

## CASE NOTES

# The CJEU as a Guarantor of Judicial Independence in the EU?

## An Analysis of Case C-564/19, IS\*

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### Abstract

*The recent Hungarian C-564/19 IS (Illegality of the order for reference) case suggests that the interpretation of the principle of judicial independence in EU law precludes the possibility to launch disciplinary proceedings against a judge for submitting a request for preliminary ruling to the CJEU, thereby adding a new angle to the discussion on the substance of Article 47 EU CFR, Article 19 TEU and Article 267 TFEU. The aim of this case note is to shed light on the reasoning of the IS AG's Opinion and the CJEU's judgment, given their possible impact on the Luxembourg and Strasbourg Courts' jurisprudence concerning the 'rule of law backsliding' and the AFSJ. The main argument presented is that the IS judgment may be seen as a further development of the previous CJEU's Associação Sindical dos Juizes Portugueses (ASJP)/Miasto Łowicz lines of cases which perceive the judicial independence of the EU Member States' courts [Article 19(1) TEU] as one of the key guarantees for the enforcement of Union values (Article 2 TEU). Apart from this important premise, the IS judgment evidently reinforced several aspects of the suspect's rights to interpretation and information in criminal proceedings within the meaning of the Interpretation and Translation Directive (2010/64/EU) and the Information Directive (2012/13/EU). Hence, the IS line of reasoning can presumably lead to the formation of 'EU-specific' procedural guarantees in these areas, which may be considered an upgrading of the standards of protection articulated by parallel developments in the ECtHR's case law.*

**Keywords:** judicial independence, rule of law backsliding, CJEU, Directive 2010/64/EU, Directive 2012/13/EU.

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## 1. Introduction

Considering the wave of the preliminary reference requests following the 2016-2018 reforms concerning the Polish judiciary, the CJEU became the key defender of judicial independence in national legal systems – using Article 47 EU CFR and Article 19 TEU as the main legal tools for this intervention.<sup>1</sup> It will be argued that the recent Hungarian *IS (Illegality of the order for reference)* case adds a new angle to the discussion, suggesting an interpretation of the principle of judicial independence in EU law as precluding the possibility to launch disciplinary proceedings against a judge for submitting a request for the CJEU's preliminary ruling (Article 267 TFEU). Moreover, the facts of the case required clarification of the scope of the right to interpretation and information within the context of the ongoing reform of the Area of Freedom, Security and Justice (AFSJ), in particular, the implementation of the so-called Stockholm Roadmap Directives.<sup>2</sup> The aim of this article is to shed light on the reasoning of the AG's Opinion and the CJEU's judgment in *IS*, given their possible impact on the Luxembourg and Strasbourg Courts' jurisprudence concerning the 'rule of law

- 1 Laurent Pech *et al.*, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', *Hague Journal on the Rule of Law*, Vol. 13, 2021, p. 26.
- 2 The adoption of the so-called 'Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings' (Resolution of the Council of 30 November 2009) – later included in the 'Stockholm Program – An open and secure Europe serving and protecting citizens' (The conclusions of the European Council, 10/11 December 2009, EUCO 6/09) – was aimed at increasing the responsibility of the CJEU and the national courts in overseeing the protection of EU *due process* rights and helping individuals enforce their rights in the course of national proceedings. In this sense, see *e.g.* Lorena Bachmaier Winter, 'New Developments in EU Law in the Field of *in Absentia* National Proceedings. The Directive 2016/343/EU in the Light of the ECtHR Case Law', or Stefano Ruggeri, 'Participatory Rights in Criminal Proceedings. A Comparative-Law Analysis from a Human Rights Perspective', in Serena Quattrococo & Stefano Ruggeri (eds.), *Personal Participation in Criminal Proceedings: A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, Springer, 2019. To date, the realization of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings includes the implementation of six basic Directives covering a wide range of procedural rights in criminal proceedings: (i) Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings; (ii) Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings; (iii) Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty; (iv) Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings; (v) Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings; (vi) Directive (EU) 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

backsliding'<sup>3</sup> and the Area of Freedom, Security and Justice (AFSJ). The main argument presented is that the *IS* judgment may be seen as a further development of the CJEU's previous *Associação Sindical dos Juizes Portugueses (ASJP)/Miasto Łowicz* line of cases which perceive the judicial independence of the EU Member States' courts [Article 19(1) TEU] as one of the key guarantees for the enforcement of Union values (Article 2 TEU). Apart from this important premise, the *IS* judgment evidently reinforced several aspects of the suspect's rights for an interpretation and information in criminal proceedings within the meaning of the Interpretation and Translation Directive (Directive 2010/64/EU, Articles 2 and 5) and the Information Directive (Directive 2012/13/EU, Articles 4 and 6). Hence, the *IS* line of reasoning can presumably lead to the formation of *EU-specific procedural guarantees* in these areas, which may be considered an upgrading of the standards of protection articulated by the parallel developments in the ECtHR's case law.

## 2. Background of the Case

The *Criminal proceedings against IS* case originated from the Hungarian criminal proceedings against a Swedish national of Turkish origin, who was arrested in Hungary on 25 August 2015 due to an alleged infringement of the law on firearms and ammunition. While the assistance of a lawyer and an interpreter was requested before questioning, the defense counsel was unable to participate and the accused person (*IS*) was informed through the interpreter of the suspicions against him. Hungary does not have an official register of translators and interpreters to be appointed in criminal proceedings, and there are no formal criteria for the appointment of an *ad hoc* translator or interpreter in criminal proceedings with a cross-border element. Hence, neither the lawyer, nor the court assessing the case are capable of verifying the quality of the interpretation provided within the context of criminal proceedings.<sup>4</sup> The accused person refused to testify because he could not consult his lawyer, and was then released after questioning. An act of prosecution was issued on 26 February 2018 for an alleged

3 Within the given context, this phenomenon – sometimes also referred to as 'systemic deficiencies' – is often defined as the governmental strategy aimed at the weakening the state's internal checks and balances system, and undermining key *rule of law* components (such as the access to justice and judicial review, legal certainty, and transparency). In this sense, see e.g. Kim Lane Scheppelle & Laurent Pech, 'What is Rule of Law Backsliding?', *Verfassungsblog*, 02 March 2018, at <https://verfassungsblog.de/what-is-rule-of-law-backsliding>; Armin von Bogdandy, 'Principles and challenges of a European Doctrine of systemic deficiencies', *MPIL Research Paper No. 2019-14, Vol. 14*, 2019, pp. 10-11; Veronika Bilkova, 'The Council of Europe and the Rule of Law – The Venice Commission', in Stefan Kadelbach & Rainer Hofmann (eds.), *70 Years of Human Rights and the Rule of Law in Europe*, Nomos Verlag, 2021, pp. 130-132; Barbara Grabowska-Moroz & Dimitry Vladimirovich Kochenov, 'EU Rule of Law: The State of Play Following the Debates Surrounding the 2019 Commission's Communication', in Giuliano Amato & Benedetta Barbisan (eds.), *Rule of Law vs Majoritarian Democracy*, Bloomsbury Publishing, 2021, p. 73.

4 Opinion of Advocate General Pikamäe Delivered on 15 April 2021, *Case C-564/19, Criminal proceedings against IS*, ECLI:EU:C:2021:292, paras. 16-17.

infringement of the law on firearms and ammunition. Since the accused currently lives outside Hungary and the summons to appear before the court was returned marked as ‘unclaimed’, the referring court was required under national law to continue proceedings *in absentia*.<sup>5</sup>

In view of the substance of the questions submitted for the CJEU’s preliminary ruling, the broader Hungarian legal and social context shall also be taken into consideration. After the Hungarian judicial reform (2012), the President of the *Országos Bírósági Hivatal* (National Office for the Judiciary, NOJ) obtained broad discretion in deciding on judicial appointments and commencing disciplinary proceedings against judges. A particular example for such appointments was the President of the *Fővárosi Törvényszék* (Budapest High Court) which was an appellate court for the referring court in the *IS* proceedings, namely a single judge at *Pesti Központi Kerületi Bíróság* (Central District Court of Pest).<sup>6</sup> In 2018, a legislative amendment established an additional remuneration of prosecutors, while the rules on the remuneration of judges remained unchanged. Consequently, the salaries of judges were generally lower than those of prosecutors of the same level and with the same grade and duration of service. Nonetheless, the distribution of bonuses and rewards to the Hungarian judges by the NOJ President was also allowed at that point in time.<sup>7</sup>

The single judge of the Central District Court of Pest made a reference for the CJEU’s preliminary ruling (Article 267 TFEU) upon the request of the *IS*’s defense counsel. The Prosecutor General brought an extraordinary appeal before the *Kúria* (Curia of Hungary, *i.e.* the Hungarian Supreme Court) on 19 July 2019, directed against the initial request for a preliminary ruling, which was made possible under Article 668 of the Hungarian Code of Criminal Procedure. The Curia of Hungary held on 10 September 2019 that the initial request for a preliminary ruling was unlawful since the questions referred were presumably irrelevant for the resolution of the dispute. As a consequence of the declaration of illegality, disciplinary proceedings were initiated against the referring judge by the President of the Budapest High Court – which were however terminated on 22 November 2019.<sup>8</sup>

