Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 20 May 2021 [1]

Joined Cases C-748/19 to C-754/19

Prokuratura Rejonowa w Mińsku Mazowieckim
v
WB (C-748/19)
and
Prokuratura Rejonowa Warszawa-Żoliborz w Warszawie
v
XA,
YZ (C-749/19)
and
Prokuratura Rejonowa Warszawa–Wola w Warszawie
v
DT (C-750/19)
and
Prokuratura Rejonowa w Pruszkowie
v
ZY (C-751/19)
and
Prokuratura Rejonowa Warszawa–Ursynów w Warszawie
v
AX (C-752/19)
and
Prokuratura Rejonowa Warszawa–Wola w Warszawie
v
BV (C-753/19)
and
Prokuratura Rejonowa Warszawa–Wola w Warszawie
v
CU (C-754/19),
joined parties:
Pictura Sp. z o.o.

[1] Original language: English.

(Request for a preliminary ruling from the Sąd Okręgowy w Warszawie (Regional Court of Warsaw, Poland))

(Reference for a preliminary ruling – Principles of EU law – Judicial independence – Second subparagraph of Article 19(1) TEU – Directive (EU) 2016/343 – Composition of judicial panels in criminal cases including judges seconded by the Minister for Justice – Admissibility of requests for a preliminary ruling – Independence of the judicial panel issuing the order for reference – Limits to Article 19(1) TEU – Concept of 'court or tribunal' for the purposes of Article 267 TFEU – Relevance and necessity of the question – Presumption of innocence)

I. Introduction

1. The present cases raise crucial issues relating to the admissibility of questions referred for a preliminary ruling on the requirement of judicial independence pursuant to the second subparagraph of Article 19(1) TEU. The Court is invited to clarify the limits of Article 19(1) TEU, in particular in the light of the recent decisions in *A. K. and Others*; *Miasto Łowicz*; *Maler*; and *Land Hessen*.[2]

2. The present cases also raise a significant substantive question: does EU law preclude national provisions according to which the Minister for Justice, who is simultaneously the General Prosecutor, may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion?

II. Legal framework

A. EU law

3. Article 2 TEU reads as follows:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

4. Pursuant to the second subparagraph of Article 19(1) TEU, 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

5. Under Article 267 TFEU, only a 'court or tribunal' of a Member State may submit to the Court of Justice of the European Union a request for a preliminary ruling.

[2] Judgments of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) ('*A. K. and Others*'); of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234) ('*Miasto Łowicz*'); of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535) ('*Land Hessen*'); and order of 2 July 2020, *S.A.D. Maler und Anstreicher* (C-256/19, EU:C:2020:523) ('*Maler*').

6. Title VI of the Charter of Fundamental Rights of the European Union ('the Charter'), under the heading 'Justice', includes Article 47 thereof, entitled 'Right to an effective remedy and to a fair trial', which states as follows:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …

…'

7. Recital 22 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, [3] reads as follows:

'The burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and any doubt should benefit the suspect or accused person. The presumption of innocence would be infringed if the burden of proof were shifted from the prosecution to the defence, without prejudice … to the independence of the judiciary when assessing the guilt of the suspect or accused person …'

8. Pursuant to Article 6 of Directive 2016/343, entitled 'Burden of proof':

'1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. …

2. Member States shall ensure that any doubt as to the question of guilt is to benefit the suspect or accused person, including where the court assesses whether the person concerned should be acquitted.'

B. Polish law

9. Article 77 of the Ustawa z dnia 27 lipca 2001 r. – Prawo o ustroju sądów powszechnych (Law of 27 July 2001 on the Organisation of the Ordinary Courts) ('Law on the organisation of ordinary courts') [4] reads as follows:

'1. The Minister for Justice may second a judge, with his or her consent, for the purpose of exercising judicial functions or administrative tasks:

(1) to another court of the same or lower rank or, in particularly justified cases, to a higher court, taking into account the rational use of ordinary court staff and the needs resulting from the workload of the various courts,

…

[3] OJ 2016 L 65, p. 1.

[4] Consolidated text published in Dz. U. of 2019, item 52, as amended.

– for a fixed period, which may not exceed 2 years, or for an indeterminate period.

…

4 Where a judge is seconded, on the basis of points 2, 2a and 2b of paragraph 1 and of paragraph 2a, for an indefinite period, the secondment of that judge may be revoked or the person concerned may resign from the post to which he or she has been seconded provided that three months' notice is given. In other cases where a judge is seconded, such revocation or resignation does not require prior notice.

…'

10. Pursuant to Article 30(2) of the Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (Law of 6 June 1997 – Code of Criminal Procedure) ('the Code of Criminal Procedure'),[5] 'the court of appeal shall give its ruling as a single judge, or as a panel of three judges where the decision under appeal was not delivered by a court sitting in a single-judge session or where, due to the particular complexity of the case or its importance, the president of the court orders that it be examined by a panel of three judges, unless the law provides otherwise'.

11. In accordance with Article 41(1) of the Code of Criminal Procedure, 'a judge shall be excluded where there exists a circumstance such as to give rise to a legitimate doubt as to his or her impartiality in the case at issue'.

III. Facts, national proceedings and the questions referred

12. The present requests for preliminary rulings have been submitted by the President of a judicial panel of the 10th Criminal Appeal Section of the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland), in the context of seven criminal cases pending before that court. According to the orders for reference, those criminal proceedings concern various criminal offences set out in the Criminal Code[6] and the Criminal Tax Code.[7]

13. The referring court considers that the present proceedings are governed by EU law. It states that Polish courts are obliged, pursuant to Articles 3 and 6 of Directive 2016/343, to ensure that suspects and accused persons are presumed innocent until proven guilty according to law and must apply appropriate standards as regards the distribution of the burden of proof. In accordance with Article 6, read in conjunction with recital 22 of that directive, the presumption of innocence must be without prejudice to the independence of the judiciary.

14. That court points out that each of the judicial panels destined to hear the respective case at issue in the main proceedings is composed of the referring judge as President, and two other judges. In each of the cases, one of the 'other' judges is a judge seconded from a lower court by decision of the Minister for Justice/General Prosecutor, adopted pursuant to Article 77 of the Law on the organisation of ordinary courts ('the seconded judges'). Furthermore, according to

5 Consolidated text published in Dz. U. of 2020, item 30.

6 Articles 200, 280, 177, 296 of the Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Law of 6 June 1997 establishing the Criminal Code, consolidated version Dz. U. 2019, position 1950).

7 Article 62(2) of the Ustawa z dnia 10 września 1990 r. – Kodeks karny skarbowy (Law of 10 September 1990 establishing the Criminal Fiscal Code, consolidated version, Dz. U. 2020, position 19).

the explanations provided by the referring court, some of the seconded judges also hold the position of 'disciplinary agent' attached to the Rzecznik Dyscyplinarny Sędziów Sądów Powszechnych (Disciplinary Officer for Ordinary Court Judges).

15. The referring court harbours doubts as to the compatibility with EU law of certain provisions of national law which grant the Minister for Justice/General Prosecutor the power to second judges to higher courts for an indefinite period and, to terminate, at any time, that secondment at his own discretion ('the national provisions at issue'). In particular, the referring court takes the view that those provisions may infringe the requirement of independence of the national judiciary that follows from Article 19(1) TEU, read in conjunction with Article 2 TEU.

16. It is within this factual and legal context that the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) decided to stay the proceedings and, in each of the seven cases, refer the following (identically worded) questions to the Court of Justice for a preliminary ruling:

'(1) Should the second subparagraph of Article 19(1) [TEU], in conjunction with Article 2 thereof and the principle of the rule of law enshrined therein, and Article 6(1) and (2), in conjunction with recital 22, of Directive [2016/343] be interpreted as meaning that the requirements of effective judicial protection, including the independence of the judiciary, and the requirements arising from the presumption of innocence are infringed in the case where judicial proceedings, such as criminal proceedings against a person accused under [various provisions of the Criminal Code] and other matters, are conducted in the following manner:

– the composition of the court includes a [judge] seconded pursuant to a personal decision of the Minister Sprawiedliwości (Minister for Justice [Poland]) from a court situated one level below in the court hierarchy, the criteria followed by the Minister for Justice when seconding this judge are not known, and national law does not provide for any judicial review of such a decision and allows the Minister for Justice to terminate the judge's secondment at any time?

(2) Are the requirements referred to in Question 1 breached in a situation where the parties can lodge an extraordinary appeal against a judgment handed down in court proceedings such as those described in Question 1, and this extraordinary appeal is lodged with a court such as the Sąd Najwyższy (Supreme Court, Poland), the decisions of which cannot be the subject of appeal under national law, and national law imposes on the president of the organisational unit of that court (chamber) competent to hear the appeal the obligation to allocate cases in accordance with an alphabetical list of judges of that chamber, expressly prohibiting the omission of any judge, and the judges among whom the cases are allocated include a person appointed upon the motion of a collegiate body such as the Krajowa Rada Sądownictwa (National Council of the Judiciary [Poland]), the members of which are judges:

(a) elected by a chamber of parliament which votes for a list of candidates drawn up in advance by a parliamentary committee from among the candidates nominated by parliamentary factions or a body of that chamber of parliament on the basis of proposals from groups of judges or citizens, and as a result there are three occasions on which the candidates receive support from politicians during the election procedure;

(b) who represent a majority of the members of that collegiate body sufficient to take decisions on submitting motions for appointments to judicial positions as well as other binding decisions required under national law?

(3) From the point of view of EU law, including the provisions and requirements referred to in Question 1, what is the effect of a judgment handed down in court proceedings such as those described in Question 1, and of a judgment handed down in proceedings before the [Sąd Najwyższy] Supreme Court, if the person referred to in Question 2 participates in the handing-down of that judgment?

(4) Does EU law, including the provisions referred to in Question 1, make the effects of the judgments referred to in Question 3 conditional upon whether the court in question has ruled in favour of or against the accused person?'

17. By decision of the President of the Court of 25 October 2019, Cases C-748/19 to C-754/19 were joined for the purposes of the written and oral proceedings and for the judgment.

18. By decision of the President of the Court of 2 December 2019, the application of the expedited procedure set out in Article 105(1) of the Rules of Procedure of the Court of Justice, requested in the orders for reference, was rejected.

19. On 31 July 2020, the Court addressed a request for information to the referring court, which was answered by letter of 3 September 2020.

20. Written observations have been submitted by the Prokuratura Regionalna w Warszawie ('Prosecutor of the Warsaw Province'), the Prokuratura Regionalna w Lublinie ('Prosecutor of the Lublin Province'), the Polish Government and the European Commission.

IV. Analysis

21. This Opinion is structured as follows. First, I shall deal with the objections to jurisdiction and admissibility submitted by the interested parties (A). Having suggested that, in line with the traditional approach of this Court and its case-law, the referring court's first question is indeed admissible, I shall, second, turn to the issue on which the objections to the jurisdiction of the Court and the admissibility of the questions referred are based: the nature and limits of the second subparagraph of Article 19(1) TEU (B). Finally, I shall provide an assessment of the merits of the first question raised by the referring court, relating to the system of delegation of judges that affects the judicial panels called on to adjudicate in the main proceedings (C).

A. Jurisdiction and admissibility

22. A number of arguments have been put forward by some of the parties submitting observations, objecting to the jurisdiction of the Court and/or the admissibility of the requests for preliminary rulings. Although these parties have merged their arguments on both issues, I will nevertheless examine them separately.

23. First, I shall address the arguments relating to the jurisdiction of the Court which, in my view, deserve short shrift (1). Second, I shall turn to the various arguments put forward concerning the admissibility of the requests altogether, or more specifically of certain questions. Indeed, some arguments raise rather complex issues which ought to be examined in detail (2).

1. Jurisdiction of the Court

24. The Polish Government, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province argue that the Court does not have jurisdiction to reply to the questions referred. In their view, the organisation of justice and, more precisely, matters such as the appointment of judges, the composition of judicial panels, the delegation of judges from one court to another and the legal effects of the decisions of national courts, all fall within the exclusive competence of the Member States. To the extent that the main proceedings concern national criminal law in sectors that have not been harmonised at EU level, those cases are – according to those parties – purely internal to Poland.

25. Moreover, according to the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, that position also flows from paragraph 29 of the judgment of the Court in *Associação Sindical dos Juízes Portugueses*.[8] Some versions of that judgment in languages other than English indicate that, in order to be applicable, Article 19(1) TEU requires that a Member State act, in the specific case, within the scope of EU law.

