That guarantee requires three separate measures for its implementation. First, the referring court must decide whether or not the conditions laid down in Article 8(2) of the directive are met. Second, (if the answer is in the negative) it must be found in favour of the person convicted *in absentia* that he or she has available one or more of the legal remedies referred to in Article 9 of the directive. Third, measures must be taken to ensure that that finding (the second measure) is brought to the attention of the person convicted *in absentia* at a later stage, in particular at the time of his or her detention and/or notification of the judicial decision (e.g. by requiring the prison authorities to serve the person convicted *in absentia*, after his or her arrest, with the judicial decision in which that finding is made).

37 Articles 8 to 10 of Directive 2016/343 say nothing about the first possible moment at which the guarantee provided for in the second sentence of Article 8(4) of the directive should be effected. However, it follows from the case-law of the Court of Justice that it is the court hearing at which the final decision on guilt is taken and the sentence is set.

38 That is the case in so far as the Court of Justice has held that, in order to ascertain whether criminal proceedings were held in the absence of the accused person and thus to determine the nature of the absence (whether or not it falls under the conditions laid down Article 8(2) of the directive), it is necessary to assess the factual circumstances characterising the absence of the accused person at the time of the final judicial decision as to the merits as regards the relevant issues of fact and law (judgment of 17 December 2020, C-416/20 PPU, EU:C:2020:1042, paragraph 48, and judgment of 23 March 2023, C-514/21 and C-515/21, EU:C:2023:235, paragraphs 52 and 53).

39 At an earlier stage, that finding cannot be made because a future appearance by the accused person would lead to the conclusion that his or her right to participate in person under Article 8(1) of the directive has been respected. In the present case, for example, a future appearance by an authorised defence counsel and his or her statement that the accused person is aware of the trial would lead to the conclusion that Article 8(2)(b) of the directive is applicable.

40 As regards the last possible moment, account must be taken of the third and fourth sentence of recital 12 of Directive 2016/343. It states that the directive is applicable until the decision as to the merits becomes definitive and does not apply to legal remedies which become applicable after the decision has become definitive. Furthermore, the second sentence of Article 8(4) of the Directive is an

important part of the mechanism for safeguarding the right to be present in person under Article 8(1) of the directive. Therefore, Member States should take measures to ensure its application while the proceedings are pending and before the decision delivered *in absentia* has become definitive. That means that the decision determining the nature of the absence – whether or not it meets the conditions laid down in Article 8(2) of the directive – should be taken before the judgment delivered in the absence of the accused person becomes definitive.

41 The referring court notes that an appeal against its decision as to the merits may be lodged within 15 days from the date on which it is taken. If no appeal is lodged, the decision becomes definitive and thus final on the sixteenth day. It therefore has the potential to become a final decision as to the merits.

42 The referring court therefore has an interest in knowing exactly the point in the proceedings at which it must: (1) decide whether the proceedings are *in absentia* and do not fall under the conditions laid down Article 8(2) of Directive 2016/343; (2) if that is the case, state the remedies available to VB; and (3) take the necessary measures to ensure that he is informed thereof when he is detained and/or notified of the decision.

43 There is a risk of an infringement of EU law if that decision is taken at a later stage, inter alia after the person convicted *in absentia* has been located and possibly detained. That is the case for two reasons. First, if the referring court were to take that decision and adopt measures to ensure the notification thereof to the person convicted *in absentia* only then, its measures would fall outside the scope of the directive, which is not applicable after the judicial decision as to the merits has become definitive (fourth sentence of recital 12). Second, it will take some time to take such a decision and ensure that that decision is notified to the person convicted *in absentia* and therefore that notification will not take place when the person convicted *in absentia* is apprehended (as required by the second sentence of Article 8(4) of Directive 3016/343), but later, even significantly later. That type of delayed guarantee does not meet the requirement relating to effectiveness laid down in Article 10(1) of the directive and the first paragraph of Article 47 of the Charter.