Considering these premises, the Hungarian judge firstly felt it necessary to refer the question to the CJEU as to (i) whether a Member State was obliged to create a register of properly qualified independent translators and interpreters, in order to comply with the requirement of a fair trial stemming from Article 6(1) TEU and Article 5 (‘Quality of the interpretation and translation’) of the Interpretation and Translation Directive. (ii) Secondly, he also found it crucial to clarify whether the NOJ President’s powers in the allocation of cases, the commencement of disciplinary procedures against judges, and the assessment of judges were compatible with the principle of judicial independence as captured by the joint reading of Article 19(1) TEU and Article 47 EU CFR. (iii) Thirdly, the

5 Id. paras. 6, 15.

6 Id. para. 18.

7 Id. paras. 19, 24.

8 Id. paras. 22-23.

referring court asked for the CJEU's interpretation of the latter provisions to explain whether it precludes a situation where, by law, Hungarian judges receive lower remuneration than prosecutors, notwithstanding the fact that they are professionals of the same level and with the same grade and duration of service. (iv) Fourthly, the Central District Court judge submitted a procedural question as to whether a national practice, whereby the court of last instance declares unlawful a decision by which a lower court makes a request for a preliminary ruling, is compatible with the interpretation of Article 267 TFEU. (v) Fifthly, the referring court questioned the compatibility of the disciplinary proceedings brought against a judge for having made a request for a preliminary ruling with the principle of judicial independence, reaffirmed by Article 19(1) TEU and Article 47 EU CFR read in conjunction with Article 267 TFEU.<sup>9</sup>

### 3. Advocate General's Opinion

In his Opinion, Advocate General Pikamäe assessed the Hungarian legislation on the right to interpretation and information in criminal proceedings and on the preliminary reference procedure, in light of the right to an effective remedy and to a fair trial under Article 19 TEU and Article 47 EU CFR, as well as the CJEU's case law on the principles of judicial independence and the primacy of EU Law. In order to analyze the questions submitted by the Central District Court of Pest in accordance with Article 267 TFEU, AG Pikamäe clearly aimed at defining the degree of national judges' discretion in submitting a request for a preliminary ruling. Since the 'rule of law backsliding' context presumably adds a new angle to the ongoing discussion on the substance of judicial independence as a concept of EU law, the facts of the *IS* case shall be interpreted in light of pertinent CJEU's jurisprudence. The earlier *Miasto Łowicz* formula – which was also reiterated in the subsequent *Commission versus Poland (Disciplinary regime for judges)*<sup>10</sup> – where the CJEU underlined that a possibility of the disciplinary proceedings for making a request for a preliminary ruling could discourage the EU Member States' national judges from using the Article 267 TFEU mechanism (*chilling effect*)<sup>11</sup> paved the way to the *IS* findings.<sup>12</sup>

The appraisal of admissibility laid the foundation for the substantive analysis of the questions submitted for the CJEU's preliminary ruling. In light of the introductory remarks, it comes as no surprise that the suggested order of the questions' assessment in the Opinion was the following: the fourth, the first, the

9 Id. para. 24.

10 Judgment of 15 July 2021, *Case C-791/19, Commission v Poland (Disciplinary regime for judges)*, ECLI:EU:C:2021:596. In this sense, see also Laurent Pech, 'Protecting Polish Judges from Political Control: A Brief Analysis of the ECJ's Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)', *Verfassungsblog*, 21 June 2021, at <https://verfassungsblog.de/protecting-polish-judges-from-political-control>.

11 Petra Bárd, 'Jeopardizing Judicial Dialogue is Contrary to EU Law: The AG Opinion in the *IS* case', *Verfassungsblog*, 20 April 2021, at <https://verfassungsblog.de/jeopardizing-judicial-dialogue-is-contrary-to-eu-law>.

12 *Case C-564/19, IS*, AG Opinion, paras. 26-27.

second and third (in conjunction) concluded by an analysis of the fifth question. Importantly, the emphasis was placed on the role of the preliminary reference procedure within the ‘rule of law backsliding’ context, and in particular the Hungarian legislation allowing for the possibility to declare the preliminary ruling request unlawful and to initiate the disciplinary proceedings against the national judges for making such a reference to the Luxembourg Court.<sup>13</sup>

The recourse was made to the reasoning presented in earlier CJEU’s case law, which was summarized in the *Miasto Łowicz* judgment: questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance, and it is only for the CJEU to make decision(s) on their admissibility. At the same time, the preliminary reference procedure of Article 267 TFEU is an instrument of direct cooperation between the CJEU and the national courts, aimed at providing an interpretation of EU law provisions for the effective resolution of the pending dispute. Hence, within the context of the CJEU’s assessment, no general or hypothetical questions shall be considered admissible, but only those necessary to ‘give judgment’ within the meaning of Article 267 TFEU. This implies the requirement of a connecting factor – *either direct or indirect* – between that dispute and the EU law provisions whose interpretation is sought.<sup>14</sup>

Starting with the fourth question, AG Pikamäe suggested to find it admissible considering an *indirect but real link* between the main proceedings and Article 267 TFEU (*Miasto Łowicz*). The fourth question is presented as a procedural issue which must be solved before deciding the case on the merits – contrary to the Hungarian Government’s claim to find the issue irrelevant to the outcome of the main proceedings. The Curia’s judgment declaring the initial order for the preliminary reference to be unlawful was seen as requiring the CJEU’s intervention, as the interpretation of Article 267 TFEU was crucial to choose one of two legal tracks under Hungarian law, namely, deciding the dispute only on the basis of national legislation, or applying EU law to the circumstances of the case.<sup>15</sup>

While turning to the substantive analysis of the fourth question submitted by the Pest court, the Advocate General shed light on the possibility of extraordinary appeals (or the ‘*appeals in the interests of the law*’) following the request of the national court for a preliminary ruling. The importance of a free dialogue between independent national courts and the CJEU was underlined in four points. (i) Firstly, the preliminary ruling system remains a key tool to guarantee the uniform application of EU law within the context of the Union’s multilevel judicial system (Article 19 TEU). The system created by Article 267 TFEU does not frame a triangular relationship, but rather creates a link between the national court(s) and the CJEU, since the EU legislator has not intended other courts to participate in this construct.<sup>16</sup> (ii) Secondly, the EU law principle of

13 Id. paras. 27-30.

14 Id. paras. 32-33.

15 Id. paras. 34-39.

16 Id. paras. 44-47.



effectiveness would presumably be questioned if the appeal system under national law (even in case of the highest national court) could limit the discretion of national judges to forward preliminary reference requests under Article 267 TFEU.<sup>17</sup> (iii) Thirdly, considering the *erga omnes* legal force of the CJEU's judgments – comprising ones given in the preliminary ruling proceedings – the Curia's final declaration of unlawfulness under national law of an order for such a ruling made prior to the substantive decision in the main proceedings potentially undermines the *primacy* of EU law.<sup>18</sup> (iv) Fourthly, the national courts not only have the power to apply EU law, but also have the power to disapply the conflicting provisions of national legislation.<sup>19</sup>

After having examined the issue of the Curia's extraordinary appeal, AG Pikamäe moved to the analysis of the first question, which formed the core of the original criminal proceedings against *IS* at the Hungarian court. It should be mentioned that the AG proposed to broaden the scope of the originally submitted question(s), proposing to focus on the systemic interpretation of the provisions of the Interpretation and Translation Directive, the Information Directive and the Presumption of innocence Directive (Directive 2016/343/EU) in conjunction with Article 47 EU CFR ('Right to an effective remedy and to a fair trial'). Since the criminal proceedings *in absentia* were pending and gave rise to several questions clearly connected to the application of the Interpretation and Translation Directive and the Information Directive, the CJEU's response was considered to be crucial for deciding the case on the merits. Hence, this question cannot be considered irrelevant or hypothetical, having no relation to the case facts, and shall thus be admissible.<sup>20</sup>

The Advocate General focused on the first part of the question, concerning the scope of the EU Member States' obligation to create a register of properly qualified independent translators and interpreters, in order to comply with the requirements of Article 2 'Right to interpretation', Article 3 'Right to translation of essential documents' and Article 5 'Quality of the interpretation and translation' of the Interpretation and Translation Directive. He reiterated that linguistic assistance in criminal proceedings shall be provided both in the form of oral interpretation and the written translation of certain essential documents, shall be free and of 'adequate' quality, sufficient to safeguard the fairness of the proceedings.<sup>21</sup>

The benchmark for the assessment of the interpretation and translation of the 'sufficient quality' is established by Article 5(1) of Directive 2010/64/EU which – read in conjunction with Article 2(8) and Article 3(9) of that Directive – requires that the suspected or accused persons shall (i) have knowledge of the case against them, and (ii) to exercise their rights of defense. At the same time, AG Pikamäe acknowledged that the EU Member States had broad discretion in