26. In my view, those arguments cannot be upheld.

27. First, as the Court has consistently held, although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law, including those stemming from Article 2 and Article 19(1) TEU.[9] Those obligations may relate to any feature of national structures or procedures used for the national enforcement of EU law. The object of the present requests for preliminary rulings concerns precisely the obligations of the Member States that flow from those provisions, and whether the national provisions at issue in fact comply with those obligations. As such, the Court has jurisdiction to interpret Article 2 and Article 19(1) TEU and to provide a ruling on the issues raised in the questions referred.[10]

28. Second, contrary to the arguments submitted by the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, I do not see any meaningful difference between the various language versions – including, most importantly, the Portuguese version, since that was the language of procedure – of paragraph 29 of the judgment of the Court in *Associação Sindical dos Juízes Portugueses*. That passage concerned the difference between the scope of the second subparagraph of Article 19(1) TEU and that of the Charter. The Court stated that Article 19(1) TEU applies to all 'fields covered by Union law', given that that provision does not contain any limitation such as that set out in Article 51(1) of the Charter. For the purposes of that case, the Court did not elaborate further on that point.[11]

29. However, the exact meaning of that passage was made abundantly clear in the case-law of the Court thereafter. The difference in the material scope of the two provisions mentioned above means that Article 19(1) TEU is applicable where a national body *may* rule, as a court or tribunal, on questions concerning the application or interpretation of EU law, and which thus fall within

8 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117).

9 See, to that effect, *A. K. and Others*, paragraphs 75, 84, and 86 and the case-law cited.

10 See, to that effect, judgment of 7 March 2017, *X and X* (C-638/16 PPU, EU:C:2017:173, paragraph 37); *A. K. and Others*, paragraph 74; *Land Hessen*, paragraph 41; and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 69).

11 See, for further detail in that regard, my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, point 54).

the fields covered by EU law.[12] In other words, national courts must comply with the standards laid down in that provision whenever they are, as a matter of principle, ruling on matters governed by EU law. Conversely, it is not necessary that the specific cases at issue in fact concern EU law.

30. As regards the present cases, there is little doubt, as the Commission rightly noted, that the judicial body whose independence is at issue in the present proceedings – the Sąd Okręgowy w Warszawie (Regional Court, Warsaw) – is a body that may be called upon to rule, as a court or tribunal, on questions concerning the application or interpretation of EU law. Furthermore, it is common ground that the Court has jurisdiction to interpret the provisions of Directive 2016/343, as well as Article 2 and Article 19(1) TEU.

31. As a result, the Court clearly has jurisdiction to rule on the present cases.

2. Admissibility

32. With regard to the admissibility of the questions referred, I will first address the objections raised against Questions 2, 3 and 4 since those questions are, in my view, inadmissible (a). I will then turn to the admissibility of Question 1, which, on the contrary, requires a more in-depth discussion (b).

33. However, before embarking on that analysis, an objection specific to the admissibility of the request for a preliminary ruling in Case C-754/19 must be dealt with. The Prosecutor of the Warsaw Province submits that the referring court did not suspend the case giving rise to that request and, in fact, subsequently adopted a final decision on 11 December 2019.

34. It follows from established case-law that, if no dispute is pending before the referring court, and so an answer to the question referred is of no use for the resolution of a dispute, the Court must find that there is no need to provide a ruling on the request for a preliminary ruling.[13]

35. Accordingly, if – as the Prosecutor of the Warsaw Province argues – the main proceedings in Case C-754/19 were not in fact suspended, and a final decision has been adopted, then the request for a preliminary ruling has lost its purpose. In those circumstances, it would no longer be necessary for the Court to rule on the questions referred in that case.

36. That being said, the referring court has neither informed the Court of any supervening relevant fact, nor withdrawn its reference. Moreover, since the questions referred in that case are *identical* to those raised in the other six cases at issue in this Opinion, in which it is undisputed that those cases are still pending before the national court, it is unnecessary to investigate this matter any further.

37. I shall now turn, therefore, to the specific arguments put forward concerning the admissibility of the various questions referred.

12 See judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraph 51); *A. K. and Others*, paragraph 83; and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 111).

13 See, for example, judgments of 3 July 2014, *Da Silva* (C-189/13, EU:C:2014:2043, paragraphs 34 and 35), and of 26 February 2015, *Matei* (C-143/13, EU:C:2015:127, paragraph 38).

(a) Questions 2, 3 and 4

38. By its second question, the referring court asks essentially whether certain provisions of EU law are infringed in circumstances where the parties are able to lodge an extraordinary appeal against the judgment to be handed down in the main proceedings, when that appeal is to be heard by a court – the Sąd Najwyższy (Supreme Court) – whose independence is doubted by the referring court.

39. The third question concerns the legal effects of a future decision delivered by the referring court, as well as the legal effects of the rulings of the Sąd Najwyższy (Supreme Court) in the potential appeals that may ultimately be brought against the decisions to be handed down in the main proceedings.

40. In close connection with that question, the fourth question asks whether under EU law the consequences of the judgment handed down in that extraordinary appeal by the Sąd Najwyższy (Supreme Court) depend on whether that court rules in favour of or against the accused person.

41. In line with the submissions of the Polish Government, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province, as well as the Commission, I am of the view that those three questions are inadmissible.

42. In so far as those questions are based on the premiss that in the present cases an extraordinary appeal will be lodged in the future before the Sąd Najwyższy (Supreme Court), those questions rely on a purely *hypothetical* event. It should be recalled, in that context, that, according to settled case-law, the purpose of a request for a preliminary ruling cannot be to obtain advisory opinions on general or hypothetical questions. [14]

43. Similarly, in as much as Questions 3 and 4 also refer to the possible effects of the judgments that the referring court will deliver, those questions are *premature* and *insufficiently motivated*. They are premature because they relate to proceedings that may take place at a later date before a different court, but do not relate to the current stage of proceedings of the cases. Moreover, as the referring court explains, should the Court decide that the national measures at issue do not comply with Article 19(1) TEU, there are other courses of action that are available to it in order to remedy the situation. Therefore, the problem raised by the referring court may never materialise. Those questions also fall short of the requirements of Article 94 of the Rules of Procedure of the Court of Justice since the referring court does not provide any detail as to how the allegedly defective composition of the judicial panels, destined to perhaps hear the cases at some point in the future, can specifically affect the lawfulness of the decisions to be delivered by the referring court.

44. Without in any way neglecting the general national context, which is indeed problematic and complex to say the least, there nevertheless remain well-established limits to what may be asked in a request for a preliminary ruling. Put simply, the questions referred should relate to the present (or past circumstances clearly having an impact on the present [15]) case before the referring court. Even if that condition has been interpreted broadly and leniently in the traditional case-law of the

14 See, for a recent example, judgment of 3 October 2019, *A and Others* (C-70/18, EU:C:2019:823, paragraph 73 and the case-law cited).

15 See, in this regard, for instance, judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626). Strictly speaking, the question raised by the referring court concerned a presumption about the future treatment of a case by a national administrative authority in the event of its annulment by the national court. However, in view of the fact that the national administrative authority already disregarded the previous decisions of the national court, the treatment of the case in the *past* clearly made the question about the *future* much less hypothetical and justified.

Court, the main point is that the guidance sought must be capable of being taken into account by the referring court for the decision that it will deliver. That excludes conjecture about future events that may never materialise.

45. Therefore, in my view, Questions 2, 3 and 4 are indeed inadmissible.

(b) Question 1

46. By its first question, the referring court asks, in essence, whether EU law precludes national provisions according to which the Minister for Justice/General Prosecutor may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, may, at any time, terminate that secondment at his own discretion. In particular, the referring court makes reference to the second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and the principle of the rule of law enshrined therein, and Article 6(1) and (2), together with recital 22, of Directive 2016/343.

47. Various objections have been raised in relation to the admissibility of that question. Those objections concern: the concept of 'court or tribunal' within the meaning of Article 267 TFEU (1), compliance with the requirements of Article 94 of the Rules of Procedure of the Court (2), and the necessity and relevance of the question referred (3). I shall examine those issues in turn.

(1) 'Court or tribunal' within the meaning of Article 267 TFEU

48. First, the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province point out that the requests for preliminary rulings have been submitted by a single judge – the President of the judicial panel hearing the criminal cases at issue – and not by the panel itself. They argue that, pursuant to Article 29(1) of the Code of Criminal Procedure, appeal proceedings such as those at issue are to be adjudicated by a panel of three judges, except in specific circumstances provided by law. Those specific circumstances are, in their view, absent in the present case. Therefore, the referring body does not fulfil the conditions required to be considered a 'court or tribunal' for the purposes of Article 267 TFEU.

49. It is uncontested that the present requests for preliminary rulings were submitted by the Sąd Okręgowy w Warszawie (X Wydział Karny Odwoławczy) (Regional Court (10th Criminal Appeal Section), Warsaw). The order for reference states that that court is composed of the President of the judicial panel, who also signed that order for reference.

50. In my view, however, this is not enough *automatically* to render the requests for preliminary rulings inadmissible.

51. First, it must be borne in mind that a 'court or tribunal' within the meaning of Article 267 TFEU has always been *defined in an autonomous manner* under EU law and by this Court, independently of denominations and qualifications under national law. In the light of those criteria, there is no doubt (and it is not, in fact, disputed by the parties) that the referring body does tick all the boxes of the so-called *Dorsch* criteria:[16] it is established by law, it is permanent, its jurisdiction is compulsory, its procedures are *inter partes*, it applies rules of law, and is – as a matter of principle – independent and impartial.

[16] Judgment of 17 September 1997, *Dorsch Consult* (C-54/96, EU:C:1997:413, paragraph 23). More recently, *Land Hessen*, paragraph 43 and the case-law cited).

52. Second, the concept of 'court or tribunal' within the meaning of Article 267 TFEU is examined at the structural, *institutional* level. In other words, it is examined by looking at the judicial body making the reference as such, while taking into account the function that that body is called upon to perform in the *specific circumstances* of a case. Simply put, a body can be a court even where usually it acts in another (non-judicial) capacity [17] and vice versa. [18] The specific functions that a body is called upon to perform in the main proceedings are thus of the utmost importance. In the present cases, there is no doubt that the referring court acts in a judicial capacity when hearing appeals in criminal proceedings, as well as when possibly verifying the composition of the panel to hear such appeals. Both of these functions are performed in a judicial capacity.

53. Third, the Court's case-law is consistent in stating that it is not 'for the Court to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and legal proceedings.' [19] According to that case-law, 'the Court must abide by the decision from a court of a Member State requesting a preliminary ruling in so far as that decision has not been overturned in any appeal procedures provided for by national law'. [20]

54. Thus, from the above it follows rather clearly that, if the body making the request is a court acting in a judicial capacity, both of those concepts being defined autonomously under EU law, it is not the role of this Court to start double-checking compliance with all procedural rules of national law: is the seal correct? Is the order in compliance with all requirements of formal and procedural national law? Are all the signatures in the right place?

55. It is perhaps worth recalling that this approach and this case-law originates from a case – *Reina* – in which the admissibility of the request for a preliminary ruling was challenged on the ground that the referring court was incorrectly composed. [21] Furthermore, in *San Giorgio*, the Court expressly rejected an objection similar to the one being made in the present proceedings. The Italian Government contested the admissibility of the request for a preliminary ruling (submitted by the President of the referring court) arguing that, under national law, the decision fell within the jurisdiction of the full court. The Court swiftly brushed aside that objection, emphasising that, in accordance with settled case-law, any national court is 'entitled to request a preliminary ruling … regardless … of the stage reached in the proceedings pending before it and regardless of the nature of the decision which it is called upon to give'. [22]

56. The Court did not follow that approach only where the referring court *manifestly* lacked jurisdiction to hear the case, as in the recent *Di Girolamo* cases. [23] However, the present cases are clearly different to the *Di Girolamo* cases. It is undisputed that the referring court is competent to deal with the cases at issue in the main proceedings. The sole issue concerns the body, within that same court, authorised to refer a question to the Court under Article 267 TFEU. The present cases are thus much more comparable to those examined by the Court in *Reina* and *San Giorgio*.

17 See, for example, judgment of 17 July 2014, *Torresi* (C-58/13 and C-59/13, EU:C:2014:2088, paragraphs 15 to 30).

18 See to that effect, judgment of 31 January 2013, *Belov* (C-394/11, EU:C:2013:48, paragraph 40 and the case-law cited).

19 Judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 30 and the case-law cited).

20 Judgment of 16 July 2020, *Governo della Repubblica italiana (Status of Italian magistrates)* (C-658/18, EU:C:2020:572, paragraph 61 and the case-law cited).