44 **Reasoning on which Question 4 is based**: The question arises as to the procedural rules under which the referring court is to determine whether the absence of VB is of such a nature as to fall outside the scope of Article 8(2) of Directive 2016/343 and the manner in which it must ensure provision of the required information under Article 8(4) of the directive.

45 That question is not governed by that directive, but account must be taken of the requirement to provide an effective legal remedy under Article 10(1) of the directive and the first paragraph of Article 47 of the Charter, as well as the principle of equivalence.

46 The referring court conducts criminal proceedings against VB in the presence of the public prosecutor who brought the charges and set them out, and also in the presence of a defence counsel, designated by the Bar and appointed by the court of its own motion, who defends the interests of the absent VB. Under national law, all judicial decisions which may affect the legal sphere of the absent VB should be taken after hearing the prosecutor and VB's defence counsel. The aim is for them to set out their positions, whilst requesting that procedural and substantive rights be respected. The public prosecutor defends the relevant legality, whether in favour or against the absent VB, while the latter's defence counsel only defends his rights and interests by pointing out all the circumstances in his favour. Both the public prosecutor and the defence lawyer can appeal against the judicial decisions.

47 That potentially leads to the finding that a judicial decision relating to the guarantee of a right recognised in EU law – namely the right to obtain certain information under the second sentence of Article 8(4) of Directive 2016/454 – should be taken under the same conditions as judicial decisions relating to VB's rights to participate in proceedings recognised only in national law, with a view to safeguarding effective protection for the absent VB and in accordance with the principle of equivalence. That means that the referring court should take its decision after hearing the parties concerned.

48 **Reasoning on which Question 5.1. is based**: The second sentence of Article 8(4) of Directive 2016/343,), in conjunction with the first sentence thereof, states that if an accused person is convicted *in absentia*, but without the conditions laid down Article 8(2) being met, that person has 'the possibility to challenge the decision and … the right to a new trial or to another legal remedy, in accordance with Article 9'.

49 The rule can be interpreted as referring to two separate rights which are independent of each other. The first is the right to appeal within the appeal period (before the conviction becomes final) and the second is the right to a new trial or legal other remedy (after the conviction becomes final). That finding is supported by the Bulgarian meaning of the term 'обжалва решението' ('to lodge an appeal against the decision') [used in the Bulgarian language version of the second sentence of Article 8(4) of Directive 2016/343], which is used only in the case of a challenge to a judicial decision as to the merits within the challenge period, namely 15 days from the date on which the decision is taken and before it becomes final. That term is not used in the context of challenging final judgments.

50 The rule can also be interpreted as designating a right which produces two effects, namely the right to challenge the final judicial decision, with such challenge giving rise to the application of the legal remedies provided for in Article 9 of Directive 2016/343. Arguments to that effect are to be found in a comparison of Article 8(1) and the second sentence of Article 8(4) of Directive 2016/343. During ongoing proceedings, including appeal proceedings, Article 8(1) of the directive applies, which guarantees the right of the accused person to be present. Only when

the proceedings in his or her absence are completed by a final judgment is it possible to assess whether the conditions laid down in Article 8(2) of the directive were met and, if not, the provision of information is to be ensured in accordance with the second sentence of Article 8(4) of the directive. Furthermore, under the first sentence of Article 8(4) of the directive, the decision delivered *in absentia* may not only be taken but also enforced, which means that it becomes definitive, as only definitive judicial decisions can be enforced, and this means that the appeal during the appeal period is either concluded or precluded at the time the person convicted *in absentia* is detained or he or she is informed pursuant to the second sentence of Article 8(4) of the directive.

51 **Reasoning on which Question 5.2. is based**: In accordance the second sentence of 8(4) of Directive 2016/343, Member States are required to organise their judicial system in such a way that a person who has been convicted *in absentia*, without the conditions laid down in Article 8(2) being met, is informed of certain rights in connection with the conduct of a new (full or partial) trial after his or her detention for the purpose of executing the sentence. He or she can certainly only be informed of the rights which he or she has – and which are conferred on him or her by the directive. The question therefore arises as to what rights that person has at the time of his or her detention, of which he or she must be informed.