17 Id. paras. 48.

18 Id. paras. 49-50.

19 Id. para. 51.

20 Id. paras. 53-55.

21 Id. paras. 59-62.

means of guaranteeing this quality of linguistic assistance. While Article 5(2) of Directive 2010/64/EU clearly encourages the Member States' authorities to create the 'register or registers of independent translators and interpreters who are appropriately qualified', the existence of such a register cannot be considered mandatory. However, a procedural law framework shall be created for the quality control of interpretation and translation in the criminal procedure, comprising the possibility to complain that the quality of interpretation provided was not sufficient [Article 2(5) and Article 3(5) of Directive 2010/64/EU].<sup>22</sup>

Advocate General then moved to the second part of the first question, attempting to discuss the possibility of *in absentia* proceedings against an accused person (i) who does not speak or understand the language of the criminal proceedings and (ii) who cannot be established to have been informed of the suspicions or accusation against him or her (iii) owing to a lack of adequate interpretation – in view of holistic interpretation of Directives 2010/64, 2012/13 and 2016/343, in conjunction with Article 47 of the EU Charter. He underlined that the legal constructs of Article 1 'Subject matter', Article 3 'Right to information about rights' and Article 6 'Right to information about the accusation' of the Information Directive 2012/13 captured two separate rights of suspects or accused persons, namely the right to be informed of their procedural rights and the right to information about the accusation as such. He also noted that the applicable provisions of the Presumption of Innocence Directive 2016/343 (Article 1 'Subject matter' and Article 8 'Right to be present at the trial') established the following conditions for the substantive assessment of guilt or innocence in *in absentia* trials: (i) the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance or (ii) alternatively, they are represented by a mandated lawyer, having been informed of the trial.<sup>23</sup>

Thus, AG Pikamäe did not seem to discard completely the possibility for the EU Member States to remedy a breach of the right to information about the accusation during the investigation stage during a subsequent *in absentia* trial, even in light of Article 47 EU CFR guarantees. He noted however that the disclosure of detailed information on the charges shall take place *no later* than when the hearing of the argument on the merits begins (*Kolev and Others*).<sup>24</sup> Moreover, the adversarial principle and the principle of equality of arms require that the accused and/or his defense counsel shall be provided with sufficient time to become acquainted with that information, in order to enable a suspected/accused person or, alternatively, his lawyer to effectively prepare the defense. This requirement allows that, in case of necessity, such (*in absentia*) proceedings can be stayed, with the case hearing being postponed to a subsequent date (*Moro*).<sup>25</sup>

22 Id. paras. 63-66.

23 Id. paras. 67-76.

24 Id. para. 80-81.

25 Id. para. 82.



Further, the Advocate General approached the second (NOJ President's powers) and third (judges' remuneration) questions in conjunction. Since general or hypothetical questions are directly excluded from the scope of Article 267 TFEU, only relevant questions shall be answered by the CJEU within the framework of the preliminary reference procedure. The *IS* case concerns an *in absentia* trial within the context of the application of the Interpretation and Translation Directive), the Information Directive and the Presumption of Innocence Directive. Hence, the questions concerning the peculiarities of the Hungarian judicial system – such as the remuneration scales and appointment of members of the judiciary – are of a general nature and shall be considered inadmissible.<sup>26</sup>

Finally, he elaborated on the fifth question concerning the possibility of initiating disciplinary proceedings against judges for making a request for a preliminary ruling. Since the said disciplinary procedure has already been discontinued, the fifth question was rendered hypothetical and irrelevant for the solving of the *IS* case – at least from a purely legal point of view.<sup>27</sup> However, AG Pikamäe suggested the second line of reasoning allowing for finding the fifth question admissible – by considering the fourth and fifth questions as an indivisible whole.

Referring to the *Miasto Łowicz* premises, he underlined that even the mere existence of a possibility of bringing disciplinary procedures against a judge for making a preliminary ruling request could be seen as grounds for the CJEU's prevention of any recurrence of actions of this type. The suggestion was therefore made for a corresponding reformulation,<sup>28</sup> in order to apply the '*procedural questions of national law*' (*Miasto Łowicz*) approach which allows for a significant degree of flexibility in the interpretation of Article 267 TFEU. Within the margin allowed for this approach, the conditions for continuing the main criminal proceedings – such as the possible disciplinary investigation against the referring judge even if it does not relate to the substantive resolution of the dispute – may be considered such a question.<sup>29</sup>

#### 4. The Judgment of the CJEU

The *IS* judgment seems to have adopted a less straightforward approach than the AG Pikamäe Opinion, while *generally following the key suggestions of the Advocate General*. It is quite interesting that the AG Opinion's human rights-based argument primarily revolves around Articles 47-48 EU CFR – both in the sections containing the analysis of the matters related to the peculiarities of the Hungarian judicial system and the scope of application of the Stockholm Roadmap Directives' procedural rights. As far as the first question is concerned, the CJEU's judgment places a strong emphasis on the correspondence between

26 Id. paras. 85-92.

27 Id. paras. 93-97.

28 Id. para. 98.

29 Id. paras. 98-100.

the standard of protection afforded by the EU CFR and the one articulated by the ECHR. Meanwhile it approaches the substance of other questions related to the various aspects of judicial independence under EU law primarily through the lens of Article 47 EU CFR and/or Article 267 TFEU. The CJEU starts the analysis from the fourth and the fifth question, then moves to the first one, to then conduct the admissibility assessment of the second and third question (read in conjunction).

The request for an expedited procedure submitted by the referring judge was declined by the Luxembourg judges, since this route is reserved only for matters of exceptional urgency. The disciplinary investigation against the referring judge was withdrawn during the preliminary reference proceedings, and the case did not involve an individual deprived or subjected to deprivation of liberty. Moreover, the sensitive and complex issues raised by the *IS* case required a thorough and detailed analysis, which could not be conducted properly in course of an requested expedited procedure.<sup>30</sup>

The Grand Chamber, first, reformulated the fourth question, having made a special emphasis on the principle of the *primacy* of EU Law as a possible ground for the national court to disregard a decision of the supreme court declaring unlawful a request for the CJEU's preliminary ruling made by that lower court. The Luxembourg judges underlined the gravity of possible consequences of the Curia decision for the development of the *IS* proceedings, as the referring judge still had to make further decisions concerning the relaunch of the proceedings and the willingness to maintain the questions submitted for a preliminary ruling.<sup>31</sup>

After noting that Article 267 TFEU remains a keystone of the EU judicial system established by the Treaties, the CJEU stated that the effectiveness of EU law would be questioned if an appeal to the Curia would *de facto* limit the discretion of the lower court – which was clearly precluded by the earlier *Melki/Abdeli* case law. The CJEU also underlined that if the pending preliminary reference request is not answered properly, this Curia precedent could become typical for the Hungarian legal system. The Grand Chamber judges also noted that this would be contrary to the *Van Gend en Loos* '*vigilance of the EU individual*' approach – and would hence undermine the principle of the *primacy* of EU law – a situation for which even the national constitutional provisions cannot serve as an acceptable justification. Hence, the CJEU concluded that the *primacy of EU law requires a lower court to disregard a decision of the supreme court of the Member State* in question, and the provisions of national law which undermine the *effectiveness* of Article 267 TFEU shall be set aside.<sup>32</sup>

The CJEU followed the suggestions of AG Pikamäe and found the fifth question admissible after the proposed reformulation. Thus, the Grand Chamber addressed the question whether the referring judge would still be able to refrain

30 Judgment of 23 November 2021, *Case C-564/19, Criminal proceedings against IS (Illegality of the order for reference)*, ECLI:EU:C:2021:949, paras. 52-56.

31 *Id.* paras. 58-66.

32 *Id.* paras. 67-82.

from complying with the Curia decision when solving the dispute in the main proceedings without having to be concerned about the reopening of the disciplinary proceedings that were brought against him (for submitting the request for a preliminary ruling).<sup>33</sup> Therefore, the referring judge is faced with a procedural obstacle, arising from the application of national legislation against him, which he must address before solving the main case on the merits without external interference. While underlining the crucial significance of the *external* aspect of judicial independence in EU law, the CJEU made reference to Article 47 EU CFR and the earlier *Governo della Repubblica italiana* and *Miasto Łowicz* cases. At the same time, the Grand Chamber judges prominently made a distinction from *Miasto Łowicz* where the similar issue had not been discussed substantively.<sup>34</sup>

Despite the strong message sent on admissibility, the substantive analysis seems to be rather brief. The CJEU skipped the direct analysis of the combined reading of Article 19 TEU, Article 47 EU CFR and Article 267 TFEU (just like in the original question submitted), and – since the *Miasto Łowicz* ‘procedural questions’ approach was chosen – preferred to examine the matter only in light of Article 267 TFEU. The EU Member State judges are responsible for the application of EU law, comprising the effective exercise of their discretion to make a reference to the CJEU. Therefore, any provision of national law exposing national judges to disciplinary proceedings for making such request are disallowed for undermining their role as judges responsible for the application of EU law on the national level (*Miasto Łowicz, Commission versus Poland/Disciplinary regime for judges*). Such disciplinary proceedings are capable of discouraging all national courts from making Article 267 references, which in itself could jeopardize the uniform application of EU law. Thus, the construct of Article 267 TFEU as such comprises the guarantee to be free from any disciplinary proceedings for making the preliminary reference request to the CJEU.<sup>35</sup>

The CJEU then turned to the scope of the EU Member States’ discretion in creating a register of qualified translators and interpreters and the obligation to control the quality of language interpretation in criminal proceedings, which gave rise to the dispute pending before the national court. The Grand Chamber had no issue with finding the first question admissible, since the main proceedings concerned an investigation in the course of which the accused person had been questioned by the police in the presence of a Swedish-language interpreter and without the assistance of a lawyer, which was therefore clearly related to the application of the Interpretation and Translation Directive and Information Directive.

