Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 15 April 2021 [1]

Case C-564/19

Criminal proceedings
against
IS

(Request for a preliminary ruling
from the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary))

(Reference for a preliminary ruling – Judicial cooperation in criminal matters – Right to information in criminal proceedings – Directive 2012/13/EU – Right to interpretation and translation – Directive 2010/64/EU – Right to be present at one's trial in criminal proceedings – Directive 2016/343/EU – Right to an effective remedy and an impartial tribunal – Article 47 of the Charter of Fundamental Rights of the European Union – Article 267 TFEU – Admissibility – Appeal in the interests of the law against an order for reference – Power of the higher court to declare that order unlawful)

1. How can it be determined whether the preliminary ruling sought is necessary to enable the referring court to 'give judgment' within the meaning of the second paragraph of Article 267 TFEU? How is the concept of 'giving judgment', which is central to the preliminary ruling procedure, to be interpreted? That question is certainly not new, but it has acquired a particular dimension in the context of the all too many cases of alleged infringements of the rule of law and the independence of the judiciary which have been dealt with by the Court or are currently under consideration. It is clear that questions are regularly referred to the Court for a preliminary ruling which, in some cases, are appeals for assistance from national judges concerned by or even subject to disciplinary proceedings and which must be answered in compliance with the conventions of that unique legal remedy, the reference for a preliminary ruling.

2. In the judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234; '*Miasto Łowicz*'), the Court sought to consolidate its case-law on the admissibility of requests for preliminary rulings in this highly sensitive area, in which the concept of '*res judicata*' may have a dimension other than strictly legal. The present case gives the Court the opportunity to explain the full significance of that judgment by responding, in particular, to a novel question concerning a decision, adopted by a higher court adjudicating at last instance, declaring an order for reference to be unlawful, without affecting the legal effects of that order.

[1] Original language: French.

I. Legal context

A. EU law

3. In addition to certain provisions of primary law (namely Article 19 TEU, Article 267 TFEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), Articles 2 and 5 of Directive 2010/64/EU,[2] Articles 1, 6 and 8 of Directive 2012/13/EU[3] and Articles 1 and 8 of Directive (EU) 2016/343[4] are also relevant in the present case.

B. Hungarian law

1. Rules on the accused person's right to use his or her mother tongue

4. Article 78(1) of the büntetőeljárásról szóló 2017. évi XC. törvény (Law XC of 2017 establishing the Code of Criminal Procedure) (*Magyar Közlöny* 2017/99., p. 9484; 'the Code of Criminal Procedure') provides, in essence, that if a party to criminal proceedings wishes to use as his or her mother tongue a language other than Hungarian, he or she is entitled to use his or her mother tongue and to be assisted by an interpreter.

5. Under Article 201(1) of the Code of Criminal Procedure, only an interpreter with an official qualification may be appointed in criminal proceedings, but, if that is not possible, an interpreter with sufficient knowledge of the language may also be appointed.

6. Under Article 755(1)(a) and (aa) of the Code of Criminal Procedure, where an accused person, residing at a known address abroad, is duly summoned and fails to appear at a hearing, the criminal proceedings must be continued *in absentia* if it is not appropriate to issue a European or international arrest warrant, or if such a warrant is not issued because the prosecutor does not propose that the accused person be sentenced to a custodial sentence or placement in a correctional education facility.

7. Under Article 2 of a szakfordításról és tolmácsolásról szóló 24/1986. (VI.26.) minisztertanácsi rendelet (Decree 24/1986 of the Council of Ministers on official translation and interpretation) (*Magyar Közlöny* 1986/24.), specialised translation or interpretation may only be provided for remuneration under a contract of employment or in the context of another relationship relating to the performance of work by a translator or interpreter who is appropriately qualified. The Minister for Justice is responsible for the central administration and management of translation and interpretation services. The certification of the professional qualifications of interpreters carrying on their activity as self-employed persons has not been regulated since 1 October 2009.

8. The a szakfordító és tolmácsképesíque megszerzésének feltételeiről szóló 7/1986. (VI.26) MM rendelet (Decree 7/1986 of the Minister for Education on the requirements for obtaining qualifications as a translator and interpreter) (*Magyar Közlöny* 1986/24.) provides that persons

[2] Directive of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings (OJ 2010 L 280, p. 1).

[3] Directive of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (OJ 2012 L 142, p. 1).