21 Judgment of 14 January 1982 (65/81, EU:C:1982:6, paragraph 6).

22 Judgment of 9 November 1983, *San Giorgio* (199/82, EU:C:1983:318, paragraphs 7 to 10).

23 See orders of 6 September 2018, *Di Girolamo* (C-472/17, not published, EU:C:2018:684), and of 17 December 2019, *Di Girolamo* (C-618/18, not published, EU:C:2019:1090).

57. Fourth, the fact that the referring court, in order to submit a question to the Court under Article 267 TFEU, would – according to the Prosecutor of the Warsaw Province and the Prosecutor of the Lublin Province – have to disregard certain rules of its internal legal order is, even if it were confirmed, immaterial. There are numerous examples in the Court's case-law where national courts were, under EU law, allowed, or even required, to override national procedural rules curtailing their prerogatives to submit requests for preliminary rulings to the Court. [24]

58. A recent case in which the situation was quite similar to the present cases is *A. K. and Others*. In that case, the Polish Government argued that the national proceedings were invalid because they disregarded the rules relating to the *composition and jurisdiction of courts*. According to that government in that case, the proper composition to deal with the case under national law was that of a single judge rather than a panel of three judges who referred the questions. [25] The Court concluded, however, that 'the questions referred precisely concern the question of whether, notwithstanding rules of national law in force in the Member State in question attributing jurisdiction, a court such as the referring court has the obligation, under the provisions of EU law to which those questions refer, to disapply those rules of national law and to assume, where relevant, jurisdiction for the actions in the main proceedings. A judgment in which the Court were to uphold the existence of such an obligation would be binding on the referring court and all other bodies of the Republic of Poland, and could not be affected by the provisions of domestic law relating to the invalidity of proceedings or by the distribution of jurisdiction between the courts to which the Polish Government refers'. [26]

59. Fifth, to accept the objections put forward by the Polish Government – according to which, in order to comply with national law, a question such as the present one may be submitted only by the full panel – would give rise, in my view, to two additional problems.

60. On the one hand, issues relating to the correct composition of judicial panels would be unlikely ever to reach the Court, or to reach it in a timely fashion. Indeed, the judges allegedly appointed incorrectly are unlikely to agree with the need to send a question for a preliminary ruling to the Court as to whether they were correctly appointed to deal with that case. In those circumstances, such an issue could be raised only if and when an appeal against the decision adopted by the (possibly unlawfully composed) court is lodged. Therefore, in the best-case scenario, the issue arrives before the Court rather late. In the worst-case (or rather realistic) scenario, it never arrives at all.

61. On the other hand, embracing the logic suggested by the Polish Government would lead to another paradox. Should the doubts expressed by the referring court be well founded on the merits, it may be assumed that one of the members of those panels is not independent. Thus, in the rather unlikely scenario that such a member of the panel were ready to sign an order for reference calling into question his own independence, would such a reference then be admissible? Would the referring body in that composition not fail to fulfil the criterion of independence inherent to the concept of 'court or tribunal' within the meaning of Article 267 TFEU?

[24] See, among many, judgments of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraphs 21 to 32 and the case-law cited), and of 15 January 2013, *Križan and Others* (C-416/10, EU:C:2013:8, paragraphs 62 to 73 and the case-law cited).

[25] *A. K. and Others*, paragraph 110.

[26] Ibid., paragraph 112.

62. This clearly emphasises two points. First, to reiterate, issues concerning the proper composition of a judicial panel may never in fact be raised by that panel itself. Second, making the admissibility of requests for a preliminary ruling, and the autonomous criterion of Article 267 TFEU, conditional on the fulfilment of all procedural elements under national law is not only illogical, but also dangerous in systemic terms.

63. Sixth, the judge making the request in the present cases is not just *any* judge of the panel hearing the cases: she is the *President* of that panel. Presidents of judicial bodies are not only endowed with additional powers, but they are also entrusted with extra responsibilities. They are in fact called upon to act as 'guardians of the independence and impartiality of judges and of the court as a whole'.[27] Within smaller compositions of a court, or as far as specific proceedings are concerned, those functions are generally performed by the President of the composition (or Chamber), who has the role of presiding on the panel and directing the work thereof.[28] They are typically expected to oversee both the procedure and the internal deliberations of the panel over which they preside. Accordingly, I do not find it unusual (let alone unlawful) that, as President of the panel, the referring judge considers that she is obliged to ensure the correct composition thereof.

64. Finally, there is another consideration connected to that last point: what is in fact the exact procedure for which the referring court seeks guidance from the Court? Certainly, one way of looking at the issue is to consider that the relevant procedure is the criminal proceedings before a panel of three judges who will take a decision on the merits in relation to the criminal charge.

65. However, there is also another way of looking at the same issue. That would be to focus on *the specific incident of procedure* and the actual decision that must be handed down in response to that incident. In that case, the proceedings in respect of which the guidance from the Court is sought does not constitute *the entire criminal proceedings*, but only a *preliminary issue* concerning the correct composition of the panel hearing that case. With regard to that part of the proceedings, and also in view of the type of (preliminary) procedural decision to be taken within it, it is the referring judge, in her capacity as President of the panel, who actually rules as a single judge within that part of the overall proceedings. In the context of this preliminary incident of procedure, which must be settled *before* the case can properly be heard by an EU law-compliant judicial panel, the referring judge is the one and only judge who can, and by all means should, address the issue before the cases can proceed.

66. I am of course not suggesting that the Court should accept requests for preliminary rulings from judges (or panels) that are manifestly incompetent to deal with the cases at issue in the main proceedings, that are misusing their capacity to make a reference under Article 267 TFEU or that, in relation to the main proceedings, do not fulfil the *Dorsch* criteria. The present cases do not, however, fall into any of those situations: the referring court is a 'court or tribunal' for the purposes of Article 267 TFEU, it has jurisdiction to deal with the cases at issue and those cases are genuine, as is the issue raised *in limine litis*.

27 See, for example, Council of Europe, Consultative Council of European Judges (CCJE), Opinion N 19 (2016) of 10 November 2016, 'The Role Of Court Presidents' (CCJE(2016)2), p. 2.

28 See, for illustration, Article 11(4) of the Rules of Procedure of the Court.

(2) Lack of sufficient detail

67. The Polish Government, as well as the Prosecutors of the Warsaw and Lublin Provinces, argue that the requests for preliminary rulings do not meet the requirements of Article 94 of the Rules of Procedure. They submit that those requests do not provide sufficient detail as to the link between the provisions of EU law the interpretation of which is required and the pending cases.

68. In that regard, it must be acknowledged that, at least as far as that question refers to the provisions of Directive 2016/343, the orders for reference are concise. It could be argued that the national court could have made a greater effort in clarifying the factual context. In particular, more details could have been provided as to how the Member States' obligations relating to the burden of proof, set out in Article 6 of Directive 2016/343, may affect the procedures at issue in the main proceedings.

69. That notwithstanding, I do not think that the referring court's 'verbal parsimony' may be considered to fall short of the requirements of Article 94 of the Rules of Procedure. Indeed, Directive 2016/343 (i) is applicable to the cases at hand, and (ii) appears relevant.

70. As regards the first point, it is clear from the order for reference that, in the main proceedings, the accused persons must undergo a criminal trial, and that a final decision on their guilt has not yet been taken. The provisions of Directive 2016/343 are thus applicable. In accordance with its Article 2, that directive applies to natural persons who are suspects or accused persons in criminal proceedings. It applies at all stages of the criminal proceedings, from the moment when a person is suspected or accused of having committed a criminal offence, or an alleged criminal offence, until a final decision on whether that person has committed the criminal offence concerned has become definitive.[29] It is hardly necessary to add, in this context, that that directive is also applicable in proceedings that are 'purely internal' to one Member State.

71. As regards the second point, it suffices to note that an issue with the presumption of innocence or the burden of proof may arise where one or more of the judges sitting on a judicial panel hearing a criminal case has ties to one of the parties, namely the side of the prosecution. If a judge's secondment to, and his or her position in, a higher court is possibly conditional on the prosecutorial side being satisfied with his or her performance, since otherwise it may at any moment be revoked, the question arises whether that is capable of casting doubts on the independence and impartiality of the seconded judge. It may be put as an issue of judicial impartiality (if approached from a structural point of view) or possibly as an issue relating to the presumption of innocence or the burden of proof (if approached from the point of view of the accused, who might believe that a panel thus composed may have a tendency to side with the prosecution).

72. In any event, the requirements of Article 94 of the Rules of Procedure are complied with in so far as the second subparagraph of Article 19(1) TEU is concerned. Indeed, the factual and contextual framework necessary for the Court to carry out its assessment on the basis of that provision does not require further information on the specifics of the main proceedings. The orders for reference set out, concisely but exhaustively, the national legal framework that governs the secondment of judges, the specific issues faced by the referring court in the composition of the

[29] See judgment of 5 September 2019, *AH and Others (Presumption of innocence)* (C-377/18, EU:C:2019:670, paragraph 32).

panel called on to adjudicate in the main proceedings, as well as the reasons for which that court doubts the compatibility with EU law of that framework. Those factors, taken together, allow the Court to understand the question being asked by the referring court and the reasoning behind it.

(3) The relevance and necessity of the question

73. The Polish Government, as well as the Prosecutors of the Warsaw and Lublin Provinces, submit that an answer to the question is not necessary or relevant for the adjudication in the main proceedings. In essence, they argue that the question is purely hypothetical. From a procedural point of view, it would be impossible for the referring court to apply the response of this Court concerning the interpretation of Article 19(1) TEU in the main proceedings. Under national law, that court has – they contend – no power to 'correct' the potential flaws stemming from the national procedural rules at issue. It would be, where appropriate, for another judicial body (namely, a different panel) to take action in order to decide on the exclusion of one of the sitting judges in the referring court. Moreover, those parties point out that the accused have not raised any issue concerning the formation of the panel. They also contend that the orders for reference do not present the national rules concerning judicial secondments in a complete and impartial manner, and invoke the judgments of the Court in *Foglia*. [30]

74. For its part, the Commission notes the succinct nature of the orders for reference. However, it does not consider the question to be inadmissible: a question referred, which is of a procedural nature, may in fact be identified in the main proceedings which, in order to be dealt with, may require the Court to provide an answer to the question raised.

75. On this matter, I agree with the Commission. I also take the view that the first question is indeed admissible. That question raises an issue *in limine litis* of compatibility between national law and EU law that the referring court is *required* to address before it may (lawfully) rule in the main proceedings. That conclusion is borne out by the Court's well-established case-law regarding the relevance and necessity of the question referred (i), and is not called into question by some recent case-law of the Court (ii), from which the present cases may be easily distinguished (iii).

(i) The established case-law on 'relevance' and 'necessity'

76. According to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both *the need* for a preliminary ruling in order to enable it to deliver judgment, and the *relevance* of the questions that it submits to the Court. It follows that questions referred by national courts enjoy a *presumption of relevance* and that the Court may refuse to rule on those questions only where it is quite obvious that the interpretation sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to those questions. [31]

30 Judgments of 11 March 1980, *Foglia* (104/79, EU:C:1980:73), and of 16 December 1981, *Foglia* (244/80, EU:C:1981:302).

31 See, among many, judgments of 1 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraphs 26 and 27), and of 1 October 2019, *Blaise and Others* (C-616/17, EU:C:2019:800, paragraph 35).

77. Relevance and necessity are, therefore, two sides of the same coin: a question is relevant if the answer to it is necessary in order for the national court to be able to rule in the main proceedings, and vice versa. The Court has consistently found questions to be admissible when an answer thereto is necessary to enable the referring courts to 'give judgment' in the cases before them.[32] This has traditionally been understood as requiring, in principle, that two conditions are met: (a) there must be a case *pending* before the referring court,[33] and (b) the decision to be given by that court must be capable *of taking account* of the preliminary ruling.[34]

78. As far as the first condition is concerned, it is common ground that in all the cases referred, except possibly the one at issue in Case C-754/19,[35] there is an ongoing criminal procedure before the referring court. The key issue is, therefore, whether the second condition is fulfilled: is the referring court able to *take into account* the Court's reply to the question referred?

79. When the facts of the present cases are assessed in the light of the Court's traditional case-law, the answer to that question is clearly in the affirmative. That established case-law shows why the objections put forward by the Polish Government, as well as by the Prosecutors of the Warsaw and Lublin Provinces, are without merit.