During the course of the national trial, the issue of the possibility of continuing criminal proceedings *in absentia* arose, hence the CJEU’s answer was obviously necessary for the resolution of the dispute in the main proceedings.<sup>36</sup>

33 Id. paras. 83-85.

34 Id. paras. 86-88.

35 Id. paras. 89-93.

36 Id. paras. 94-97.

However, the Luxembourg judges found Article 6(1) TEU – apart from the general reference to the EU CFR – irrelevant for answering the first question. Hence, the issue was solved solely on the basis of the pertinent Charter provisions. In particular, the CJEU took recourse to Article 48 EU CFR ('Presumption of innocence and right of defense') and underlined the pre-eminence of the scope and standard of protection under the ECHR [Article 52(3) EU CFR] in the case of the corresponding rights, namely Articles 6(2) and (3) ECHR.<sup>37</sup>

In light of these premises, the Grand Chamber then reformulated the first part of the question in order to establish whether Article 5 of Directive 2010/64 creates an obligation (i) to create a register of independent translators and interpreters and (ii) to establish procedural mechanisms to review the quality of the interpretation in criminal proceedings. The Directive's objectives and the legal context shall be considered for interpretation (*Surmačs, DHL Express*), as well as the fact that this EU law instrument lays down *common minimum rules*, with a wide margin of discretion granted to the EU Member States in their implementation. Article 5(2) of the Interpretation and Translation Directive ('Member States shall endeavor to establish a register or registers') presents the creation of a register of independent translators or interpreters as the desirable situation and the mean to ensure the 'sufficient quality' of interpretation provided. However, the Directive's wording ('*endeavor*') does not create a (directly effective) obligation to achieve a certain result, therefore, the establishment of such a register cannot be regarded as a requirement towards the EU Member States.<sup>38</sup>

Nevertheless, the State shall still adopt '*concrete measures*' to ensure the '*sufficient quality*' of interpretation, and a complaint procedure shall be established to control the quality of the translation provided in accordance with Article 5 of the Interpretation and Translation Directive. This statement was supported by reference to the earlier CJEU's case law which clarified that the '*sufficient quality*' of interpretation meant that the suspected or accused persons were provided with the sufficient information on the charges, putting them into a position where they could arrange for defense (*Covaci*).<sup>39</sup> Furthermore, the Strasbourg Court's case law also provided empirical backing to the CJEU's reasoning: the requirements relating to a fair trial stemming from Article 6 ECHR comprise not only the interpreter's appointment but the subsequent control over the interpretation quality as well (*Hermi, Knox*).<sup>40</sup> While it is still for the Member States to take concrete measures to comply with the abovementioned criteria, it is crucial that the national judges are provided with sufficient information on the interpreters' selection and appointment procedures in order to conduct the required assessment.<sup>41</sup>

37 Id. paras. 98-101.

38 Id. paras. 103-106.

39 Id. para. 113.

40 Id. para. 114.

41 Id. paras. 115-117.

With regard to the second part of the question, the Grand Chamber aimed to clarify whether – in the absence of a register of interpreters, and when it is impossible to verify if the suspect or accused person has been informed of the suspicions or accusation against him or her – the combined reading of Articles 4(5), 6(1) of Information Directive and Article 48(2) EU CFR precludes the continuation of the criminal proceedings *in absentia*.<sup>42</sup> The Grand Chamber judges, again, demonstrated the loyalty to the ECHR standards of protection and referred to Article 6(1)-(3) ECHR which require that the information on the nature and cause of the accusation shall be delivered in the language the accused or suspected person understands (*Pélissier/Sassi, Sejdic, Simeonovi*).<sup>43</sup>

The Grand Chamber judges underlined that providing full, detailed information concerning the charges and procedural rights was crucial for the effective realization of the accused's right to prepare their defense, and thus for the compliance with the Information Directive requirements. In accordance with Articles 4 'Letter of Rights on arrest' and 6 'Right to information about the accusation' of Directive 2012/13, the accused or suspected persons shall be provided with both oral interpretation without delay and the written translation of essential documents – as a minimum, in the form of a 'Letter of Rights' in a language that they understand (Article 4). While the Information Directive does not establish an exact procedure for providing information on the criminal charge, the EU legislators underline that it shall be done *promptly* and in sufficient detail to enable the suspect/accused person to exercise defense rights effectively (Article 6).<sup>44</sup>

The CJEU addressed this construct from the perspective of an *in absentia* trial situation: if the quality of interpretation/translation was not appropriate and the substance of charge was not communicated (which is for the national court to verify), the *in absentia* proceedings would infringe the right to a fair trial and – at the later date – be contrary to the objectives of Article 6 of the Information Directive. In order to provide additional backing to this conclusion, the CJEU took recourse to Articles 8 'Right to be present at the trial' and 9 'Right to a new trial' of the Presumption of Innocence Directive. These provisions make an *in absentia* trial possible only in case the suspected/accused persons were informed of the trial and the consequences of non-appearance in due time – with the possibility of a new trial, or an access to other legal remedy, allowing a new determination of the merits of the case if these conditions were not met. In light of this systemic approach to the Stockholm Roadmap Directive, the trial *in absentia* in the given case would potentially constitute an infringement not only of the Interpretation and Translation Directive [Article 2(5)] and of the Information Directive [Articles 4(5) and 6(1)], but of Article 8(2) of the Presumption of Innocence Directive as well.<sup>45</sup>

42 Id. para. 118.

43 Id. paras. 121-122.

44 Id. paras. 125-128.

45 Id. paras. 129-137.

Finally, the CJEU considered the second and third questions in conjunction, finding both of them inadmissible. The Grand Chamber judges followed the AG Opinion's reasoning and underlined that only the questions which were necessary to allow the national court to give a judgment in the case should be considered. With reference to the *Miasto Łowicz* formula, the CJEU elaborated on the lack of a connecting factor between the dispute in the main proceedings and EU law.<sup>46</sup> Since the dispute pending before the national court did not concern the Hungarian judicial system as a whole, a material connection between the substance of the main proceedings and Article 47 EU CFR and – more broadly – Article 19 TEU was not sufficient. The *Miasto Łowicz* 'procedural questions of national law' criterion was not applied either, since the interpretation of Article 19 TEU and Article 47 EU CFR was not required to enable the referring national court to rule on the substance of the *IS* pending dispute.<sup>47</sup>

## 5. Comments

The judgment of the CJEU in *Criminal proceedings against IS* raises many interesting questions, especially with respect to the CJEU's increasing role in framing the guarantees of judicial independence within the EU Member States' legal systems. Moreover, the *IS* judgment sheds light on several aspects of the right to information and interpretation in criminal proceedings, which could be of importance for the implementation of the Interpretation and Translation Directive, the Information Directive and the Presumption of Innocence Directive. This comment first addresses the CJEU's interpretation of Article 267 TFEU, whereby the supreme courts of the EU Member States are precluded from declaring a request of the national courts for a preliminary ruling unlawful (Section 5.1). After discussing the Grand Chamber's approach to the disciplinary proceedings against the national judges for submitting such a request (Section 5.2), it will examine the potential significance of the *IS* outcomes for the further development of the CJEU's jurisprudence on the Stockholm Roadmap Directives (Section 5.3).

### 5.1. (Further) Limiting the Procedural Autonomy of the EU Member States?

Before moving to the substantive analysis of the Grand Chamber approach to the fourth question submitted by the Central District Court of Pest, one shall shed light on the broader context of the case, namely the earlier Luxembourg Court's case law on national remedies 'sufficient to ensure effective legal protection in the fields covered by Union law' [Article 19(1) TEU] and the newly formed body of the CJEU/ECtHR 'rule of law backsliding' jurisprudence. Early CJEU's case law, through the *direct effect* and *primacy* doctrines, created a two-level system of EU law adjudication with the CJEU and the EU Member States courts, acting as an integral part of the EU legal system (*Foto-Frost*).<sup>48</sup> In *Van Gend en Loos*, the CJEU

46 Id. paras. 139-143.

47 Id. paras. 144-147.

48 Judgment of 22 October 1987, *Case C-314/85, Foto-Frost*, ECLI:EU:C:1987:452, para. 16.



was concerned that a different outcome ‘would remove all direct legal protection’ of the individual rights of the Union’s nationals:

“[t]here is the risk that recourse to the procedure under [EU law] would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty”.<sup>49</sup>

In accordance with Article 19(1) TEU, it is for the national courts – and therefore not in principle for the EU – to provide ‘remedies sufficient to ensure effective legal protection in the fields covered by Union law’. Indeed, as the CJEU famously put in *Rewe*, in the absence of Union rules, it was for the domestic legal systems to designate courts with jurisdiction and to lay down procedural rules governing actions before those courts (*national procedural autonomy*)<sup>50</sup> for the purpose of safeguarding the rights stemming from EU law, provided that the rules are no less favorable than those governing similar domestic actions (*equivalence*), and do not render virtually impossible or excessively difficult the exercise of rights conferred by EU law (*effectiveness*).<sup>51</sup>