[4] Directive of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016 L 65, p. 1).

who hold qualifications as specialised translators, specialised translator-revisers, interpreters, specialised interpreters and conference interpreters are qualified as specialised translators and interpreters. Those qualifications may be obtained in basic or further training programmes provided by higher education institutions as well as institutions designated by the Minister of Culture. The decree also specifies the conditions for obtaining the qualifications, but does not provide for any certification that those conditions have been met.

2. Rules on the preliminary ruling procedure and appeals in the interests of the law

9. Article 490(1) and (2) of the Code of Criminal Procedure provides, in essence, that a national court may, of its own motion or at a party's request, stay proceedings and refer questions to the Court of Justice of the European Union for a preliminary ruling.

10. Article 513(1)(a) of the Code of Criminal Procedure provides that an order for reference is not subject to an ordinary appeal.

11. Article 491(1)(a) of the Code of Criminal Procedure provides, in essence, that the suspended criminal proceedings must be resumed if the grounds for the stay have ceased to exist.

12. Article 667(1) of the Code of Criminal Procedure provides that a public prosecutor may bring extraordinary appeal proceedings, known as 'an appeal in the interests of the law', seeking a finding by the Kúria (Supreme Court, Hungary; 'the Kúria') that a judgment or order delivered by a lower court is unlawful.

13. Article 669 of the Code of Criminal Procedure is worded as follows:

'1. If the Kúria considers the appeal in the interests of the law to be well founded, it shall find, in a judgment, that the decision complained of is unlawful and, if not, it shall dismiss the appeal by means of an order.

2. If the Kúria finds the decision at issue unlawful, it may acquit the accused person, rule out forced medical treatment, terminate the proceedings, impose a lighter penalty or apply a lighter measure, set aside the contested decision and, if appropriate, refer the case back to the competent court for fresh proceedings.

3. Except in the cases referred to in paragraph 2, the Kúria's decision shall be limited to a finding of illegality.

…'

II. The main proceedings and the questions referred

14. The referring court, which sits as a single judge at Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) ('the referring judge'), is hearing proceedings against the accused person, IS, on the basis of an act of prosecution issued on 26 February 2018 by the public prosecutor of the 5th and 13th districts of Budapest (Hungary) for an alleged infringement of the law on firearms and ammunition. The accused person, a Swedish national of Turkish origin, was arrested in Hungary on 25 August 2015 and questioned as a suspect on the same day. Before the questioning, the accused person requested the assistance of a lawyer and an interpreter. During

the questioning, which the lawyer was unable to attend, the accused person was informed through the interpreter of the suspicions in his respect but he refused to testify because he could not consult his lawyer. The accused person was released after the questioning.

15. The accused person is currently outside Hungary and the summons to appear before the court was returned marked 'unclaimed'. If the prosecution merely applies for a fine, the referring judge is required under national law to continue the proceedings *in absentia*. At the hearing, the accused person's defence made an application seeking a request for a preliminary ruling, which was granted.

16. In the request for a preliminary ruling, the referring judge observes that Article 5(1) of Directive 2010/64 provides that Member States must take concrete measures to ensure that the interpretation and translation provided meet the quality required under Article 2(8) and Article 3(9) of that directive, which means that the interpretation must be of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence. He also points out that Article 5(2) of that directive provides that, in order to promote the adequacy of interpretation and translation and efficient access thereto, Member States must endeavour to establish a register or registers of independent translators and interpreters who are appropriately qualified. According to the referring judge, there is no information about how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and the accused person understood each other.

17. In addition, the referring judge states that Article 4(5) and Article 6(1) of Directive 2012/13 provide that suspects or accused persons must be immediately informed in writing of their rights in a language which they understand and of the criminal act they are suspected or accused of having committed. In that connection, he states that Hungary does not have an official register of translators and interpreters and that Hungarian law does not specify who may be appointed in criminal proceedings as an ad hoc translator or interpreter, nor according to what criteria, as only the certified translation of documents is regulated. Thus, according to the referring judge, the question arises as to whether the national law and practice at issue before him are compatible with the directives on the rights of accused persons in the European Union and whether it follows from EU law that, if they are not compatible, a national court may not continue the proceedings *in absentia*.