80. First, it is hardly necessary to point out that a question referred for a preliminary ruling need not be directly relevant for the adjudication of the case *on the merits*. The case-law contains many examples of preliminary rulings concerning procedural questions of various kinds.[36] In fact, there is a particularly rich strand of case-law which concerns the scope of the principle of procedural autonomy and the limits thereof, especially those flowing from the need to ensure the effectiveness of EU law.[37] Some of the questions dealt with by the Court relate, for example, to procedural limitations imposed on national courts by national rules,[38] or of procedural issues that the referring court has to deal with before a decision on the merits can be taken.[39] Some questions referred have concerned, like in the present cases, certain aspects of the national rules on judicial organisation.[40]

81. In fact, the present cases distinctly resemble the situation at issue in *A. K. and Others*. In that case, the Court found cases to be admissible where the referring court 'wishe[d] to be instructed not as to the substance of the cases before it which do in turn raise other questions of EU law, but as regards a procedural problem which it must answer *in limine litis*, since that problem relates to the jurisdiction of that court to hear and rule those cases'.[41]

32 See, inter alia, judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraph 35).

33 See, notably, judgments of 21 April 1988, *Pardini* (338/85, EU:C:1988:194, paragraphs 10 and 11), and of 16 July 1992, *Lourenço Dias* (C-343/90, EU:C:1992:327, paragraph 18).

34 See, inter alia, judgments of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraph 24), and of 19 June 2018, *Gnandi* (C-181/16, EU:C:2018:465, paragraph 31).

35 See above, points 33 to 36 of this Opinion.

36 See, recently, judgments of 17 January 2019, *Dzivev and Others* (C-310/16, EU:C:2019:30), and of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, EU:C:2019:1114).

37 See, among many, judgment of 4 December 2018, *The Minister for Justice and Equality and Commissioner of the Garda Síochána* (C-378/17, EU:C:2018:979). Specifically on that issue, and with numerous references to the case-law, see also my Opinion in *An tAire Talmhaíochta Bia agus Mara and Others* (C-64/20, EU:C:2021:14 and the case-law cited).

38 See, by way of example, judgment of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626).

39 See, inter alia, my Opinion in *Asociația "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, EU:C:2020:746 point 92 and the case-law cited) ('*AFJR*').

40 See, in particular, judgment in *A. K. and Others*.

41 Ibid., paragraphs 99 and 100.

82. There are also examples of cases in which the Court has examined, in the context of a preliminary ruling procedure, the issue of independence in relation to a specific composition of a judicial panel. For example, in *Ognyanov*, the Court assessed whether EU law precluded a national rule which required a judicial panel to be disqualified because it had expressed, in the request for a preliminary ruling addressed to the Court, a provisional opinion on the substance of a case. [42]

83. Second, the fact that the answer to be provided by the Court in the present proceedings cannot be applied by the referring court in a decision that takes the form of a *judgment* (or a decision on the merits of the case) is immaterial.

84. According to settled case-law, the admissibility of a request for a preliminary ruling is subject to the referring court being 'called upon to give judgment in proceedings intended to lead to a decision of a judicial nature'. [43] This means that a reference received from a national court that, exceptionally, intervenes in a procedure of an administrative nature is not admissible. [44] By contrast, that does not mean that the decision which the referring court is to take, in the main proceedings, on the specific issue raised in the context of its questions referred must relate to the closure of the procedure, let alone take the form of a judgment. The Court has consistently stated that questions are admissible when they concern issues of procedure relating to 'the whole procedure leading to the referring court's judgment'. The requirement in question must in fact be 'interpreted broadly in order to prevent many procedural questions from being regarded as inadmissible and from being unable to be the subject of interpretation by the Court and the latter from being unable to interpret all procedural provisions of EU law that the referring court is required to apply'. [45]

85. Indeed, there is no shortage of examples where the answer of the Court intended to assist the referring court could not be applied in a decision taking the form of a judgment (or any other decision on the merits). For example, in *VB Pénzügyi Lízing*, one of the questions asked about the obligation for national courts, when making a request for a preliminary ruling, to inform the Minister for Justice at the same time that a reference had been made. [46] In *Eurobolt*, the Court did not hesitate to answer a question asking whether, pursuant to Article 267 TFEU, a national court is entitled to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court. [47] In *Salvoni*, the Court provided the national court with the interpretation of the relevant EU rules sought, precluding that court from having an *ex parte* communication with one of the parties. [48] Similarly, in a number of cases relating to the interpretation of EU instruments adopted in the field of judicial cooperation, the Court interpreted the relevant provisions of EU law in order to assist the referring courts in their task of completing the forms provided for in the annexes to those instruments. [49]

42 Judgment of 5 July 2016 (C-614/14, EU:C:2016:514).

43 See, inter alia, judgment of 28 January 2021, *Spetsializirana prokuratura (Letter of rights)* (C-649/19, EU:C:2021:75, paragraph 34 and the case-law cited).

44 See, for example, judgment of 19 October 1995, *Job Centre* (C-111/94, EU:C:1995:340).

45 See, inter alia, judgment of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162, paragraph 35 and the case-law cited).

46 Judgment of 9 November 2010 (C-137/08, EU:C:2010:659, paragraphs 31 and 32).

47 Judgment of 3 July 2019 (C-644/17, EU:C:2019:555, paragraph 27).

48 Judgment of 4 September 2019 (C-347/18, EU:C:2019:661).

49 See, inter alia, judgments of 2 March 2017, *Henderson* (C-354/15, EU:C:2017:157), and of 24 October 2019, *Gavanozov* (C-324/17, EU:C:2019:892).

86. Thus again, there are many examples of answers provided for in the case-law that relate to various procedural, structural, or institutional issues, and which help a referring court to settle other issues arising before, at that time, or even after the final decision on merits. [50]

87. Third, the situation, as alleged by the Polish Government, whereby under national law, the referring court would have *no power to* '*correct*' the potential flaws stemming from the possible incompatibility of the national procedural rules at issue with EU law, is immaterial.

88. On the one hand, that argument is contested by the referring court. In its reply of 3 September 2020 to a question of the Court on this point, the referring court stated that, should the Court find an incompatibility between the national rules at issue and EU law, it had three options available to it in order to remedy that incompatibility, or at least to limit partially the effects thereof. First, under Article 41(1) of the Code of Criminal Procedure, a judge can request to be excluded from a case. Second, as President of the panel adjudicating in the cases at issue, the referring judge could lodge a request to the President of her court, requesting to apply Article 47b of the Law on the organisation of ordinary courts, which could lead to a change in the composition of the judicial panel. Third, pursuant to Article 37 of the Code of Criminal Procedure, the referring court could ask the Sąd Najwyższy (Supreme Court) to allocate the cases to another court of the same rank where the interests of justice so require.

89. In the light of this divergence of opinions, I must again recall that, it is for the referring court to define the relevant factual and legislative context. The Court has repeatedly stressed that it is not for it, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court's interpretation of such provisions is correct, since such an interpretation falls within the exclusive jurisdiction of the referring courts. [51] It is thus not for this Court to arbitrate on what is the correct content or interpretation of national law.

90. On the other hand, and in any event, the requirement of necessity has consistently been assessed by the Court *irrespective of* the legal avenues available under *national law* to remedy the potential incompatibility between national law and EU law. It is established case-law that 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of [Union] law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable [Union] rules from having full force and effect are incompatible with the requirements which are the very essence of [Union] law'. [52]

91. The arguments raised by the Polish Government cannot be reconciled with the consistent case-law of the Court as regards direct effect and primacy. If the national courts' obligations to uphold EU law were limited to that which national law expressly allows them to do, there would not be much EU law to start with. If there is a problem of EU law before the referring court, that court is required to do whatever is possible to eliminate the (potential) incompatibility in order to

50 See, for example, from amongst many, judgment of 20 March 1997, *Hayes* (C-323/95, EU:C:1997:169) (on security for costs being required under national law before any assessment on the merits may take place); judgment of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432) (a preliminary issue of exclusive jurisdiction in a Member State needing to be settled before any assessment on merits can take place).

51 See, recently, judgments of 3 July 2019, *UniCredit Leasing* (C-242/18, EU:C:2019:558, paragraphs 46 and 47), and of 25 November 2020, *Sociálna poisťovňa* (C-799/19, EU:C:2020:960, paragraphs 44 and 45).

52 See, for instance, judgments of 9 March 1978, *Simmenthal* (106/77, EU:C:1978:49, paragraphs 22 and 23), and of 8 September 2010, *Winner Wetten* (C-409/06, EU:C:2010:503, paragraphs 56 and 57).

reach compliance as soon as possible. The referring court may, to that end, interpret national rules in conformity with EU law or, where appropriate, disapply the national provisions which prevent it from ensuring compliance.[53] The fact that the problem could hypothetically be resolved, at least in accordance with the letter of national law, at a later stage by another court (or another panel), is not a valid objection, least of all in the eyes of EU law.

92. Consequently, the fact that, according to the Polish Government, the referring court may be unable to take any specific action to remedy the potential incompatibility of the national rules with EU law – even if it were to be confirmed, which, in my view, is not the case – would in any event not render the question referred inadmissible. After all, when requests for preliminary rulings are aimed at clarifying the obligations and the powers that national courts derive from EU law, the issue of whether one or more national procedural rules are compliant with EU law becomes the central *question of merits* in the case. That is not a matter of admissibility.

93. A confirmation of these principles may be found, once again, in *A. K. and Others*. There, the Court expressly stated: 'the fact that national legislation … provides for discontinuance of cases such as those in the main proceedings cannot, in principle and without a decision of the referring court ordering such discontinuance or to the effect that there is no need to rule on the cases in the main proceedings, lead the Court to find that it is no longer necessary for it to answer the questions before it which were referred for a preliminary ruling.'[54] The Court recalled the wide discretion of national courts in submitting a request for a preliminary ruling and concluded that 'a rule of national law thus cannot prevent a national court, where appropriate, from exercising that discretion, or complying with that obligation'.[55]

94. Fourth, the fact that the persons subject to the criminal proceedings before the referring court have *not challenged* the compatibility of the national rules at issue with EU law does affect either the relevance of the question, or its admissibility. It is common ground that the fact that the parties to the main action did not raise a point of EU law before a national court does not preclude the latter from bringing the matter before the Court. Article 267 TFEU is not restricted to cases where one or another of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of EU law, but also extends to cases where a question of this kind is raised by the referring court of its own motion.[56] That is all the more important in a case where serious doubts arise as to the correct composition of the panel of judges hearing the case.[57]

53 See, with further references, judgment of 24 June 2019, *Popławski* (C-573/17, EU:C:2019:530, paragraph 50 et seq.).

54 *A. K. and* Others, paragraph 102.

55 Ibid., paragraph 103. The same logic was most recently confirmed yet again in judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153). Indeed, in that case, the referring court also found itself in a situation where, in essence, it had no jurisdiction to act *under national law* in order to secure compliance with Article 19(1) TEU.

56 See, inter alia, judgment of 16 June 1981, *Salonia* (126/80, EU:C:1981:136, paragraphs 5 to 7). More recently, judgment of 1 February 2017, *Tolley* (C-430/15, EU:C:2017:74, paragraphs 30 to 33).

57 To that effect, judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-11, EU:C:2020:232, paragraphs 57 and 58).

95. Nor are the present cases 'contrived cases' bearing any resemblance to the *Foglia* cases.[58] It is common ground that the criminal proceedings before the referring court are genuine disputes. There is absolutely nothing to indicate that the parties have artificially orchestrated those proceedings in order to seek the Court's guidance on the interpretation of certain provisions of EU law.[59]

96. Fifth and finally, in terms of a preliminary assessment, it seems to me that the present cases exhibit all the components required for Article 19(1) TEU to be applicable.

97. To begin with, the issues raised by the present proceedings are hardly negligible or ancillary in nature, either in relation to the cases at issue in the main proceedings, or for the national legal system in general. Indeed, since the issues raised with regard to the correct composition of the judicial panels are not specific to the main proceedings, but stem from national legislation of general application, the Court's answer to the question referred is liable to have significant repercussions in a number of other cases.

98. As far as the nature of the issue in the main proceedings is concerned, in *Simpson*, the Court emphatically stated: 'the guarantees of access to an independent and impartial tribunal previously established by law, and in particular those which determine what constitutes a tribunal and how it is composed, represent *the cornerstone of the right to a fair trial*. That right means that *every court is obliged to check* whether, as composed, it constitutes such a tribunal where a serious doubt arises on that point. That check is necessary for the confidence which the courts in a democratic society must inspire in those subject to their jurisdiction. In that respect, such a check is an essential procedural requirement, compliance with which is a matter of public policy and must be *verified of the court's own motion*'.[60] Therefore, provided it harbours genuine doubts about its lawful composition, the referring court can and should raise such an issue before it proceeds to assess the substance of the cases before it.

99. Moreover, in terms of what can be taken from the context of the present cases, as well as from a number of other cases concerning the same Member State, recently giving rise to a number of cases in the docket of this Court, the legal system at issue is unlikely to offer adequate mechanisms of self-correction of the potential issue raised by the referring court. The issue identified by the referring court is not merely one singular and unfortunate mishap in an otherwise adequately functioning system.