The model of decentralized judicial review chosen by the Union favored the development of the ‘EU-specific’ principle of effective judicial protection (review) fulfilling the two-fold task of: (i) the effective protection of the rights of individuals stemming from EU law and (ii) the effective enforcement of EU law within national legal systems.<sup>52</sup> In view of these premises, the issue of remedies before national courts within the CJEU’s jurisprudence was traditionally addressed from two perspectives, namely the principle of effective judicial protection (the *Johnston* case law) and the *Rewe effectiveness*. The *Johnston* line of reasoning found its origins in Articles 6 and 13 ECHR and gave rise to the cluster of procedural guarantees enhancing individuals’ access to the national courts acting within the scope of EU law.<sup>53</sup> On the contrary, the *Rewe effectiveness* jurisprudence was formulated negatively, fulfilling the task of precluding EU Member States from introducing laws that make the exercise of rights under EU law ‘excessively difficult’.<sup>54</sup>

It will be argued that the *IS* case significantly develops the *Rewe* line of reasoning: both AG Pikamäe and the Grand Chamber judges built the analysis

49 Eyal Benvenisti & George Downs, ‘The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions’, *European Journal of International Law*, Vol. 25, Issue 1, 2014, p. 86.

50 Judgment of 16 December 1976, *Case C-33/76, Rewe-Zentralfinanz*, ECLI:EU:C:1976:188, para. 5. Diana-Urania Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the ‘Functionalized Procedural Competence’ of EU Member States*, Springer, 2010, pp. 1-8.

51 Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Bloomsbury Publishing, 2013, p. 228.

52 Christoph Görisch, ‘Effective Legal Protection in the European Legal Order’, in Zoltán Sente & Konrad Lachmayer (eds.), *The Principle of Effective Legal Protection in Administrative Law: A European Perspective*, Routledge, 2016, pp. 29-33.

53 Monica Claes, *The National Courts’ Mandate in the European Constitution*, Hart, 2006, p. 138.

54 Judgment of 5 March 1996, *Joined Cases C-46/93 and C-48/93, Brasserie du Pêcheur*, ECLI:EU:C:1996:79, para. 83.

primarily around *effectiveness*-related arguments. Comparing the Opinion with the judgment, the main difference that stands out is that the Advocate General approached the issue of admissibility primarily from the perspective of the ‘indirect but real link’ between the main proceedings and Article 267 TFEU (*A.K. and Others*), enabling the national judge to resolve ‘a procedural question of national law’ before being able to rule on the substance of the main case before him (*Miasto Łowicz*).<sup>55</sup> By contrast, the CJEU primarily examined the admissibility of the fourth question in light of the more traditional ‘*relevance*’ (*Omni Metal Service, Openbaar Ministerie*) and seemed to avoid references to the ‘*backsliding*’ Polish jurisprudence, presumably due to the sensitivity of the matter. At the same time, the Grand Chamber judges emphasized that the CJEU’s answer was crucial not only for the development of the main proceedings, but also for the referring judge’s decision on whether or not to maintain his questions submitted for a preliminary ruling.<sup>56</sup>

While the judgment’s reasoning reflected four main points made by the Advocate General, with the analysis revolving primarily around the principle of the *primacy* of EU law and the (ensuing) *effectiveness* principle, the references to the case law providing empirical backing to the conclusions seem to be quite different. The Grand Chamber judges took recourse to the premises of *Opinion 2/13* (*the keystone of the judicial system established by the Treaties*)<sup>57</sup> and – with an additional reference to the recent *A.B. and others* case – underlined that Article 267 TFEU had established a direct system of cooperation between the EU Member States’ courts and the CJEU, in order to enable the national judges to ensure the consistency of EU law, its full effect and its autonomy.<sup>58</sup> Mirroring *PFE* – one of the cases concerning the concept of ‘court or tribunal’ within the meaning of Article 267 TFEU<sup>59</sup> – the Luxembourg judges emphasized the wide discretion of ordinary national courts in referring questions to the CJEU, and the importance of the obligation for the courts of last resort to make such references.<sup>60</sup>

The CJEU underlined that even though Article 267 TFEU did not exclude the possibility for the reference to be subject to the national remedies (*Cartesio*),<sup>61</sup> the possible outcome of the national practice of declaring requests for preliminary ruling unlawful could have the effect of discouraging national courts from making such requests, and, as a consequence, undermining the *effectiveness* of EU law (*Melki and Abdeli*).<sup>62</sup> Therefore, the Grand Chamber elaborated on the so-called ‘*chilling effect*’ concept, which, following *Miasto Łowicz/Commission versus Hungary* (*Transparency of Associations*) has given a new impetus to the

55 *Case C-564/19, IS*, AG Opinion, paras. 39, 98-100.

56 *Case C-564/19, IS*, judgment, paras. 58-66.

57 *Id.* para. 72.

58 *Id.* para. 64.

59 Sacha Prechal, ‘The Many Formations of the Court of Justice: 15 Years After Nice’, *Fordham International Law Journal*, Vol. 39, Issue 5, 2016, p. 1282.

60 *Case C-564/19, IS*, judgment, paras. 68-70.

61 *Id.* para. 72.

62 *Id.* para. 73.

Luxembourg Court's 'EU values' jurisprudence.<sup>63</sup> Within the given context, this doctrine is understood as the 'national measures which are adopted and/or applied with the aim to dissuade natural persons from fulfilling their professional obligations' related to EU law (in this case, the EU Member States' judges) and shall therefore be precluded by EU law.<sup>64</sup>

The CJEU thus connected the *Van Gend en Loos* 'vigilance of individuals' premise with the limitations on the exercise by national courts of the discretion conferred upon them by Article 267 TFEU, which would potentially (i) restrict the *effective judicial protection* of the rights deriving from EU law and (ii) the *effectiveness* of cooperation established by the preliminary ruling mechanism (*Ognyanov*). The reference to *Ognyanov* may possibly indicate a potential welcoming of further *strategical* requests for preliminary references on national rules undermining the effectiveness of the preliminary reference system established by the EU Treaties.<sup>65</sup> The further sequence of the judgment seems to confirm this idea, for apart from elaborating on the key CJEU's primacy cases (*Van Gend en Loos*, *Cartesio*, *Melki*) the Grand Chamber judges also incorporated the very recent jurisprudence on the issues of judicial independence in Romania (*Asociația 'Forumul Judecătorilor din România'*).<sup>66</sup>

Finally, the strong statement was made by the Grand Chamber, namely the new obligation of the EU Member State courts to *disregard* the decision of the national supreme court declaring unlawful the request for a preliminary ruling submitted to the CJEU under Article 267 TFEU by a lower court. This finding derived from the principle of EU law *primacy*, and seems to reflect the ongoing judicial dialogue between the two European Courts and the Polish Constitutional Tribunal. It should be mentioned here that the legitimacy of the latter court was recently questioned by both the CJEU (*A.B. and others*) and the ECtHR (*Xero Flor*).

In *A.B. and others* the Grand Chamber judges emphasized that "*maintaining ... independence is essential [for the national courts] as confirmed by the second paragraph of Article 47 [EU Charter of Fundamental Rights]*", so they could realize the principle of effective judicial protection of the rights stemming from EU law. Therefore, the CJEU used the principle of *primacy* of EU law as a tool to set aside a decision of the Polish Constitutional Tribunal, which *de facto* limited the discretion of the national courts in submitting requests for preliminary rulings. This underlined that the abovementioned principle is binding on all the bodies of the Member States, and even the reliance on the constitutional provisions cannot

63 Laurent Pech, *The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU*, Open Society European Policy Institute, 2021, p. 2.

64 Id. pp. 4-6.

65 Jesse Claassen, 'Assessing the strategic use of the EU Preliminary Ruling Procedure by National Courts', in Alicia Köppen et al. (eds.), *Cynical International Law? Abuse and Circumvention in Public International and European Law*, Springer, Berlin, Heidelberg, 2020, p. 181.