18. Furthermore, the referring judge observes that, since the entry into force of the 2012 judicial reform, responsibility for the central administration and management of the judicial system has lain with the President of the Országos Bírósági Hivatal (National Office of the Judiciary, Hungary, 'the NOJ'), who is appointed by the National Assembly for a term of nine years; that President has extensive powers, which include deciding on judicial appointments, making senior judicial appointments and initiating disciplinary proceedings against judges. He further states that the Országos Bírói Tanács (National Judicial Council, 'NJC') – whose members are elected by the judiciary – is responsible for overseeing the actions of the President of the NOJ and approving her decisions in certain cases. On 2 May 2018, the NJC adopted a report stating that the President of the NOJ had regularly infringed the law by her practice of declaring vacancy notices for judicial and senior judicial posts unsuccessful without sufficient explanation and appointing temporary senior judges of her choice, such as the President of the Fővárosi Törvényszék (Budapest High Court, Hungary), which is the court of appeal for the referring court. There is currently friction between the President of the NOJ and the NJC. In those circumstances, the referring judge questions whether such functioning of the NOJ is compatible

with the principle of judicial independence enshrined in Article 19 TEU and Article 47 of the Charter. He also wonders whether, in such circumstances, the proceedings before him may be regarded as fair.

19. In addition, the referring judge observes that the national system of remuneration provides for lower pay for judges than for prosecutors and the discretionary award by the President of the NOJ and senior judges of various exceedingly high allowances compared to judges' basic pay, which may thus potentially constitute undue influence and entail a breach of judicial independence.

20. In those circumstances, the Pesti Központi Kerületi Bíróság (Central District Court, Pest) decided to stay the proceedings and to refer three sets of questions to the Court for a preliminary ruling (Question 1(a) and (b); Question 2(a) and (b); and Question 3(a) and (b)).

21. By order for reference of 18 November 2019, the referring judge decided to submit an addendum to his initial request and to refer supplementary questions for a preliminary ruling.

22. In that connection, the referring judge explains that, after the initial reference for a preliminary ruling had been submitted, on 19 July 2019 the public prosecutor lodged an extraordinary appeal, known as 'an appeal in the interests of the law', against the order for reference in the present case with the Kúria pursuant to Article 668 of the Code of Criminal Procedure. In a final judgment of 10 September 2019, the Kúria declared that order unlawful, finding, in essence, that the questions raised were not relevant to deciding the main case and that the first question did not in fact concern the interpretation of EU law but instead sought a finding that the applicable Hungarian law did not comply with the principles protected by EU law. The referring judge states that, notwithstanding the declaratory effect of the Kúria's judgment, he is unsure what course to adopt in the remainder of the main proceedings in the light of the possible incompatibility of that judgment with EU law.

23. The referring judge adds that, on 25 October 2019, the President of the Fővárosi Törvényszék (Budapest High Court) brought disciplinary proceedings against him, reproducing verbatim the grounds of the Kúria's judgment of 10 September 2019. Following information communicated by the Hungarian Government to the effect that those proceedings had been brought to an end, the Court sent a question to the referring judge. In his reply of 10 December 2019, the referring judge confirmed that, by a document dated 22 November 2019, the President of that court had withdrawn the decision to initiate disciplinary proceedings and stated that he did not intend to amend his supplementary request for a preliminary ruling.

24. In those circumstances, the Pesti Központi Kerületi Bíróság (Central District Court, Pest) decided to refer supplementary questions to the Court of Justice for a preliminary ruling (Question 4(a) to (c) and Question 5). Thus, by his two decisions, the referring judge referred the following questions to the Court for a preliminary ruling:

'1 (a) Must Article 6(1) TEU and Article 5(2) of Directive 2010/64/EU be interpreted as meaning that, in order to guarantee the right to a fair trial for accused persons who do not speak the language of the proceedings, a Member State must create a register of properly qualified independent translators and interpreters or – failing that – ensure by some other means that it is possible to control the quality of language interpretation in court proceedings?

(b) If the previous question is answered in the affirmative and if, in the specific case, since the language interpretation is not of adequate quality, it is not possible to establish whether the accused person has been informed of the subject matter of the charge or indictment against him, must Article 6(1) TEU and Article 4(5) and Article 6(1) of Directive 2012/13/EU be interpreted as meaning that, in those circumstances, the proceedings cannot continue in his or her absence?

2 (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice of the European Union be interpreted as meaning that that principle is breached where the president of the [NOJ], who is responsible for the central administration of the courts and who is appointed by the parliament, the only body to which he or she is accountable and which may remove him or her from office, fills the post of president of a court – a president who, inter alia, has powers in relation to organisation of the allocation of cases, commencement of disciplinary procedures against judges, and assessment of judges – by means of a direct temporary nomination, circumventing the applications procedure and constantly disregarding the opinion of the competent self-governance bodies of judges?