100. In conclusion, it seems to me that the first question is, in the light of the Court's well-established case-law, admissible. By that question, the referring court inquires as to the proper interpretation of Article 19(1) TEU – a provision clearly applicable in the present cases – in order to resolve an issue of a procedural nature, so that the main proceedings can be carried out in a manner that is compliant with EU law.

101. The arguments concerning an alleged lack of relevance or necessity of the question are, in the light of the Court's traditional case-law, unpersuasive. The recent decisions of the Court delivered within the specific context of the independence of the national judiciary and the admissibility of such questions do not alter that conclusion.

58 See above, footnote 30 of this Opinion.

59 See, for example, judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, especially paragraphs 12 and 26).

60 Judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-11, EU:C:2020:232, paragraph 57). My emphasis.

(ii) The recent case-law: Miasto Łowicz *and its progeny*

102. In *Miasto Łowicz*,[61] the Court was asked whether the new regime for disciplinary proceedings against judges in Poland satisfied the requirements of judicial independence under the second subparagraph of Article 19(1) TEU. The Court, however, did not address the merits of the questions referred, finding the questions referred to be inadmissible.

103. In reaching that conclusion, the Court first emphasised that, for the purposes of establishing 'necessity' within the meaning of Article 267 TFEU, there must be a *connecting factor* between the dispute before the referring court and the provisions of EU law whose interpretation is sought, 'by virtue of which that interpretation is objectively required for the decision to be taken by the referring court'.[62] The Court went on to identify several situations in which questions referred comply with that condition. The Court provided a taxonomy of the 'type of situations' in which a request for a preliminary ruling has a sufficient connecting factor in order to ensure its relevance for the purposes of Article 267 TFEU. That connecting factor exists where: (i) the dispute is *substantively* connected to EU law;[63] (ii) the question concerns the interpretation of *EU provisions of a procedural nature* that may be applicable;[64] or (iii) the answer sought from the Court appears capable of providing the referring court with an interpretation of EU law which allows it to resolve *procedural questions of national law* before being able to rule on the substance.[65]

104. The Court then concluded that no such connecting factor could be identified in the cases at hand, since they did not fall into any of the situations outlined above. In fact, the Court found that any answer to be given would have no bearing on the judicial procedures pending before the referring courts.

105. In my view, the Court's findings in *Miasto Łowicz* are hardly surprising.

106. First, I do not consider that judgment to be introducing limitations to, or derogations from, the principles flowing from previous case-law. In my view, it seems broadly to reflect the thrust of that case-law: the need to ensure that the referring court is able to *take into account*, in the main proceedings, the answers that are sought from the Court. The impact on those proceedings may concern – as the Court expressly held – either substantive or procedural aspects thereof. However, in one form or the other, that impact must be specific and foreseeable, and cannot be hypothetical, theoretical or merely speculative.

107. Second, the application of the principles flowing from its traditional case-law to the specific situations at issue in *Miasto Łowicz* also appears reasonable. There was a significant disconnection between the facts at issue before the referring courts and the rather general question that was posed by those courts.[66] It was unclear – also in the light of the limited detail provided in the

61 Judgment in *Miasto Łowicz*.

62 Ibid., paragraph 48.

63 Ibid., paragraph 49, with reference to the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

64 Ibid., paragraph 50, with reference to the judgment of 17 February 2011, *Weryński* (C-283/09, EU:C:2011:85, paragraphs 41 and 42).

65 Ibid., paragraph 51, with reference to the judgment in *A. K. and Others*.

66 See, for further detail in that regard, my Opinion in *Statul Român – Ministerul Finanțelor Publice* (C-397/19, EU:C:2020:747, points 33 and 34).

orders for reference[67] – how the Court's findings on the compatibility of the new regime for disciplinary proceedings against judges in Poland could have had an actual impact of a procedural or substantive nature in the main proceedings. Those proceedings concerned different matters.[68]

108. Third, in contrast to some scholarly voices,[69] I do not think that such a requirement of at least some base-line direct relevance for the decision to be taken by the referring court in the main proceedings is a departure from the traditional case-law of the Court. I suspect that part of the issue might simply be the consequence of an 'optical illusion'. Before the existence of a distinct obligation flowing directly from Article 19(1) TEU was affirmed by the Court, in order to fall within the jurisdiction of the Court, the case had to be within the scope of EU law in the traditional sense. That requirement automatically limited the range of questions that could be asked because some discernible connection to a provision of EU legislation or at least a broader conflict with one of the EU law freedoms or principles was needed.[70] Assessed against that (naturally narrower) gateway, the issue of relevance and necessity did not arise often or appeared to be too onerous.

109. By contrast, once the second subparagraph of Article 19(1) TEU was no longer confined to the requirement that the case in the main proceedings fall within the scope of EU law in the traditional sense, the second (narrower, substantive) gateway was effectively removed. Now what stands in full sight is the first gateway of necessity/relevance, which has always been there, without anyone really paying it much attention, and for a rather understandable reason: one tends to pay attention, intuitively, to the narrower, not the broader, gateways. However, now that that is effectively the only gateway, it may be perceived as a new or a more stringent limitation, simply because it is the only one left standing.

110. The Court's approach in *Miasto Łowicz* has subsequently been applied in *Prokuratura Rejonowa w Słubicach*,[71] which concerned national proceedings and questions rather similar to those at issue in *Miasto Łowicz*. By contrast, *Maler*,[72] as well as *Land Hessen*,[73] raise somewhat different issues on admissibility or jurisdiction.

111. In *Maler*, the request for a preliminary ruling was made due to a difference of opinion within the Verwaltungsgericht Wien (Administrative Court, Vienna, Austria) between the referring court (sitting as a single judge) and the President of that court. The referring court considered that the allocation of one specific case, made on the basis of that court's internal rules on the allocation of cases, gave rise to issues under Article 83 of the Bundes-Verfassungsgesetz (Austrian Federal Constitutional Law) according to which, inter alia, no one may be removed from the jurisdiction of his or her lawful judge. As a result of the alleged conflict with the principle of the lawful judge, the referring court also expressed doubts as to whether it could be

67 Opinion of Advocate General Tanchev in Joined Cases *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2019:775, points 115 to 126).

68 Judgment in*Miasto Łowicz*, paragraphs 45 to 53.

69 See, for example, Platon, S., 'Court of Justice, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: *Miasto Lowicz*', *Common Market Law Review*, vol. 57, Issue 6, 2020, pp. 1843 to 1866.

70 For a more detailed discussion, see my Opinion in *TÜV Rheinland LGA Products and Allianz IARD* (C-581/18, EU:C:2020:77) – on the scope of EU law in the more traditional, free movement cases, and my Opinion in *Ispas* (C-298/16, EU:C:2017:650) – on the scope of EU law within the meaning of Article 51(1) of the Charter.

71 Order of 6 October 2020 (C-623/18, EU:C:2020:800).

72 Order of 2 July 2020 (C-256/19, EU:C:2020:523).

73 Judgment of 9 July 2020 (C-272/19, EU:C:2020:535).

considered to be 'independent enough' to deal with the case under the standards laid down in Article 6 of the European Convention on Human Rights ('ECHR'), in Article 19(1) TEU, and in Article 47 of the Charter.

112. Applying *Miasto Łowicz*, the Court declared the reference inadmissible in its entirety, insisting that the case was not substantively connected to the second subparagraph of Article 19(1) TEU and that the answer of the Court could not provide the referring judge with an interpretation of EU law that would allow him to resolve the issues pending before him. [74]

113. Two other elements are perhaps worthy of mention in this context. First, the issue raised by the referring judge was a rather technical one within an area where a number of potential approaches are conceivable. Indeed, no one is likely to claim that as a matter of EU law, there is only one specific way in which cases might be allocated within a court in order to ensure compliance with the right to a lawful judge or, more broadly, the right to a fair trial. Second, and perhaps more importantly, the order for reference did not point to any elements that, either in isolation or taken together, could cast any doubt on the independence and impartiality of the judicial bodies involved in the case, or on the general health of the judicial system. In particular, no structural, systemic or other issues relating to the rule of law were brought to the attention of the Court in that case. On the contrary, the facts of the case showed that the national system did in fact offer some avenues for remedying the alleged infringement of the law, in the event that one existed. In fact, the referring court even made use of those avenues, but appeared to be dissatisfied with their ultimate outcome. [75]

114. In such circumstances, not dealing with the reference on the merits may be considered to be in line with established case-law according to which, in the absence of any indication to the contrary, it is not for the Court to infer that the national provisions ensuring the courts' independence and impartiality may be applied in a manner contrary to the principles enshrined in the domestic legal order or the principles of a State governed by the rule of law. [76] Put simply, no serious issue, possibly arising under Article 19(1) TEU, was detected that could suggest that the national legal system at issue were not able to 'auto-remedy'.

115. Finally, in *Land Hessen*, the referring court had asked the Court a question concerning its own status as a 'court or tribunal' within the meaning of Article 267 TFEU, read in the light of Article 47 of the Charter. The Court noted that, by that question, the referring court was, in essence, inviting the EU judiciary to examine the admissibility of its request for a preliminary ruling. Indeed, given that being a 'court or tribunal' within the meaning of Article 267 TFEU is a condition of admissibility of the reference, the fulfilment of that condition could be regarded as a prerequisite for the interpretation by the Court of the provision of EU law specified in the other question raised by the national court.

116. The Court analysed thoroughly the concerns raised by the referring court as regards admissibility and concluded that that body complied with the requirements of Article 267 TFEU. [77] However, the Court closed the section on admissibility by stating that 'that conclusion has no effect on the examination of the admissibility of the second question referred for a preliminary ruling, which, as such, is inadmissible. Since that question concerns the

74 *Maler*, paragraphs 46 to 48.

75 Ibid., see paragraphs 7 to 27, in particular paragraph 16.

76 See already judgment of 4 February 1999, *Köllensperger and Atzwanger* (C-103/97, EU:C:1999:52, paragraph 24).

77 *Land Hessen*, paragraphs 42 to 61.

interpretation of Article 267 TFEU itself, which is not at issue for the purposes of resolving the dispute in the main proceedings, the interpretation requested by that question is not objectively required for the decision which must be made by the referring court'. [78]

117. The approach followed by the Court in its judgment and the wording of certain passages thereof may, at least at first sight, appear intriguing. However, upon closer inspection, it may perhaps be understood as follows.

118. The Court intended simply to indicate that when issues as to whether the conditions set out in Article 267 TFEU for the admissibility of the references arise, the examination of those issues pertains, rather obviously, to the *admissibility* of the reference, and not to its merits. Therefore, if doubts arise as to whether the body making a reference is a 'court or tribunal' for the purposes of Article 267 TFEU (for allegedly not being adequately independent, as was the case in *Land Hessen*, or for any other reason), that problem constitutes a preliminary issue of procedure, regardless of whether it was presented to the Court in terms of admissibility or made the object of a specific question referred. [79]

119. It is true that the Court's position on that issue has not been entirely consistent over the years. Indeed, the judicial nature of the body making the request for a preliminary ruling has been assessed both in terms of jurisdiction of the Court, [80] and in terms of admissibility of the reference. [81] Furthermore, unlike in *Land Hessen*, the Court has in some cases answered questions concerning the concept of 'court or tribunal' within the meaning of Article 267 TFEU and whether the national body making the request in a case could be considered as such. [82]

120. However, I do not believe that much emphasis ought to be placed on the inevitable heterogeneity of the case-law assembled over the years since it is naturally likely to be very case-dependent. While of course such a proposition is probably unsatisfactory from a theoretical point of view, I do not consider it to give rise to any specific problem. In so far as the Court carries out a verification of the judicial nature of a national body making a request, whether it does so in the context of jurisdiction, admissibility, or (eventually) even merits, is of limited practical significance. The national court obtains the clarification sought and, where the Court detects a problem, the request is refused on procedural grounds, without any consideration of the substance of the questions referred. [83]

121. I do not consider, therefore, that the judgment of the Court in *Land Hessen* constitutes a departure from the case-law outlined above. In any event, the present cases can easily be distinguished from those examined in *Miasto Łowicz*, *Maler* and *Land Hessen*, an issue to which I now turn.

78 Ibid., paragraph 62.

79 Cf. Iannuccelli, P., 'L'indépendance du juge national et la recevabilité de la question préjudicielle concernant sa propre qualité de «juridiction»', *Il Diritto dell'Unione Europea*, 2021, pp. 823 to 841.

80 See, inter alia, judgment of 6 October 2015, *Consorci Sanitari del Maresme* (C-203/14, EU:C:2015:664, paragraphs 16 to 31).