66 Case C-564/19, IS, judgment, paras. 78-79.

prevent that.<sup>67</sup> In *Xero Flor*, the Strasbourg judges described the independence and impartiality of the court members (*'very close interrelationship'*) as one of the key components of the notion of *'court or tribunal'* within the meaning of Article 6 ECHR.<sup>68</sup> Consequently, a violation of the right to a fair trial was established, since the breaches in the procedure for electing three judges of the Constitutional Tribunal were of such gravity as to undermine the very essence of the right to a *'tribunal established by law'*, with no remedies available.<sup>69</sup>

The Polish Constitutional Tribunal responded to these statements in its K3/21 judgment (7 October 2021), aimed at examining the conformity of several provisions of the TEU with the Polish Constitution.<sup>70</sup> The Tribunal judges found that Article 1 TEU (*competences*) in conjunction with Article 4(3) TEU (*the principle of sincere cooperation*), and Article 19 TEU (*the principle of effective judicial review*) are incompatible with the Constitution of the Republic of Poland seeing that the CJEU uses these provisions to review the various aspects of national judicial independence, in particular the procedures for the judicial appointments (pertaining to the powers of the President of the Republic of Poland as well of the National Council of the Judiciary).<sup>71</sup>

Hence, the subsequent *IS* judgment seems to respond to the arguments in K3/21, claiming the EU's authority in guaranteeing judicial independence in the EU Member States. Given that the national judges are acting within the scope of EU law, the CJEU relies on the *primacy* of EU law and the ensuing *Rewe effectiveness* as bases for this interference. At the same time, insofar as the Grand Chamber judges found the second and third questions inadmissible (concerning, among other issues, the powers of the Hungarian National Office for the Judiciary in judicial appointments), the *IS* ruling also defines the limits for possible EU intervention in the traditional area of national procedural autonomy, namely the organization of the Member States' judicial systems.

## 5.2. Disciplinary Investigations against Judges and the Preliminary Ruling Procedure

The status as a court or tribunal is perceived by the CJEU as 'a self-standing concept of EU law',<sup>72</sup> since the CJEU systematically interprets any reference to these notions in light of Article 267 TFEU (*i.e.* a body authorized to submit a

67 Judgment of 2 March 2021, *Case C-824/18, A.B. and others*, ECLI:EU:C:2021:153, paras. 140-150. In this sense, see e.g. Marcjanna Dębska *et al.*, 'You Cannot Change the Rules in the Middle of the Game' – An Unconventional Chapter in the Rule of Law Saga (Case C-824/18, *A.B. and others v. the KRS*), at <https://europeanlawblog.eu/2021/04/22/you-cannot-change-the-rules-in-the-middle-of-the-game-an-unconventional-chapter-in-the-rule-of-law-saga-case-c-824-18-a-b-and-others-v-the-krs>.

68 ECtHR, *Xero Flor w Polsce sp. Zoo. v. Poland*, No. 4907/18, 7 May 2021, para. 247.

69 *Id.* paras. 288-291.

70 Polish Constitutional Tribunal, Decision K 3/21, 7 October 2021, at <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

71 *Id.* para. 3.

72 Information note No. 2009/C 297/01 on references from national courts for a preliminary ruling, para. 9.

request for a preliminary ruling).<sup>73</sup> Hence, the notion of judicial independence could appear in the CJEU's case law on the admissibility of the national body – not formally belonging to the judicial system of the EU Member State – to the preliminary reference system.<sup>74</sup> The independence of the national judiciary as such has not been questioned by the Luxembourg Court for a long time since, from the 1970s, all the EU Member States remained simultaneously ECHR signatories and were bound by the Strasbourg standards of protection in this area.<sup>75</sup>

Indeed, the ECtHR's early jurisprudence in this area was rather profound, with properly conducted disciplinary proceedings as one of the key components of judicial independence within the system of the administration of justice ('*internal independence*'),<sup>76</sup> finding Article 6(1) ECHR ('*civil limb*') guarantees applicable in this category of cases.<sup>77</sup> According to the Strasbourg Court, disciplinary proceedings against judges shall be conducted with a high degree of care, due to the gravity of the possible consequences for the individual judges and their careers and for society in general, as the public confidence in the functioning of the judiciary is at stake while "*in a democratic State, this confidence guarantees the very existence of the [rule of law]*."<sup>78</sup> The Strasbourg Court also responded to the reform of the Polish judiciary with a series of judgments elaborating on the standard of protection afforded by Article 6 ECHR in these cases, addressing the issue of disciplinary proceedings against judges either directly or indirectly (*Reczkowicz*,<sup>79</sup> *Dolińska-Ficek/Ozimek*,<sup>80</sup> *Grzęda*).<sup>81</sup>

The '*rule of law backsliding*' has given a new impetus to the CJEU's jurisprudence in this area as well: in *ASJP*, the Luxembourg judges demonstrated a clear intention to consider the judicial independence of the EU Member States' courts [Article 19(1) TEU] as one of the key guarantees of Union values (Article 2 TEU).<sup>82</sup> In order to justify this intervention and the development of an EU-specific principle of effective judicial review, the Luxembourg Court referred to the EU Member States courts competence to apply and/or interpret EU law, and

73 Judgment of 19 September 2006, *Case C-506/04, Wilson*, ECLI:EU:C:2006:587, paras. 51-62.

74 Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU', *German Law Journal*, Vol. 21, Special Issue 1, 2020, p. 30.

75 Laurent Pech & Angela Ward, 'Effective Judicial Remedies before the Court of Justice', in Steve Peers *et al.* (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, 2014, p. 1251.

76 Joost Sillen, 'The concept of 'internal judicial independence' in the case law of the European Court of Human Rights', *European Constitutional Law Review*, Vol. 15, Issue 1, 2019, pp. 104-106. In this sense, see ECtHR, *Parlov-Tkalčić v Croatia*, No. 24810/06, 22 December 2009, para. 86; ECtHR, *Agrokompleks v Ukraine*, No. 23465/03, 6 October 2011, para. 137; ECtHR, *Moiseyev v Russia*, No. 62936/00, 9 October 2008, para. 182.

77 ECtHR, *Olujić v Croatia*, No. 22330/05, 5 February 2009, paras. 39-44.

78 ECtHR, *Ramos Nunes de Carvalho e Sá v Portugal*, Nos. 55391/13, 57728/13 and 74041/13, 6 November 2018, para. 196.

79 ECtHR, *Reczkowicz v Poland*, No. 43447/19, 22 July 2021.

80 ECtHR, *Dolińska-Ficek and Ozimek v Poland*, Nos. 49868/19 and 57511/19, 8 November 2021.

81 ECtHR, *Grzęda v Poland*, No. 43572/18, 15 March 2022.

82 Judgment of 27 February 2018, *Case C-64/16, Associação Sindical dos Juizes Portugueses*, ECLI:EU:C:2018:117, paras. 32-35.

the deriving right (or duty) to submit requests for the CJEU's preliminary rulings (Article 267 TFEU).<sup>83</sup> The similar reasoning prominently appeared in the subsequent Polish *Miasto Łowicz* and *Commission versus Poland (Disciplinary regime for judges)* cases where the CJEU approached Article 19 TEU and Article 267 TFEU within the context of the possibility of initiating disciplinary proceedings against national judges for submitting a request for the CJEU's preliminary ruling.

In *Miasto Łowicz*, the CJEU found the questions of two Polish judges inadmissible, as the answer would not have had any impact on the solution of the dispute in the main proceedings and the disciplinary investigations had already been closed. However, it was the first occasion where the CJEU underlined that, considering the crucial importance of the effective exercise of the discretion granted by Article 267 TFEU, the

“provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot therefore be permitted.”<sup>84</sup>

The Luxembourg Court also attempted to extend the scope of the Article 267 TFEU application by incorporating the ‘procedural questions of national law’ clause, in order to render admissible those preliminary questions which are not directly linked to the facts of the case, but should be answered to enable the referring national courts to rule on the substance of the disputes before them.<sup>85</sup> This extended the scope of the ‘necessity’ criterion of Article 267(2) TFEU, “a [CJEU’s] decision on the question is necessary to enable it to give judgment.”<sup>86</sup>

In *Commission versus Poland (Disciplinary regime for judges)*, the CJEU took a step further and conducted the substantive assessment of the Commission’s claim concerning a possible restriction of the right of national courts to submit requests for a preliminary ruling and of their obligation to do so by ensuing disciplinary proceedings under Article 267 TFEU. Referring to the above-mentioned *A.B. and others/Miasto Łowicz* arguments, the CJEU concluded that such provisions of national law are contrary to Article 19(1) TEU,

“since they give rise to the risk that the disciplinary regime at issue might be used for the purpose of creating, in respect of judges of the Polish ordinary courts, pressure and a deterrent effect which are likely to influence the content of the judicial decisions which those judges are called upon to give.”<sup>87</sup>

It will be argued that the *IS* judgment is based on and developed these premises: the CJEU has followed the *ASJP* institutional perspective and applied the *Miasto Łowicz/Commission versus Poland (Disciplinary regime for judges)* formulae to the

83 Id. paras. 42-44.

84 Judgment of 26 March 2020, *Case C-558/18, Miasto Łowicz (Disciplinary regime applicable to national judges)*, ECLI:EU:C:2020:234, para. 58.

85 Id. para. 51.

86 Id. para. 45.

87 *Case C-791/19, Commission v Poland (Disciplinary regime for judges)*, judgment, para. 229.