(b) If question 2(a) is answered in the affirmative and if the court hearing the specific case has reasonable grounds to fear that that case is being unduly prejudiced as a result of the president's judicial and administrative activities, must the principle of judicial independence be interpreted as meaning that a fair trial is not guaranteed in that case?

3 (a) Must the principle of judicial independence referred to in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice of the European Union be interpreted as precluding a situation in which, since 1 September 2018 – unlike the practice followed in previous decades – Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform, particularly in the light of the practice of discretionary bonuses applied by holders of high level posts?

(b) If the previous question is answered in the affirmative, must the principle of judicial independence be interpreted as meaning that, in such circumstances, the right to a fair trial cannot be guaranteed?

4 (a) Must Article 267 TFEU be interpreted as precluding a national practice whereby the court of last instance, in proceedings to harmonise the case-law of the Member State, declares as unlawful a decision by which a lower court makes a request for a preliminary ruling without interfering with the legal effects of the decision in question?

(b) If question 4(a) is answered in the affirmative, must Article 267 TFEU be interpreted as meaning that the referring court must disregard contrary decisions of the courts of last instance and positions of principle adopted in the interest of harmonising the law?

(c) If question 4(a) is answered in the negative, in that case, can the suspended criminal proceedings be reopened given that the preliminary ruling proceedings are pending?

5 Must the principle of judicial independence, established in the second subparagraph of Article 19(1) TEU, Article 47 of the [Charter] and the case-law of the Court of Justice, read in the light of Article 267 TFEU, be interpreted as meaning that that principle precludes disciplinary proceedings being brought against a judge for having made a request for a preliminary ruling?'

III. Procedure before the Court

25. Observations were submitted by the Hungarian, Netherlands and Swedish Governments and the European Commission.

IV. Assessment

26. At the outset, it should be noted that the Hungarian Government disputes the admissibility of all the questions referred to the Court for a preliminary ruling on the same ground, namely the lack of any connection between the provisions of EU law whose interpretation is sought and the main proceedings and describes the questions referred as being irrelevant to deciding the case. That general criticism merits an individual response on the basis of the relevant case-law of the Court and, more specifically, its consolidated expression in *Miasto Łowicz*.

27. In that judgment, the Court recalled that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. However, it has also been consistently held that the procedure provided for in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them. The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute. [5]

28. As is apparent from the actual wording of Article 267 TFEU, the preliminary ruling sought must be 'necessary' to enable the referring court to 'give judgment' in the case before it. The Court has thus repeatedly held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a request for a preliminary ruling unless, inter alia, a case is pending before it in which it is called upon to give a decision which is capable of taking account of the preliminary ruling. In preliminary ruling proceedings, the Court's function is to help the referring court to resolve the specific dispute pending before it. In such proceedings, there must therefore be a connecting factor between that dispute 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. [6]

29. It is apparent from *Miasto Łowicz* that that connecting factor may be direct or indirect. It is direct where the national court is required to apply the EU law whose interpretation is sought in order to determine the substantive solution to be given to the main dispute. It is indirect where the

[5] Judgment in *Miasto Łowicz* (paragraphs 43 and 44).

[6] Judgment in *Miasto Łowicz* (paragraphs 45 and 46).

order for reference is capable of providing the referring court with an interpretation of EU law which would allow it to resolve procedural questions before it, whether of EU law or of national law, before being able to rule on the substance of the dispute before it.[7]

30. In the light of those clarifications, I consider that the answer to be given to the Hungarian Government's complaint of inadmissibility is certainly negative as regards the first question and affirmative for the second and third questions. The answer to the fourth and fifth questions requires, by contrast, a more nuanced assessment. With regard to the order in which the questions are to be considered, it seems to me necessary to give priority to the fourth question, which follows national procedural developments that took place after the first order for reference was submitted, namely the lodging of an appeal in the interests of the law by the public prosecutor and the Kúria's subsequent adoption of the judgment declaring that order unlawful. That question seems to me to be preliminary from the point of view of the scheme of reasoning since it concerns the admissibility of the initial request for a preliminary ruling.