81 See, inter alia, judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 51 to 80).

82 See, inter alia, judgments of 27 April 1994, *Almelo* (C-393/92, EU:C:1994:171, paragraphs 21 to 24); of 4 June 2002, *Lyckeskog* (C-99/00, EU:C:2002:329, paragraphs 10 to 19); and of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 54 to 63).

83 See also Opinion of Advocate General Wahl in *Gullotta and Farmacia di Gullotta Davide & C.* (C-497/12, EU:C:2015:168, points 15 and 25).

(iii) The present cases are unlike those previously outlined

122. First, in contrast with the situation in *Miasto Łowicz*, the reply given by the Court to the first question can indeed be taken into account as it concerns the correct composition of the adjudicating panel. From that point of view, the relevance of the first question is connected to the need to solve a specific and real problem that directly affects the proceedings before the referring court. In that regard, the President of the panel has various options available to her in order to remedy the situation of non-compliance.

123. By reference to the taxonomy referred to in *Miasto Łowicz*, I consider the present cases to fall squarely within the *third category*: the referring court seeks an answer from the Court in order to resolve a procedural question of national law before being able to rule on the substance of the cases before it.

124. At the same time, the present cases also fall within the *second category*: the referring court relies on the provisions of Directive 2016/343, a piece of EU legislation laying down rules of a procedural nature which appear to be applicable in the main proceedings, both *ratione personae* and *ratione materiae*.[84]

125. Against that background, and in the light of the alleged links between certain judges sitting on the panels destined to adjudicate in the main proceedings and the Minister for Justice/General Prosecutor, it stands to reason that the referring court may wonder whether the national measures at issue are compatible with the provisions of Directive 2016/343. Article 3 of that directive lays down the principle that 'Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law'. In that regard, it should be noted that the presumption of innocence is enshrined in Article 48 of the Charter, which corresponds to Article 6(2) and (3) ECHR, as is apparent from the Explanations relating to the Charter.[85] In turn, Article 6 of Directive 2016/343, echoing recital 22, provides essentially that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution, and that any doubt in that regard should benefit the suspect or accused persons.

126. Whether the provisions of Directive 2016/343 *in fact preclude* national measures such as those at issue in the present proceedings is thus an issue that relates to the *merits*, and not to the admissibility, of the first question.

127. Second, unlike in *Maler*, the issue raised by the referring court concerns the compatibility of certain national measures with provisions of EU primary and secondary law. In other words, the present cases are not merely a (faded) reflex of what is essentially a problem internal to the national legal system. In addition, the substance of the matter concerns a rather basic element, that of judicial impartiality, not merely a technical matter on which no unified approach is present in EU law. Moreover, prima facie, those potential issues are of a certain gravity and are likely to have significant systemic repercussions. Finally, these cases have been referred from within a specific legal context, within which the ability of such a system to 'auto-remedy' is far from obvious.

128. Third, in *Land Hessen*, the Court did provide the clarifications sought from the referring court. The existential ('am I a court or tribunal?') and the metaphysical ('I use the Article 267 TFEU procedure in order to check whether I can use that procedure') elements underlying the

84 As set out above in points 69 to 71 of this Opinion.

85 See, for example, judgment of 25 February 2021, *Dalli* v *Commission* (C-615/19 P, EU:C:2021:133, paragraph 223).

second question referred did not preclude the Court from examining the issues raised. The Court's *obiter dictum* in paragraph 62 of the judgment has, by and large, a pedagogic function. In the present cases, if the Court were to find the requests to be inadmissible in their entirety, the referring court would receive no guidance on the issue raised.

129. Therefore, far from casting doubt on my conclusion on the admissibility of the first question referred, the Court's most recent case-law in fact reveals why an answer to that question is necessary for the referring court to give judgment in the cases pending before it.

B. The nature and the limits of Article 19(1) TEU

130. In the previous section of this Opinion, I sought to explain why I believe that, in line with the application of the traditional case-law of the Court regarding its jurisdiction and the admissibility of requests for a preliminary ruling, the referring court's first question is admissible. I also attempted to systemise the more recent case-law of the Court, demonstrating why nothing therein has in fact altered that traditionally open approach.

131. At present, it is nonetheless necessary to turn to the (new) elephant in the room: the second subparagraph of Article 19(1) TEU. There is no disguising that the unease felt as regards the assessment of admissibility in the present cases, as well, perhaps, as in other cases recently brought or currently pending before the Court, derives, to some extent, from the 'generous' approach that the Court has adopted with regard to the interpretation of Article 19(1) TEU. Indeed, once the substantive limits of needing to be 'within the scope' of EU law for the jurisdiction of the Court to be triggered fell away in the case of Article 19(1) TEU, concerns about the potential over-extensive application of the second subparagraph of Article 19(1) TEU logically arose.[86] Sooner or later, there may even be a temptation to reintroduce those limits in terms of admissibility.[87]

132. One cannot deny that the approach adopted in *Associação Sindical dos Juízes Portugueses* is quite far-reaching: the scope of Article 19(1) TEU is broad, both *ratione materiae* (encompassing all fields covered by EU law, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter in the individual case), and *ratione iudicis* (encompassing any national body that may rule, as a court or tribunal, on questions concerning the application and interpretation of EU law). As I noted in my *AFJR* Opinion, it is indeed rather difficult to find a national court or tribunal which may never, by definition, be called upon to rule on matters of EU law.[88]

133. On that basis, it could be argued that, given the broad scope of Article 19(1) TEU, a more restrictive approach to the *admissibility* of cases raising issues under that provision is warranted. In such a scenario, the criteria on admissibility would constitute the floodgates that prevent the Court from being submerged by countless references concerning a variety of aspects that, in the mind of some national courts, could raise issues of independence of the national judiciary.

134. In this section, I shall explain why I do not share that view. In fact, I am convinced that the Court's approach on this issue – when correctly framed and applied – is sound. For that purpose, it is necessary to outline the true nature of the second subparagraph of Article 19(1) TEU: it is

86 As already set out in my Opinion in *AFJR*, points 212 and thereafter.

87 At that moment, the scholarly warnings quoted above could indeed be correct – see above, points 108 and 109 and footnote 69.

88 See my Opinion in *AFJR*, point 207.

simply an extraordinary remedy for extraordinary cases. Therefore, the access threshold in terms of admissibility is and ought to remain low, while the substantive threshold for its breach is relatively high (1). In that way, Article 19(1) TEU complements, but eventually may go beyond two other key Treaty provisions which also reflect the principle of judicial independence: Article 47 of the Charter and Article 267 TFEU (2).

(a) The nature and scope of Article 19(1) TEU

135. At the outset, it must be emphasised that the Court's reading of the provision is reflected in the text of Article 19(1) TEU, which requires Member States to 'provide remedies sufficient to ensure effective legal protection *in the fields covered by Union law*'. The obligation laid down therein is extensive and unqualified. It is area-based, not case-dependent.

136. It is also hardly disputable that a minimum of guarantees of judicial independence must be ensured, as a matter of principle, for all courts and as regards all their activities. It is absurd to claim that a national rule on judicial organisation would be unproblematic in purely domestic cases while potentially being an issue each time a provision or principle of EU law becomes applicable. (In)dependence is about control, pressure, and leverage. It is structural. It must be guaranteed transversally. Certainly, a person influencing or even controlling a judge or a court might decide not to exercise his or her influence in an individual case. However, that would hardly mean that that judge is in general 'independent'.[89] For that reason, there is simply no 'judicial independence within the scope of EU law' as opposed to 'judicial independence in purely national cases'.[90] There is no 'part-time' judicial independence.[91]

137. Furthermore, it is often impossible to identify, at the beginning of a procedure, whether or not a provision or principle of EU law may turn out to be applicable in the course of a given procedure. Moreover, many judicial decisions may, at some point after delivery, enter the EU 'judicial space' for one reason or another. Mutual recognition, not to mention mutual trust, would hardly work if national authorities were required to check, each time, whether a court of another Member State was 'independent enough' when they dealt with a (initially) purely internal case that, subsequently, crossed the border (metaphorically speaking) in order to deploy certain legal effects in another Member State.

138. That problem is nonetheless not limited to the horizontal dimension of mutual cooperation between Member States.[92] In a system such as that of the European Union, where the law is the main vehicle for achieving integration, the existence of an independent judicial system (both centrally and nationally), capable of ensuring the correct application of that law, is of paramount importance. Quite simply, without an independent judiciary, there would no longer be a genuine

89 Intriguingly, ideas not too dissimilar about 'sectoral independence' were in fact advanced after 1989 in a number of former Communist States as a means of judicial self-justification and continuity, suggesting that in some areas (such as 'politics-free civil law'), the judges were in effect (already) independent, largely because in those areas, there were no (longer) attempts to influence the outcome of individual cases. For an excellent and readable account in English of how the system genuinely operated (and how flawed that logic is in terms of genuine judicial independence), see, for example, Markovits, I., *Justice in Lüritz: Experiencing Socialist Law in East Germany*, Princeton University Press, 2010.

90 On this issue, see also my Opinion in *Torubarov* (C-556/17, EU:C:2019:339, points 54 and 55).

91 Or indeed 'area-of-law-based': the idea that while perhaps there may be some issues in 'political cases', the more 'technical areas of EU law', say VAT law or environmental law, would still be applied properly, may be entertained only by somebody without any idea or historical memory of how a captured judicial system works (or, rather, does not work).

92 In that context, see particularly judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), and of 17 December 2020, *Openbaar Ministerie (Independence of the issuing judicial authority)* (C-354/20 PPU and C-412/20 PPU, EU:C:2020:1033).

legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe.

139. In view of the foregoing reasons, it is vital for the European judicial system categorically to insist on minimal guarantees of judicial independence and impartiality for all its constituent members, *irrespective of* whether in the individual case before a given court, EU law is in fact being applied.

140. However, all such structural arguments as to *why* reveal relatively little as to *how*. To start with, does Article 19(1) TEU have a *limitless* scope, thereby catching any potential problem relating to the judicial organisation of the Member States, their procedures and their practice? In other words, is Article 19(1) TEU like a powerful electron microscope, capable of detecting even the smallest particles that may (or may not) affect the 'health' of the national judiciary?

141. The answer must, in my view, be in the negative. The *material* scope of Article 19(1) TEU does not yet determine the *threshold* required for its *breach*. The former is the *area* that is 'covered' by the principles enshrined in the EU law provision: national measures that fall into that area can, accordingly, be subject to an evaluation of compatibility with the principles flowing therefrom. The latter is the *yardstick* to be used in order to carry out that evaluation.

142. That proposition requires a number of clarifications.

143. First, what in fact is the *yardstick* for a potential infringement of the second subparagraph of Article 19(1) TEU? Again, the text of Article 19(1) TEU lays down the obligation of the Member State and, accordingly, when that obligation is not complied with. It is only where Member States do not 'provide remedies sufficient to ensure effective legal protection' that they breach that provision.

144. I therefore agree with Advocate General Tanchev that Article 19(1) TEU is a provision concerned mainly with the structural and systemic elements of the national legal frameworks.[93] Those elements, irrespective of whether they stem from acts of the national legislature or the executive, or from a judicial practice, may call into question the ability of a Member State to ensure effective judicial protection for individuals. In other words, what is relevant under Article 19(1) TEU is whether a Member State's judicial system complies with the principle of the rule of law, one of the Union's founding values, which is also to be found in Article 2 TEU.

145. This is, I believe, a proposition that the Court has so far neither expressly embraced, nor refuted. In fact, the Court has not elaborated on this point, as it was not necessary for it to decide on the cases before it.

146. Second, if that were indeed the case, then the threshold for admissibility with regard to Article 19(1) TEU is not, and need not be, placed higher than usual. In this regard, the traditional case-law and approach on admissibility, as outlined in detail in the previous section of this Opinion, are sufficient. Indeed, the second subparagraph of Article 19(1) TEU already has a built-in and a rather high *substantive* threshold for its breach.

[93] See, in particular, Opinions of Advocate General Tanchev in *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:529, point 115), and in Joined Cases *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2019:775, point 125).

147. Article 19(1) TEU contains an extraordinary remedy for extraordinary situations. Its purpose is not to catch all possible issues arising with regard to the national judiciary, but only those of a certain gravity and/or of a systemic nature, to which the internal legal system is unlikely to offer an adequate remedy.

148. By *gravity and systemic nature*, I do not mean to say that, to fall foul of that provision, a problem must necessarily arise in a significant number of cases, or affect large parts of the national judicial system. The crucial issue is rather whether the (one-off or recurring) problem brought to the attention of the Court is likely to threaten the proper functioning of the national judicial system, thereby jeopardising the capacity of the Member State in question to provide sufficient remedies to the individuals.