Hungarian ‘backsliding’ context. In both the AG’s Opinion and the Grand Chamber judgment, the emphasis was put on the crucial importance of the proper functioning of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU for the uniform application of EU law, its full effect and its autonomy. The CJEU clearly made a distinction with the *Miasto Łowicz* facts, where the criterion of ‘necessity’ was not satisfied, despite the strong message sent to the Polish government.<sup>88</sup> In order to find the question admissible and to apply the ‘procedural questions of national law’ formula, the Grand Chamber judges turned to the EU concept of judicial independence, and in particular, the guarantee to decide the main proceedings without external interference (*Governo della Repubblica Italiana*).<sup>89</sup>

Hence, Article 19(1) TEU, Article 47 EU CFR and Article 267 TFEU were interpreted as giving rise to the EU-specific guarantee of judicial independence of the EU Member States’ judges, namely the freedom from being exposed to disciplinary proceedings or measures for having exercised a discretion (or a duty) to bring a matter before the CJEU within the framework of the preliminary reference procedure.<sup>90</sup> The references (*Miasto Łowicz*, *Disciplinary regime for judges*) arguably seem to demonstrate the pre-eminence of the Polish ‘rule of law backsliding’ jurisprudence (judicial reform), sending a message to both the Hungarian and Polish legislators. The reasoning adopted by the Grand Chamber seems to reflect the *Rewe* line of arguments, with a focus on the *effectiveness* of EU law within national legal systems.

The principle of ‘effective judicial protection’ was not discussed in the section of the judgment devoted to the fifth question, and the references to Articles 6 and 13 ECHR were missing from both the AG’s Opinion and the *IS* judgment. This could be explained by two possible reasons: (i) firstly, the issue is directly related to the peculiarities of the EU’s judicial system, namely the preliminary reference procedure, and the CJEU could avoid references to the Strasbourg case law while discussing the ‘EU-specific’ guarantee of judicial independence. (ii) Secondly, even though the *IS* outcome seems to be identical to the one reached by the Strasbourg Court in similar cases (*Reczkowicz*, etc.), the reasoning of the European Courts differs significantly. The ECtHR discusses the facts of the case from the *perspective of the individual right* of the judge(s) to have sufficient guarantees of internal independence within the context of disciplinary proceedings.<sup>91</sup> The CJEU has taken an *institutional perspective*: the earlier *ASJP* formula was applied in light of Articles 2 and 19 TEU as precluding the EU Member States from amending their legislation in such a way as to bring about a reduction in the protection of the rule of law, by refraining from adopting rules negatively affecting the

88 *Case C-558/18, Miasto Łowicz (Disciplinary regime applicable to national judges)*, judgment, para. 60.

89 *Case C-564/19, IS*, judgment, paras. 86-87.

90 *Id.* paras. 89-93.

91 In this sense, see e.g. Mathieu Leloup, ‘Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6(1) ECHR’, *European Constitutional Law Review*, Vol. 17, Issue 3, 2021, pp. 394-421.

organization of justice, and in particular ones undermining the independence of judges.<sup>92</sup>

### 5.3. Directive 2010/64/EU, Directive 2012/13/EU and *In Absentia Trials*

Besides elaborating on the guarantees of the EU Member State judges' independence, the *Criminal proceedings against IS* seems to make several important clarifications regarding the substance of Articles 2(5), 5 of the Interpretation and Translation Directive and Articles 4(5), 6(1) of the Information Directive. From this perspective, the *IS* case complements the developing body of the CJEU's Roadmap Directives case law: e.g. Directive 2010/64/EU provisions have been substantively assessed in five cases,<sup>93</sup> while Directive 2012/13/EU already appeared in 16 CJEU's judgments.<sup>94</sup>

Just like the Interpretation and Translation Directive, the Information Directive is primarily aimed at following or upgrading the existing Strasbourg standard of protection where the right to information arises from Articles 5(4), 6(1) and 6(3) ECHR.<sup>95</sup> The ECtHR traditionally approaches the abovementioned ECHR provisions in light of the *effectiveness* of the potential defense strategy:

“[...] the accused must at any rate be provided with sufficient information as is necessary to understand fully the extent of the charges against him with a view to preparing an adequate defense”,

being afforded necessary time and facilities for such a familiarization.<sup>96</sup> In general, the reasoning taken by the CJEU in *IS* seems to be in line with the developing body of the Roadmap Directives jurisprudence, where the Luxembourg Court interprets the procedural rights of Articles 47-50 EU CFR, paying however particular attention to the consistency with the standard of protection afforded by the Strasbourg case law.<sup>97</sup>

Firstly, the CJEU provided the EU Member States with a long-awaited answer to the question concerning the margin of discretion in establishing the register or registers of independent translators and interpreters, in order to guarantee the translation or interpretation services of sufficient quality in national criminal proceedings. Recital (31) and Article 5(2) of Directive 2010/64/EU proclaim that the EU Member States shall endeavor to establish a register or registers of independent translators and interpreters who are appropriately

92 In this sense, see e.g. Aida Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', *Maastricht Journal of European and Comparative Law*, Vol. 27, Issue 1, 2020, pp. 105-119.

93 The statistics of the Directive 2010/64/EU usage in the CJEU's judgments, via the website search form of the homepage of the CJEU (curia.eu).

94 The statistics of the Directive 2012/13/EU usage in the CJEU's judgments, via the website search form of the homepage of the CJEU (curia.eu).

95 Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, Recital (14).

96 ECtHR, *Mattoccia v Italy*, No. 23969/94, 25 July 2000, paras. 60-65.

97 In this sense, see e.g. Elaine Fahey, *The Global Reach of EU Law*, Routledge, 2016, pp. 68-89.

qualified. These provisions were considered problematic since the time of drafting, in view of the high costs of interpretation and translation services, the lack of common standards for quality assessment – or review procedures – in case of interpretation/translation of insufficient quality in criminal proceedings, and the lack of equivalent national registers of the properly qualified interpreters and translators. In view of these conditions, some authors considered the compulsory creation of the register as a necessary step for compliance with Directive 2010/64/EU requirements.<sup>98</sup> Others elaborated on the wide margin of appreciation in providing interpretation/translation services in criminal proceedings, considering the establishment of such a register a final rationale of Article 5(2) of the Interpretation and Translation Directive.<sup>99</sup>

The approach and reasoning of the AG Opinion and the *IS* judgment differ significantly: Advocate General Pikamäe's analysis of Article 5 of the Interpretation and Translation Directive (in conjunction with Articles 2 and 3) seems rather modest, while the Grand Chamber reasoning appears to be very rich and profound. The Advocate General applies the textual approach to the Directive's provisions (the verb '*endeavor*') and makes a brief reference to *Covaci* (one of the leading CJEU cases defining the scope of the right to interpretation and written translation within the meaning of Directive 2010/64) to substantiate the finding that establishing the register is not mandatory, if the proper review procedures for the quality of the interpretation and translation are ensured.<sup>100</sup>

By contrast, the Luxembourg Court's judges turned to the contextual interpretation of Article 5 and suggested the consideration of the broader context and the objectives of the Interpretation and Translation Directive, referring to the earlier comparably simple and non-controversial *Surmacs* (retail depositors protection) and *DHL Express* (postal services in the EU) cases.<sup>101</sup> The CJEU emphasized that it may also be necessary to consider EU law provisions, to which the national court has not referred to in its questions (*Smith*).<sup>102</sup> Unlike the Advocate General, the Grand Chamber made extensive references to Article 48(1) ('presumption of innocence') and 48(2) ('the rights of the defense') of the EU Charter. Moreover, the *harmonizing clause* of Article 52(3) EU CFR and the reference to *Gambino and Hyka*, which underlined that the standard of protection afforded by Article 48 should be consistent with one stemming from Article 6(2) and (3) ECHR, were used as a connecting link to the pertinent Strasbourg Court's jurisprudence.<sup>103</sup> From the ECtHR's perspective, not only the appointment of the interpreter but, if necessary, subsequent control over interpretation quality is included in the scope of Article 6 ECHR, and the failure of national courts to

98 Carmen Valero-Garcés, 'Navigating between theory and practice. Design and implementation of a continuous training course for interpreters and translators of the administration', *Lingua Legis*, Vol. 27, 2019, p. 13.

99 Michał Hara, 'Ensuring quality in legal translation by 3 parties – governments, courts and translators', *The Journal of Specialised Translation*, Vol. 27, 2017, p. 15.

100 *Case C-564/19, IS*, AG Opinion, para. 62.

101 *Case C-564/19, IS*, judgment, para. 104.

102 *Id.* para. 99.

103 *Id.* paras. 100-101.

examine the complaints regarding the inadequate quality of interpretation can amount to the infringement of defense rights.<sup>104</sup>

Importantly, the CJEU responded not only to the earlier ECHR standard of protection (*Hermi*), but also demonstrated its loyalty to the newly-formed body of the Strasbourg Court's jurisprudence with the Roadmap Directives component. The reference was made to *Knox*, one of the leading ECtHR's cases where the provisions of Directive 2010/64/EU had been used as the criterion of the developing European consensus and which has had a significant impact on the outcome of the case (the so-called *spill-over* effect of EU law on the Strasbourg doctrines).<sup>105</sup> The CJEU reiterated that Directive 2010/64/EU laid down the *common minimum rules* on interpretation and translation in criminal proceedings. Therefore, the Grand Chamber judges concluded that the wording of Article 5 of ('endeavor') indeed defined the creation of the register as the final objective of Directive 2010/64, and not as an obligation.<sup>106</sup> In view of these premises, the CJEU underlined the role of EU Member States' courts in the assessment of the proper quality of interpretation, and the need to guarantee the access of national judges to the information on the selection and appointment procedures for independent interpreters and translators within this context.<sup>107</sup>

As regards the second part of the first question, the AG Opinion suggested the lowest level of the guarantee in case of the *in absentia* trials, following the minimum harmonization approach of the Interpretation and Translation Directive, the Information Directive and the Presumption of innocence Directive.<sup>108</sup> While addressing one of the widely criticized legal gaps of Directive 2012/13 – namely the fact that it does not regulate the procedures whereby information on charges must be communicated to the suspected or accused person<sup>109</sup> – the Advocate General built his analysis around the interpretation of Article 47 EU CFR in the light of Directive 2012/13/EU (*Kolev, Moro, Lom*). Special emphasis was placed on the non-absolute nature of the right to be present at the trial within the meaning of the Presumption of Innocence Directive 2016/343 [Recital (35)], and the diligence exercised by the accused or suspected person in order to receive information on the trial and the nature of the accusation [Recital (38)],<sup>110</sup> in order to suggest the possibility to continue the proceedings *in absentia* in accordance with Article 2(8) of Directive 2010/64, Article 6(3) of Directive 2012/13, and Article 8(2)(b) of Directive 2016/343.