52 It is possible to assume that the person convicted *in absentia* has a recognised right to a new trial under Article 9 of Directive 2016/343 at that time. Consequently, that person should be informed that he or she will be granted a new trial only if he or she so requests.

53 It is also possible to assume that the person convicted *in absentia* has the right to request such a new trial and that, on the basis of his or her request, an assessment will be made at a later stage as to whether there are grounds for such a new trial and a relevant decision will be taken. If that decision grants his or her request, the person convicted *in absentia* will be granted that new trial. He or she should consequently be informed that he or she has the right to request a new trial under Article 9 of Directive 2016/343.

54 Arguments in support of the first assumption: Criminal proceedings which take place in the absence of the accused person, without the conditions laid down in Article 8(2) of Directive 2016/343 being met, infringe the right of the accused person to participate in person under Article 8(1). However, it is possible that such proceedings are conducted as a provisional measure and result in a conviction including enforcement of the decision delivered *in absentia* (first sentence of Article 8(4) of the directive) and that the person convicted *in absentia* is detained for the purpose of executing the conviction (the second sentence of Article 8(4) of the directive). That is only possible because provision is made for an effective remedy against the conviction *in absentia*, namely the right to a (full or partial) new trial. That gives rise to the following conclusions with regard to the first paragraph of Article 47 of the Charter: – Since at the time of the conviction *in absentia* it is established that the conditions laid down in Article 8(2) of the

directive are not met, all the requirements for the recognition of the right to a new trial under Article 9 of the directive are already satisfied; – the provision of information pursuant to the second sentence of Article 8(4) of the directive already seeks by its very nature to restore the infringed right to participation in person; the requirement relating to the effectiveness of the remedy granted under Article 10(1) of the directive and the first paragraph of Article 47 of the Charter makes it necessary to inform the person convicted *in absentia* of his or her right to a new trial, of which he or she may make use on request.

55 The second sentence of Article 8(4) and Article 9 of Directive 2016/343 also provide for a legal remedy against proceedings *in absentia*. They should be interpreted as meaning that that legal remedy must be effective in accordance with Article 10(1) of the directive and the first paragraph of Article 47 of the Charter. However, those provisions do not provide for a further procedure to be applied after a person who has been convicted *in absentia* without the conditions laid down in Article 8(2) being met has been informed of his or her right to challenge that decision and to request a new trial, in the course of which the merits of the request made would have to be examined. Nor is there any reference to national law. Therefore, such further procedure is not necessary. If it were necessary, the requirement to provide an effective remedy would have led the legislature to include it in Article 8 or 9 of the directive. Such a new, additional procedure for recognising the right to a new trial is therefore not necessary since the information provided pursuant to the second sentence of Article 8(4) of the directive relates precisely to the already recognised right to a new trial.

56 Similarly, the second sentence Article 8(4) of Directive 2016/343 requires that the person convicted *in absentia* be informed of two circumstances: first, his or her right to challenge the decision (that is to say to express his or her disagreement with it) and, second, his or right to a new trial or other legal remedy following that challenge (in order to obtain a legal remedy corresponding to that disagreement). That second provision of information can only be explained by an already recognised right to a new trial, in so far as it serves the first provision of information by giving it effect.

57 If a person convicted *in absentia*, without the conditions laid down Article 8(2) of the directive being met, had only the right to request a new trial and the merits of the request were the subject of an additional assessment, it would suffice in that case to inform that person only of his or her right to challenge the decision. The requirement to provide an effective remedy under the first paragraph of Article 47 of the Charter would have tied the content of that challenge precisely to a challenge before a court which would have to decide on the merits of the challenge. Consequently, it was not necessary to state additionally that he or she has the right to request a new trial (and that the merits of his or her request would have to be examined additionally).