149. Viewed from that perspective, there is no shortage of situations within the national judicial systems that may concern individual errors, or even repetitive and thus structural ones, but which will nevertheless still not cross the threshold of Article 19(1) TEU. Examples may range from an incorrect indexation of judicial salaries in a given year; the failure to approve the 'end of year' bonus; the failure to attribute a case to the correct Chamber of the court or to the correct reporting judge; the failure to promote the most qualified person to the position of President of the Chamber; and so on. Conversely, whether a single, but key, judicial appointment was lawfully made might, despite taking place only once, have systemic repercussions that may warrant an examination under Article 19(1) TEU. [94]

150. Another aspect that is, in my view, relevant under Article 19(1) TEU is whether the national system offers, *in law and in fact*, sufficient structural guarantees to *self-correct* the problem once identified. When the general legal framework put in place by a Member State is, as a matter of principle, capable of remedying the potential error, instances of individual *misapplication* of that framework do not automatically lead to a breach of Article 19(1) TEU. It is not for the Court to monitor meticulously the compliance of national courts with their own national rules. [95] Therefore, elements pointing to wider implications aside, a single, isolated case of alleged error in the interpretation or application of a national provision, *in an otherwise healthy* legal system that is compliant with EU law, does not infringe Article 19(1) TEU.

151. Again, it is almost stating the obvious to say that not all matters possibly concerning the rules that govern the judiciary or court proceedings are an issue relating to the rule of law. [96] The review that the Court must carry out of national measures which allegedly affect the independence of the national judiciary cannot but be limited to *pathological* situations.

152. Third, as part of that assessment, it is crucial not only to examine the 'law on the books', but also to include the 'law on the ground'. The Court has consistently examined the compatibility with EU law of national laws and regulations since those are applied in practice, [97] in the light of the interpretation given to them by national courts [98] and, as the case may be, taking into consideration the general legal principles of the national legal system. [99] It is for this reason that

94 See, in this regard, my Opinion in *AFJR*, points 265 to 279 (concerning the improper appointment of the head of the Judicial Inspection).

95 For a similar view, in another context, see European Court of Human Rights ('the ECtHR') judgment of 1 December 2020, *Ástráðsson v. Iceland* (CE:ECHR:2020:1201JUD002637418, § 209 and the case-law cited); ('*Ástráðsson*').

96 See, by analogy, judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/19 RX-11, EU:C:2020:232, paragraphs 71 to 76). See also, in a different context, ECtHR judgment in *Ástráðsson*, § 234.

97 See, to that effect, judgment of 27 November 2003, *Commission* v *Finland* (C-185/00, EU:C:2003:639, paragraph 109).

98 See, to that effect, judgment of 13 December 2007, *Commission* v *Ireland* (C-418/04, EU:C:2007:780, paragraph 166).

99 See, to that effect, judgment of 26 June 2003, *Commission* v *France* (C-233/00, EU:C:2003:371, paragraph 84).

the Court has insisted that alleged breaches of Article 19(1) TEU must always be examined in their context, by looking *at all relevant elements*. The technical aspects of the problem brought to the Court's attention cannot be examined in 'clinical isolation' from the broader legal and institutional landscape. [100]

153. The Court thus clearly looks beyond the individual provision. That scrutiny is not limited only to closely-related national law provisions, but extends in fact to the broader legal and institutional landscape. [101] Put simply, any potential ailment of an individual 'patient' is to be assessed by taking into account their overall 'health' with regard to judicial independence.

154. From that perspective, I remain puzzled as to how the approach to Article 19(1) TEU outlined in this section could be at odds with the equality of the Member States or could be setting any double standards. The standard is exactly the same and is required of everyone. However, the state of individual patients is objectively very different. [102] Equality of the Member States can hardly be approached in the form of purely formal, so as not to say formalist, equality: everyone must be treated exactly the same, *irrespective of* the situation and the context in which they find themselves. Senseless automaticity is not (material) equality, which indeed requires treating the same alike, but also different situations differently. [103]

155. Fourth and finally, the consequence of such an interpretation of Article 19(1) TEU is that the assessment of whether a national measure complies with the standards of Article 19(1) TEU would not be carried out when determining the *admissibility* of the questions ('does Article 19(1) TEU apply to the case at issue?), but at the stage of assessing the *merits* of the questions ('does the national measure at issue comply with the standards set out in Article 19(1) TEU?').

156. That in turn raises yet another important question, but of a more pragmatic nature: does this approach risk creating problems for the Court's docket?

157. I do not think so.

158. On the one hand, the existing case-law on admissibility allows the Court to dismiss, rather swiftly, artificial or hypothetical cases, and also cases where, despite the issue falling *ratione materiae* under Article 19(1) TEU, the national court would be unable to take into account (as in *Miasto Łowicz*) the Court's answer to the question(s) referred. [104] Similarly, cases where the basic requirements of Article 19(1) TEU appear to be lacking, and/or the referring court has not explained why an issue under Article 19(1) TEU may possibly arise, can be rejected in so far as the conditions of relevance and necessity of the question are not satisfied.

159. As I sought to explain, the *threshold* for a breach of Article 19(1) TEU is relatively high. Where the contested national measures, irrespective of their lawful or unlawful character, do not exhibit any genuine rule of law-related issue (regard being had to the gravity and systemic

100 See, with further references, my Opinion in *AFJR*, especially points 243 and 244.

101 See, for example, *A. K. and Others*, paragraph 142, or judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraphs 98 to 106, and 163).

102 Returning to the metaphor of the patient, the suggestion that the objective context does not matter in such cases makes one think of a requirement that a first response medical team, having just arrived at the scene of a car crash, is to examine not only the passengers travelling in the vehicles which were part of the collision, but also all the passengers in all the other cars present, including those who were not involved in the collision, but who had simply stopped to observe what was happening. After all, they are *all car passengers* and all of them must be *treated exactly the same*, no matter the circumstances.

103 Bartlett, R.C., and Collins, S.D., *Aristotle's Nicomachean Ethics*: *A New Translation*, University of Chicago Press, 2011.

104 For a recent example, see the Opinion of Advocate General Pikamäe in *IS (Illegality of the order for reference)* (C-564/19, EU:C:2021:292, points 85 to 92).

repercussions of the alleged breach or the inability of the system to self-correct), an assessment of the merits of the case does not appear to be more complex or time-consuming for the EU judiciary than that which focuses on its admissibility. [105]

160. Accordingly, an orthodox application of the Court's traditional case-law on admissibility as regards cases in which the questions referred for a preliminary ruling concern the interpretation of Article 19(1) TEU does not create, in my view, any risk of opening the Court's floodgates in respect of odd, ill-chosen or dishonest references. It also does not require the Court to 'tweak' its usual assessment of the 'necessity' criterion, in order to reject more cases than it normally would.

(b) Article 19(1) TEU, Article 47 of the Charter, and Article 267 TFEU: the same content, but a different purpose

161. There is one final element relating to the second subparagraph of Article 19(1) TEU that ought to be discussed: what relationship does that provision have with the other Treaty provisions which also enshrine the principle of judicial independence, in particular Article 47 of the Charter and Article 267 TFEU? [106] Indeed, the interrelationship between those provisions has been a source of some confusion for the parties, as well as for a number of referring courts. Do those provisions lay down different types of 'judicial independence'? Is it possible that a national court can be independent for the purposes of one of these provisions, while not independent enough for another? Are there, as a consequence, different 'judicial independencies' in EU law?

162. In my view, the simple answer is 'no': there is *only one and the same principle* of judicial independence. Quite apart from being self-evident in terms of logic, this consideration is also demonstrated by the fact that the Court has referred to that concept in the same manner, regardless of the EU provision being applied in the case at hand. [107] Thus, I cannot but fully agree with Advocates General Tanchev and Hogan that the content of both Article 19(1) TEU and Article 47 of the Charter, in terms of judicial independence, is, in essence, the same. [108]

163. That being said, the same content does not necessarily mean the same outcome in an individual case. The three provisions are different as to their scope and purpose within the structure of the Treaties. This difference means that a slightly different type of examination must be carried out under each of the three provisions.

164. Article 19(1) TEU has a broad scope, going beyond situations in which an individual case is governed, in the traditional view, by EU law. It requires Member States to ensure that the organisation and functioning of their judicial bodies, given their central role within the EU legal system, comply with the values of the Union, especially the rule of law. The threshold for its infringement is rather high: only issues of a systemic nature or of a certain gravity that are

105 In this regard, the reasoning set out by the Court in *Maler* as to the admissibility of the request for a preliminary ruling could very well be made, in respect of the same scope and detail, as a decision on merits.

106 Leaving aside other specific (typically secondary law) regimes that also embrace and further develop the concept of judicial independence and which may also come into question in specific scenarios, such as Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). In detail, see my Opinion in *AFJR*, points 183 to 225.

107 See, inter alia, judgment of 16 February 2017, *Margarit Panicello* (C-503/15, EU:C:2017:126, paragraphs 37 and 38) (regarding Article 267 TFEU); *A. K. and Others* (paragraphs 121 and 122) (regarding Article 47 of the Charter); judgments of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531, paragraphs 71 to 73) (regarding Article 19(1) TEU); and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 143).

108 See Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, points 45 and 46), and Opinion of Advocate General Tanchev in *A. K. and Others*, EU:C:1019:551, point 85.

unlikely to be self-corrected by the domestic system of remedies, give rise to an infringement. The Court's analysis, in that context, clearly goes beyond the individual file, and includes the broad institutional and constitutional structure of the national judiciary.

165. Article 47 of the Charter is a provision that enshrines a subjective right of any party to proceedings – to an effective remedy and a fair trial – that comes into play only when a case falls within the scope of EU law under Article 51(1) of the Charter. Within that ambit, all parties are entitled to invoke a breach of Article 47 of the Charter. The verification of the 'independence' of a court, in that context, requires a detailed and case-specific assessment of all the relevant circumstances. Issues linked to some structural or systemic feature of the national judicial system are relevant only in so far as they may have had an impact on the individual proceedings. The intensity of the Court's review with regard to the independence of the judicial body in question is moderate in this context: not all breaches of the law amount to an infringement of Article 47 of the Charter. A certain gravity is required to that end. However, once the required standard of gravity is met, that is sufficient to give rise to an infringement of Article 47 of the Charter, since no other condition needs to be satisfied in order to uphold the individual right stemming from EU law.

166. Finally, Article 267 TFEU has a broad material scope, encompassing all situations in which any EU provision may be applicable, but extending also to certain situations that fall outside the scope of EU law.[109] The concept of 'court or tribunal' (which, by definition, requires the independence of the members thereof) has, in that provision, a functional nature: it serves to identify the national bodies which can become the interlocutors of the Court in the context of a preliminary ruling procedure. An analysis under Article 267 TFEU is focused on a structural issue, at a rather general level: the position of that body within the institutional framework of the Member States. The intensity of the Court's review with regard to the independence of the body is, within that context, not that intensive. After all, the purpose of Article 267 TFEU is simply to identify the proper institutional interlocutors with regard to admissibility.

167. This differentiation has rather important consequences for the parties and the referring courts alike.

168. First, a potential issue resulting in a breach of Article 47 of the Charter can be raised only with regard to an individual right guaranteed under EU law.[110] That is likely to exclude reliance upon that provision in circumstances where questions are raised by national judges themselves concerning the compatibility of their system with the EU law principle of judicial independence, since judges themselves are unlikely to have a right stemming from EU law which is at stake in cases before them. By contrast, issues raised by judges themselves are indeed possible and admissible under Article 19(1) TEU and Article 267 TFEU.[111]

[109] See, in particular, judgment of 15 November 2016, *Ullens de Schooten* (C-268/15, EU:C:2016:874, paragraphs 50 to 53). With respect to certain specific issues raised in that regard, see recently my Opinion in *J & S Service* (C-620/19, EU:C:2020:649, points 27 to 74)

[110] A case apart are situations in which the scope of EU law under Article 51(1) of the Charter is triggered by a specific regime of EU secondary law, which then renders Article 47 of the Charter applicable. See my Opinion in *AFJR*, points 196 to 202.

[111] See also, in this regard, Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, points 33 to 47).

169. Second, the type of review, threshold and intensity, may eventually lead to different outcomes in terms of (in)compatibility. In particular, it is certainly plausible that one and the same issue may constitute a breach under Article 47 of the Charter, while not posing an issue under Article 19(1) TEU, [112] as well as the possibility of there being a breach of Article 19(1) TEU, while none under Article 47 of the Charter. [113]

170. Having concluded that the first question is admissible, I shall now turn to the merits.

C. Merits

171. By its question, the referring court asks the Court whether the second subparagraph of Article 19(1) TEU, in conjunction with Article 2 TEU and the principle of the rule of law enshrined therein, and Article 6(1) and (2), in conjunction with recital 22, of Directive 2016/343 must be interpreted as precluding national provisions according to which the Minister for Justice/General Prosecutor may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion.