A. The fourth question

31. By its fourth question, the referring judge asks, in essence, whether Article 267 TFEU must be interpreted as precluding the adoption by the highest national court, hearing an appeal in the interests of the law, of a judgment declaring the order for reference unlawful – without, however, affecting its legal effects as regards the stay of the main proceedings and the continuation of the preliminary ruling procedure – on the grounds that the questions referred are not necessary to the determination of the case and seek a declaration that national law is incompatible with EU law. The referring judge also asks the Court about the consequences of an affirmative or negative answer to that question for the conduct of the main proceedings and the taking into account of the higher court's judgment in the light of the principle of the primacy of EU law.

1. Admissibility

32. In support of its claim of inadmissibility, the Hungarian Government argues that that question is irrelevant to the outcome of the main proceedings, in so far as the Kúria did not set aside the order initiating preliminary ruling proceedings and staying the criminal proceedings, nor did it require the referring judge to withdraw or amend that order. The course of the judicial proceedings has not therefore been interrupted and the Court is able ultimately to consider the request for a preliminary ruling at issue to be admissible.

33. That line of argument cannot, in my view, be accepted, since the question at issue must be regarded as being admissible on account of an indirect but real link between the main proceedings and Article 267 TFEU. By the fourth question referred and the interpretation of that provision which he seeks in the present case, the referring judge wishes to be instructed not as to the substance of the case before him, which does in turn raise other questions of EU law, but as

[7] See, judgment in *Miasto Łowicz* (paragraphs 49 to 51). The judgment of 25 June 2020, *Ministerio Fiscal (Authority likely to receive an application for international protection)* (C-36/20 PPU, EU:C:2020:495, paragraph 49) states that a reference by a national court can be rejected only if it appears that the procedure laid down by Article 267 TFEU has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that EU law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court.

regards a procedural problem which he must answer *in limine litis*, since it concerns the conditions for the remainder of the main proceedings following the Kúria's judgment declaring the initial order for reference to be unlawful. [8]

34. In that respect, it is important to note that according to the wording of Article 490(1) of the Hungarian Code of Criminal Procedure, 'the court may, of its own motion or at a party's request, refer a matter for a preliminary ruling to the [Court], in accordance with the rules laid down in the Treaties constituting the basis of the European Union'. In accordance with the wording of paragraphs 2 and 3 of that article respectively, the court is to decide, by way of an order, either to initiate preliminary ruling proceedings and at the same time stay the proceedings or to dismiss the request for preliminary ruling proceedings to be initiated. Following an appeal in the interests of the law lodged by the public prosecutor under Article 667(1) of the Code of Criminal Procedure, the Kúria reviewed the legality of the initial order for reference in the light of Article 490 of the same Code.

35. The Kúria's judgment shows that the latter sought to ascertain whether the referring judge had grounds to refer the questions for a preliminary ruling, which was decisive for the lawfulness of the subsequent stay of criminal proceedings. It thus took the view that those questions were not necessary for determining the case, as they did not actually arise or were unconnected with the facts of that case. [9] Moreover, the first questions did not seek an interpretation of EU law but to establish that the applicable Hungarian law was not compatible with EU law. [10] The Kúria found that, by his order initiating preliminary ruling proceedings and staying the criminal proceedings, the referring judge had violated criminal procedure, in this case the rules set out in Article 490 of the Code of Criminal Procedure. Accordingly, although the initial order for reference was not set aside by the Kúria, it was nevertheless declared unlawful under Hungarian law. [11]

36. Given the Kúria's judgment, the referring judge expresses his concern regarding the course to be followed in the light of several factors. First of all, he refers to Article 491(1)(a) of the Code of Criminal Procedure, which provides that if the reason for the stay of proceedings ceases to exist, the court is to resume hearing the case, which could be so if that reason has been found to be unlawful, as in the present case. The referring judge then states that, in view of his position and statutory provisions relating, in particular, to the appraisal of judges, he is required to respect the law in general and to follow the guidelines set out in the case-law of higher courts and thus to refrain from taking any unlawful judicial decisions. Lastly, although the Kúria's judgment does not have binding legal force, it was published in the official compendium of judgments of principle with a view to ensuring the uniformity of national law, and the referring judge may depart from that judgment only by expressly stating his reasons for so doing.