58 Arguments in support of the second assumption: That is in line with the national model of protection against proceedings *in absentia*. Here, the court hears the case

in the absence of the accused without first determining the nature of the absence – whether or not it meets the conditions laid down in Article 8(2) of Directive 2016/343. In accordance with that provision, the person convicted *in absentia* has the right to request that proceedings be reopened, with the merits of the request being assessed in a special procedure.

59 **Reasoning on which Question 6 is based**: The first sentence of Article 9 of Directive 2016/343 provides a person who, without the conditions laid down in Article 8(2) of the directive being met, has been convicted *in absentia* with legal remedies against the proceedings *in absentia*. There are two remedies: the right to a 'new trial' and the right 'to another legal remedy, which allows a fresh determination of the merits of the case, including examination of new evidence, and which may lead to the original decision being reversed'.

60 It is noteworthy that only as regards the second possibility, the 'other legal remedy', are requirements laid down in respect of a certain content and a certain result, namely the possibility of fresh determination of the merits of the case and determination of new factual and legal circumstances. That requirement does not apply to the first possibility of a 'new trial' since such possibilities are an essential feature of court proceedings.

61 As regards both possibilities, the second sentence of Article 9 of Directive 2016/343 lays down the requirement that the accused person be granted an effective right to participate.

62 Thus, as a final result in the case of both possibilities under the first sentence of Article 9 of Directive 2016/343 the court before which the new trail is held in the presence of the accused person can take a judicial decision as to the merits, either a new judicial decision (first possibility) or a decision on the lawfulness of the old judicial decision delivered *in absentia*, which may also involve the overturning thereof (second possibility).

63 Article 9 of Directive (EU) 2016/343 relates only to the right to a new trial and it can therefore be assumed that the second possibility is a type of new trial.

64 The question thus arises whether the second possibility set out in the first sentence of Article 9(1) of Directive 2016/343 is to be interpreted as encompassing the legal possibility of reopening criminal proceedings in which some of the procedural acts already carried out, including a possible court decision on the merits in the absence of the accused person, retains its legal significance, but the person convicted *in absentia* is given the opportunity to participate in future procedural acts and, in the context of those acts, to exercise in full his or her right to be present in person under Article 8(1) of the directive and all other rights which he or she has under national and EU law; as a final result, there is a possibility of reviewing and, where appropriate, reversing, varying or confirming the substantive court decision delivered *in absentia* (if it has been upheld in terms of its legal significance).

65 **Reasoning on which Question 7 is based**: National law provides that a person convicted *in absentia* must appear in person before the court considering his or her application for a new trial in his or her presence. Such appearance in person is a condition for his or her request to be considered as to its merits. If that person does not appear, the proceedings are discontinued and the protection sought is not granted.

66 National law thus lays down a new, additional condition for exercising the right under Article 9 of Directive 2016/343, which is not contained in that provision. The question arises whether that is compatible with the system of protection established by the directive since it hampers it considerably.

67 The question for the referring court is therefore whether, when it ensures the provision of information in accordance with the second sentence of Article 8(4) of Directive 2016/343, it must take measures to ensure that VB is also informed that, if he fails to appear before the court with which he has requested a new trial with his participation, his request will not be examined as to the merits and his conviction *in absentia* will become final. However, the obligation to ensure such information is provided only exists if that requirement is compatible with EU law.

68 The Court of Justice has ruled on similar questions: judgment of 12 March 2020, C-659/18, EU:C:2020:201, and judgment of 22 June 2023, C-823/21, EU:C:2023:504. The Court of Justice has held that a Member State is not allowed to impose additional conditions not provided for in EU law which frustrate the achievement of the objective of effective, simple and rapid access to legal assistance or to a procedure for the granting of international protection. That approach is logically maintained where a different right is involved, namely the right to be present in person under Article 8(1) of Directive 2016/343.

69 **Reasoning on which Question 8 is based**: The question arises whether the legal remedies against proceedings *in absentia* under Article 8(4) and Article 9 of Directive 2016/343 apply equally to a conviction and an acquittal. That question is relevant in so far as the referring court may take a decision acquitting VB.