However, the CJEU took another perspective and preferred to focus on the analysis of Articles 4 ('Letter of Rights on arrest') and 6 ('Right to information

104 Id. paras. 113-114.

105 In this sense, see e.g. Tobias Lock, 'The Influence of EU Law on Strasbourg Doctrines', *European Law Review*, Vol. 41, Issue 6, 2016, pp. 804-825.

106 Id. paras. 105-107.

107 Id. paras. 105-109, and 115-117.

108 In this sense, see e.g. Thomas Elholm & Renaud Colson, 'The Symbolic Purpose of EU Criminal Law', in Renaud Colson & Stewart Field (eds.), *EU Criminal Justice and the Challenges of Diversity*, Cambridge University Press, 2016, p. 153.

109 *Case C-564/19, IS*, AG Opinion, para. 80.

110 Id. para. 77.

about the accusation') of Directive 2012/13 in light of Article 48 EU CFR, in order to preclude the possibility of an *in absentia* trial in cases where – on account of inadequate interpretation – it did not seem possible to establish whether the suspected/accused persons have been informed of the accusations against them.<sup>111</sup> The ECtHR's autonomous concept of *criminal charge* seems to have played a significant role in the Grand Chamber reasoning, as its flexible interpretation allowed for the potentially broad range of situations falling within the scope of the Interpretation and Translation Directive and the Information Directive. This is because the ensuing Article 6 ECHR guarantees shall apply from the moment (i) that an individual is officially notified by the competent authority or (ii) their situation has been substantially affected by actions taken by the authorities following from the accusations (*Simeonovi*), for instance arrest (*Brusco*),<sup>112</sup> questioning about the degree of their involvement in the acts constituting a criminal offence (*Schmid-Laffer*),<sup>113</sup> or – under certain conditions – even questioning as a witness (*Kalēja*).<sup>114</sup>

Just like in the previous section, the Grand Chamber judges took into account the pertinent developments in the Strasbourg Court's case law, starting the assessment from another *spill-over* effect judgment, namely *Simeonovi*, where the provisions of the Information Directive and Access to a Lawyer Directive (Directive 2013/48/EU) seem to have had a significant impact on the outcome of the proceedings.<sup>115</sup> While defining the standards of protection afforded by Article 48 EU CFR under the given circumstances, the Grand Chamber also elaborated on such seminal ECtHR cases as *Pelissier/Sassi* and *Sejdovic*, in order to underline (i) the close connection between being informed properly of the accusation and the effective realization of the defense rights and (ii) the necessity of the procedural and substantive safeguards of the right to be informed, considering its crucial importance for the further development of the criminal proceedings.<sup>116</sup> The CJEU then partly followed the suggestions of the Advocate General and referred to *Moro*, placing an emphasis on enabling suspects to prepare their defense for the safeguarding of the overall fairness of the trial.<sup>117</sup>

The arguments of AG Pikamäe on the possibility of an *in absentia* trial on the condition that the suspected/accused person is represented by the lawyer of their choice or appointed by the state, were disregarded in light of the overriding need for the proper enforcement of the Article 48(2) EU CFR guarantees. The Grand Chamber judges took the opposite view: further grounds for precluding the *in absentia* trials under the given circumstances were found in Article 8 of the Presumption of innocence Directive. This makes the conviction *in absentia*

111 *Case C-564/19, IS*, judgment, paras. 118-120.

112 ECtHR, *Brusco v France*, No. 1466/07, 14 October 2010, paras. 47-50.

113 ECtHR, *Schmid-Laffer v Switzerland*, No. 41269/08, 16 June 2015, paras. 30-31.

114 ECtHR, *Kalēja v Latvia*, No. 22059/08, 5 October 2017, paras. 36-41.

115 In this sense, see e.g. Nasiya Daminova, 'The European Court of Human Rights on the "Access to a Lawyer" Directive 2013/48/EU: the Quest for a Coherent Application of the Right to a Legal Assistance in Europe?', *European Criminal Law Review*, Vol. 11, Issue 2, 2021, pp. 211-241.

116 *Case C-564/19, IS*, judgment, paras. 121-122.

117 *Id.* para. 128.

possible only when the suspected/accused person has been informed, in due time, of the trial and the consequences of non-appearance. The CJEU seems to have included the right to be informed about the ‘criminal charge’ in the scope of the right to be informed of the trial within the meaning of the latter provision.<sup>118</sup> Therefore, the failure to inform the person involved of the charges as a result of an interpretation of inappropriate quality does not seem compatible with the systemic interpretation of the Interpretation and Translation Directive and Information Directive, which cannot be compensated for even by the possibility of the new trial prescribed by Article 9 of Presumption of Innocence Directive, or another legal remedy which allows for a fresh assessment of the case on its merits.<sup>119</sup>

## 6. Conclusion

The CJEU’s judgment in the *Criminal proceedings against IS* case clearly develops the earlier *ASJP* approach, *i.e.* interpreting the judicial independence of EU Member States’ courts [Article 19(1) TEU and Article 47 EU CFR] as one of the key guarantees of the Union values (Article 2 TEU). By doing so, the Grand Chamber made two key findings concerning the notion of judicial independence within the meaning of EU law.<sup>120</sup> (i) Firstly, the Luxembourg judges transposed the more recent (Polish) *Miasto Łowicz* formula precluding EU Member States from conducting disciplinary proceedings following the submission of the request for a preliminary ruling (Article 267 TFEU) to the Hungarian context, demonstrating the aspiration to develop a consistent jurisprudence on ‘*rule of law backsliding*’. (ii) Secondly, the *IS* judgment significantly developed the *primacy* of EU law doctrine, as the latter notion served as a basis for enabling national courts to *disregard* national judicial practice (comprising the decisions of supreme courts) which limits their discretion in making references to the Luxembourg Court.

Moreover, apart from elaborating on the substance of the notion of judicial independence within the meaning of Articles 2 and 19 TEU, the Luxembourg judges made several important clarifications on the scope of the rights of accused persons to information and interpretation in criminal proceedings in the EU. The Strasbourg Court’s case law on Article 6 ECHR (*Hermi, Knox*) played a decisive role in the CJEU’s assessment of the scope of the right to interpretation as captured by Article 48(2) of the EU Charter in conjunction with the provisions of the Interpretation and Translation Directive and the Information Directive. This ‘Strasbourg-friendly’ attitude is predictable as two European Courts are now actively developing the Stockholm Roadmap Directives’ jurisprudence, and the

118 Id. paras. 134-136.

119 Id. para. 135-138.

120 Petra Gyöngyi, ‘IS (Illegality of the order for reference) (C-564/19): A ground-breaking judgment but an uncertain outcome on the ground’, *EU Law Live*, 30 November 2021, at <https://eulawlive.com/op-ed-is-illegality-of-the-order-for-reference-c-564-19-a-ground-breaking-judgment-but-an-uncertain-outcome-on-the-ground-by-petra-gyongyi>.



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mutual references are a typical feature of this developing body of CJEU/ECtHR case law. From this perspective, *IS* seems to be in line with this trend, demonstrating a strive towards a consistent application of *new* procedural rights in Europe, given that 27 EU Member States make up the majority of the 46 Council of Europe States.

In view of these premises, the reasoning of the Luxembourg judges differs significantly in the sections dealing with the various aspects of judicial independence and procedural rights in EU law. While the Luxembourg Court underlined the importance of the coherent application of corresponding EU Charter/ECHR rights in accordance with Article 52(3) of the EU Charter in cases involving the application of the Stockholm Roadmap Directives,<sup>121</sup> the issue of disciplinary proceedings following the request for a preliminary ruling was scrutinized in light of the *Rewe effectiveness* principle. This is presumably due to the specificity of the matter, namely, the role of the preliminary reference procedure in EU law: by reiterating the *Opinion 2/13* orthodoxy, the CJEU connected the notion of judicial independence with the *effectiveness* of the Article 267 TFEU mechanism, hence demonstrating awareness of its own preliminary ruling jurisdiction, and the *unity* and *autonomy* of EU law.

121 *Case C-564/19, IS*, judgment, para. 101.