172. According to a well-established line of case-law, the concept of judicial independence has two aspects to it: external and internal.

173. The *external* aspect (or independence *stricto sensu*) requires the court to be protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them. As Advocate General Hogan aptly put it in a recent Opinion, independence *stricto sensu* requires that a national court is able to 'exercise its functions wholly autonomously, without being subject to any hierarchical constraint or being subordinated to any other body and without taking orders or instructions from any source whatsoever'. [114]

174. The *internal* aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests as regards the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. As Advocate General Ruiz-Jarabo Colomer emphasised in *De Coster*, impartiality requires from the judges a 'psychological attitude of initial indifference' with regard to the disputes, in order to be (and appear) equidistant from the parties. [115]

175. As the Court has consistently stated, those two requirements call for 'rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'. [116]

[112] There has been an individual breach of Article 47 of the Charter that does not reach the gravity threshold of Article 19(1) TEU.

[113] The type of breach has reached the threshold of Article 19(1) TEU, but there were no individual rights stemming from EU law at stake under Article 47 of the Charter (most recently, in essence, the scenario in the judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, in particular paragraph 89).

[114] Opinion of Advocate General Hogan in *Repubblika* (C-896/19, EU:C:2020:1055, point 58).

[115] C-17/00, EU:C:2001:366, point 93, with reference to the writings of jurist P. Calamandrei.

[116] See, more recently, *Land Hessen*, paragraph 52 and the case-law cited, and judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 117).

176. Against that background, the relevant question in the present cases seems to be the following: do the national measures at issue – in particular, those affecting the *composition* of judicial panels in criminal proceedings – offer sufficient guarantees regarding the independence and impartiality of each and every member of such panels, in order to dispel any doubt, in the mind of the individuals, that those members could be influenced by external factors or have some vested interest in the outcome of the proceedings?

177. It seems to me that the answer to that question is clearly in the negative. Indeed, the national measures at issue appear highly problematic in view of both the internal and external aspect of independence.

178. At the outset, I must stress that, under EU law, Member States are not required to adopt any particular constitutional model governing the relationship and interaction between the various branches of the State, provided of course that some basic separation of powers characteristic of the rule of law is maintained.[117] Accordingly, there is nothing in EU law that may preclude Member States from having recourse to a system according to which judges may, in the interest of service, be temporarily seconded from a court to another, either at the same level of jurisdiction or to a higher court.[118]

179. In systems where the Ministry of Justice is in charge of organisational and staff matters concerning the judiciary, decisions on secondment of individual judges are likely to fall within the competence of the Minister. Provided that the statutory procedures are followed, all the appropriate consents required under national law have been given,[119] and the *ordinary rules* on appointments, tenure and removal of judges *continue to apply during secondment*, that aspect too is in itself not problematic.

180. However, that clearly does not appear to be the case under the national rules at issue in the present cases. The seconded judges are, in many respects, not subject to the ordinary rules, but to a rather special – and very troubling – legal regime.

181. First, it seems to me that, in a system that is compliant with the rule of law, there should be at least some transparency and accountability with regard to the decisions on the secondment of judges. To be clear, I do not think that those decisions need necessarily be subject to some form of (direct) judicial review. Yet, other forms of review ought to exist, in order to avoid arbitrariness and the risk of manipulation.[120]

182. In particular, any decision relating to a secondment of a judge (initiation or termination) should be made on the basis of some *ex ante* known criteria and should be duly motivated. In my view, neither the abstract criteria, nor the specific motivation, need be of particular detail. Nevertheless, they must be capable of offering a minimum degree of clarity as to why and how a given decision was taken, in order to ensure some form of oversight.[121]

117 *A. K. and Others*, paragraph 130 and the case-law cited. In detail, with further references, see my Opinion in *AFJR*, point 230.

118 Similarly, ECtHR judgments of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, § 44), and of 20 March 2012, *Dryzek v. Poland* (CE:ECHR:2012:0320DEC001228509, § 49).

119 For example, by the judiciary self-governing body, and/or the presidents or the councils of the courts involved, and/or the judge in question.

120 See ECtHR judgment of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, §§ 42 and 44 and the case-law cited).

121 Of whatever form appropriate: be it by other members of the government and/or the national parliament; supervision by the media and public opinion; or ultimately also for a potential litigant who might entertain doubts as to the proper composition of the panel called on to adjudicate on his or her case and might wish to raise that issue in the course of the proceedings in his or her case.

183. However, no such feature can be found in the national measures at issue. As the referring court explained, the criteria used by the Minister for Justice/General Prosecutor to second judges and to terminate their secondment, if they exist, are in any event not made public. I also understand that those decisions do not include any statement of reason. It is hard to speak of some form of transparency, accountability and control in these circumstances.

184. Second, the fact that the secondment is for an indefinite period and may be terminated at any time at the discretion of the Minister for Justice/General Prosecutor is a source of major concern. In fact, it is hard to imagine a more obvious example of a direct clash with the principle of the irremovability of judges. In that regard, I tend to consider that a (judicial) secondment should normally be for a fixed period of time, determined in terms of a given duration, or until another objectively ascertainable event occurs (for example, when the regular workforce of the court is again at full strength, or when the outstanding backlog of cases is cleared, depending on the exact reason for the secondment in the first place). [122]

185. Surely, some flexibility in that regard – concerning both the circumstances justifying a secondment or its termination, and the duration thereof – must be possible. However, the exercise of unfettered, unreviewable and non-transparent discretion permitted to the Minister for Justice/General Prosecutor to second judges and *to remove them* at any time as he sees fit appears to go far beyond what could be considered reasonable and necessary to ensure the smooth functioning of, and workflow within, the national judicial structure. As the European Parliament once noted, 'discretion may be a necessary evil in modern government; absolute discretion coupled with an absolute lack of transparency, however, is fundamentally contrary to the rule of law'. [123]

186. Third, not only is the power to exercise that unfettered discretion assigned to a member of the government (and not, for example, to a judicial self-governing body, which to a certain extent may have mitigated the problem), but that member of the government also wears 'a double hat'. Indeed, within the national constitutional set-up currently in place, the Minister for Justice also holds the office of the (Public) General Prosecutor. This seems to me to be one of the most – if not the most – disturbing feature of the national legal framework.

187. In that capacity, the Minister for Justice is the chief prosecutorial body within the Member State and has authority over the entire body of public prosecution services. He has broad powers over the subordinate prosecutors. Among other things, national law grants him the power to make decisions 'concerning the content of an act in court' by a subordinate prosecutor, who is required to act in accordance with such decisions. [124]

188. This produces an 'unholy' alliance between two institutional bodies which, normally, should function separately. As regards, in particular, the issue of secondment of judges, in effect it allows the hierarchical superior of one party to criminal proceedings (the prosecutor) to compose (part of) the panel which will hear the cases brought by his or her subordinate prosecutors.

122 See ECtHR judgment of 25 October 2011, *Richert v. Poland* (CE:ECHR:2011:1025JUD005480907, § 45).

123 European Parliament (2006) Report on the Commission's 21st and 22nd Annual reports on monitoring the application of Community law (A6-0089/2006 final) p. 17.

124 For more detail and an evaluation, see Venice Commission, Opinion on the Act on the Public Prosecutor's Office, as amended (2017) Opinion 892/2017.

189. The consequence is, quite obviously, that some judges may have an incentive (to say the least) to rule in favour of the prosecutor or, more generally, in favour of the Minister for Justice/General Prosecutor. Indeed, judges of lower courts may be tempted by the possibility of being rewarded with a secondment to a higher court, with possibly improved career prospects and a higher salary. In turn, seconded judges may be discouraged from acting independently, in order to avoid the risk that their secondment may be terminated by the Minister for Justice/General Prosecutor.

190. Fourth and finally, the situation described above is further aggravated by the fact that some of the seconded judges also hold the position of disciplinary agents attached to the Disciplinary Officer for Ordinary Court Judges. It is certainly not far-fetched to believe that judges may be reluctant to disagree with colleagues who, one day, may bring disciplinary proceedings against them. Moreover, in structural terms, such persons may very well be perceived as exercising a 'diffuse control and supervision' within the judicial panels and the courts to which they have been seconded due to the context and the parameters of their secondment.

191. Unsurprisingly, the Court is currently seised with several proceedings in which the compatibility with EU law of the Polish disciplinary regime for judges is being questioned.[125] In its order of 8 April 2020, the Court identified a number of potential issues in that regard.[126] It is also a well-known fact that, recently, several disciplinary proceedings have been opened in Poland against judges who merely made use of the possibility, provided for by Article 267 TFEU, to send a request for a preliminary ruling to this Court.

192. In brief, the national provisions at issue give rise, on the one hand, to a rather worrisome network of connections between the seconded judges, the prosecutors and (one member of) the government; and, on the other hand, to an unhealthy confusion of roles between judges, ordinary prosecutors and disciplinary agents.

193. Before concluding on this point, I must add that I do not find the arguments put forward on this point by the Prosecutor of the Lublin Province convincing. I fail to see how the fact that a system of secondment of judges was introduced long before the current government took office could affect an examination of whether or not that system complies with EU law. Nor is the fact that a secondment is only permitted with the consent of the judge in question (since the Polish Constitutional Court found a secondment without consent to be unconstitutional),[127] capable of calling into question any of the above findings.

194. I cannot but again emphasise that there is no issue whatsoever from the point of view of EU law with the secondment of judges per se, provided that during their secondment within the national judicial structures, those judges enjoy the same type of guarantees in terms of irremovability and independence as any other judges within that court. Nonetheless, for the reasons that I have discussed in detail in this section, that is very clearly not the case in the present cases.

195. In conclusion, I take the view that, in circumstances such as those at issue in the main proceedings, the minimum guarantees necessary to ensure the indispensable separation of powers between the executive and the judiciary are no longer present. The national rules at issue

125 See especially Case C-791/19, *Commission* v *Poland (Disciplinary regime for judges)*. See the Opinion of Advocate General Tanchev in that case (C-791/19, EU:C:2021:366).

126 Order of 8 April 2020, *Commission* v *Poland* (C-791/19 R, EU:C:2020:277).

127 Judgment of 15 January 2009, No K 45/07, OTK ZU No 1/a/2009, position 3.

do not offer sufficient safeguards to inspire in the individuals, especially those subject to criminal proceedings, reasonable confidence that the judges sitting on the panel are not subject to external pressure and political influence, and have no vested interest in the outcome of the case.

196. Those national rules are therefore incompatible with the second subparagraph of Article 19(1) TEU. As the Court recently noted in *A.B. and Others*, that provision imposes on the Member States a clear and precise obligation as to the results to be achieved and that obligation is not subject to any condition as regards the independence to be met by the courts called upon to interpret and apply EU law.[128] In other words, that provision is endowed with direct effect and thus entitles a national court, by virtue of the principle of primacy of EU law, to do whatever is in its power to secure the compliance of national law with EU law.[129]

197. In the light of the above, I consider it unnecessary to dwell on the reasons as to why the national provisions at issue also infringe the provisions of Directive 2016/343. In the context of such a serious infringement of Article 19(1) TEU, it is of little added value to engage in further discussions on whether the burden of proof for establishing the guilt of suspects and accused persons is still on the prosecution, or whether the benefit of doubt is in fact given to suspects or accused persons. The very core of the principle of the presumption of innocence is undermined when one and the same person – the Minister for Justice/General Prosecutor – may, in criminal cases, exert influence on both the prosecutors and certain judges on the bench. Consequently, a simultaneous infringement of the provisions of Directive 2016/343 appears to me to be inevitable.

V. Conclusion

198. I propose that the Court answers the questions referred for a preliminary ruling by the Sąd Okręgowy w Warszawie (Regional Court, Warsaw, Poland) as follows:

– The second subparagraph of Article 19(1) TEU in conjunction with Article 2 TEU, and Article 6 of Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, are to be interpreted as precluding national rules according to which the Minister for Justice, who is at the same time the General Prosecutor, may, on the basis of criteria that are not made public, second judges to higher courts for an indefinite period and, at any time, may terminate that secondment at his own discretion;

– Questions 2, 3 and 4 are inadmissible.

[128] Judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153, paragraph 146).

[129] See, recently, for example, judgment of 4 December 2018, *Minister for Justice and Equality and Commissioner of An Garda Síochána* (C-378/17, EU:C:2018:979, paragraph 36 and the case-law cited).