70 Recital 37 recital and Article 8(2) of Directive 2016/343 refer to the possibility of a trial in the absence of the accused person leading to a ‘decision on (the) guilt or innocence’. However, those provisions refer to the conditions laid down in Article 8(2) of the directive, under which a person convicted *in absentia* has no right to a new trial.

71 The first sentence of recital 39 and Article 8(4) of Directive 2016/343, which refer to persons convicted *in absentia* who have a recognised remedy against the proceedings *in absentia*, now only say ‘decision’. It can be assumed that that means the decision mentioned in recital 37 and in Article 8(2), that is to say a ‘decision on (the) guilt or innocence’, but it can also be assumed that that only means a decision on guilt.

72 In the second sentence of recital 39 and Article 8(4) of Directive 2016/343, the apprehension of the convicted person is mentioned, which is an indication that it only refers to convictions. Similarly, Article 8(3) (which refers to the conditions laid down in Article 8(2) mentions enforcement of the judgment, and only judicial decisions delivering a conviction can be enforced.

73 There are therefore doubts as to whether, if VB is acquitted in his absence and found not guilty, he has a right to a new trial or another legal remedy under Article 9 of Directive 2016/343 or whether, in that case, the referring court must ensure that he is informed in accordance with the second sentence of Article 8(4) of the directive.

74 View of the referring court

75 National law – Article 423 of the NPK – provides for a legal remedy against the conviction of an accused person if the right to participate has been infringed. In particular, VB has the right to a new trial in accordance with the facts of the main proceedings established at the time of the submission, both under national and EU law.

76 However, national law does not provide for a sufficiently effective legal remedy against proceedings *in absentia*. It does not provide that the person convicted *in absentia* be informed of the available legal remedy. In particular, such information is not provided at the time of that person's detention for the purpose of serving the custodial sentence imposed on him or her.

77 Consequently, although national law provides for the protection under Article 9 of Directive 2016/343, it does not do so in a manner that would enable the person convicted *in absentia* to exercise that right in an adequate and effective manner, in accordance with Article 10(1) of the directive. In particular, there is no provision for the standard of protection laid down in the second sentence of Article 8(4) of the directive, according to which a person convicted *in absentia*, without the conditions laid down in Article 8(2) of the directive being met, is to be informed of his or her right to a new trial already at the time of his or her apprehension.

78 The national rule contained in Article 423 of the NPK is only a sufficiently effective legal remedy if the court taking the decision delivered *in absentia* was of the view that the grounds set out in Article 8(2) of Directive 2016/343 obtained and therefore did not ensure that the relevant information was provided pursuant to Article 8(4) of the directive. In that case, that view of the court which took the decision delivered *in absentia* can be challenged by the person convicted *in absentia* after his or her apprehension precisely in the proceedings under Article 423 of the NPK. That procedure would be a procedure under Article 10(1) of the directive, which seeks to provide the person convicted *in absentia* with protection both against the erroneous assessment of the court which took the decision delivered *in absentia* in respect of the nature of the absence (whether

under Article 8(2) of the directive or not) and against the conviction *in absentia* itself.

79 However, since the criminal proceedings in the absence of the accused person do not examine at all whether the circumstances referred to in Article 8(2) of Directive 2016/343 obtain, the application of the mechanism laid down in Article 423 of the NPK as the sole legal remedy against the proceedings *in absentia* appears to be insufficient, inappropriate and ineffective as the standard of information required in the second sentence of Article 8(4) of the directive is not achieved.

80 Such information required by the second sentence of Article 8(4) of Directive 2016/343 is not provided. That considerably limits the effectiveness of the right to a new trial, even though it is provided for in national law. That is the case in so far as there is a possibility that a person who has been convicted *in absentia*, without the conditions of Article 8(2) of the directive being met, will never learn that he or she has a right to a new trial in the absence of information both about the decision convicting him or her and about his or her right to a new trial. That leads to a significant lowering of the level of legal protection against convictions *in absentia*.