37. It should be noted that the declaratory effect of the Kúria's judgment and the absence of an alteration in the *inter partes* situation do not extend beyond the stage of the reference for a preliminary ruling and the stay of the main proceedings, which lasts until the Court gives judgment. The subsequent question of the accused person's criminal responsibility remains undecided and will be determined by a final decision of the referring judge based on an initial order for reference that is unlawful under Hungarian law according to a final Kúria judgment. It

8 See, to that effect, judgment 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, paragraph 99).

9 See paragraphs 61 and 70 of the Kúria's judgment.

10 See paragraph 64 of the Kúria's judgment.

11 Paragraph 20 of the Kúria's judgment states that an appeal in the interests of the law makes it possible to prevent a judicial decision, which is, in principle, unlawful, from becoming impossible to set aside.

is interesting to note that, in its statement of reasons,[12] the Kúria states that a lower court has the power to stay criminal proceedings if the conditions required by law are satisfied; this can be done only 'so as to give a lawful and well-founded decision *on the merits*' (emphasis added). It can be inferred from such a statement of reasons that the unlawfulness of the interim order to stay the proceedings is bound to affect the lawfulness of the final decision on the merits. However, it is common ground that the decision on the merits relating to that responsibility is subject to ordinary appeal under national law, to say nothing of the prospect of a further appeal in the interests of the law by the public prosecutor.

38. It is apparent from the supplementary order for reference that the referring judge faces the following choice on the basis of the Court's possible answers to his question as to whether the Kúria's judgment is compatible with Article 267 TFEU:

– if the Kúria could legitimately declare the initial order for reference unlawful, he will have to continue the criminal proceedings and rule on the accused person's responsibility taking into account only the national case file, since the first, second and third questions referred will have to be regarded as being irrelevant in that regard;[13]

– if the Kúria was not correct to declare the abovementioned order unlawful, he will have to apply EU law, as interpreted in the judgment of the Court of Justice, to determine the substantive decision to be given to the main case, by disapplying the Kúria's judgment in accordance with the principle of the primacy of EU law.

39. In the light of the foregoing considerations, the Court's answer to the fourth question is, in my view, capable of providing the referring judge with an interpretation of EU law, in this case Article 267 TFEU, that would allow him to resolve a procedural question of national law before being able to rule on the substance of the main case before him.[14] It is therefore completely admissible.

2. Substance

40. It is apparent from the file submitted to the Court that, under Hungarian criminal procedural law, although no ordinary appeal is available against an order for a reference for a preliminary ruling and the stay of the main proceedings, that order may be the subject of an extraordinary appeal, in the present case an appeal in the interests of the law lodged by the public prosecutor with the Kúria with a view to ensuring the uniformity of national law. The higher court before which the matter is brought has the power to declare that order unlawful, although that finding has effect only for the future.

41. According to the Court's case-law, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 267 TFEU does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from

[12] See paragraph 75 of the Kúria's judgment.

[13] In that connection, the wording of Question 4(c) seems to me to contain a certain ambiguity that is inappropriate to elicit a useful answer from the Court in preliminary ruling proceedings the conduct of which is not affected by the Kúria's judgment. The wording of that question, which raises an issue of timing, would make sense only if the supplementary request for a preliminary ruling had been dealt with in isolation and as a matter of priority by the Court, which is not the case since all the questions are brought together in a single preliminary ruling procedure on which the Court will give a single decision. In other words, and contrary to what the Commission and the Netherlands Government submit, the question is not whether the referring judge should await the Court's answer without having to resume hearing the suspended national proceedings 'in the meantime'.

[14] Judgment in *Miasto Łowicz* (paragraph 51).

remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 267 TFEU on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of EU law necessitating a ruling by the Court. The Court has thus held that that jurisdiction cannot be called into question by the application of rules of national law which permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court which adopted that order to resume the domestic law proceedings.[15] In a situation where a case was pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court had been quashed by a supreme court, the Court also held that the court at first instance remained free to refer questions to the Court pursuant to Article 267 TFEU, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court.

42. It has to be said that those two holdings are irrelevant, since the Kúria's judgment did not set aside the order for reference or require the referring judge to withdraw or alter it or even to resume the criminal proceedings. The higher court found that there had been a breach of the law without remedying it. However, the analysis of that judgment cannot be confined to that observation and to the operative part alone, the latter having necessarily to be read in the light of the grounds, from which it cannot be dissociated.

43. In that judgment, the Kúria reviewed the lawfulness of the initial order for reference in the light of Article 490 of the Code of Criminal Procedure, regarded as a 'projection' into national law of the requirements of EU law concerning requests for a preliminary ruling.[16] In accordance with that singular premiss, accompanied by formal precautions as regards respect for the Court's jurisdiction, the Kúria undertook a form of review of the admissibility of the initial order for reference with a view to determining whether the answer to the questions put by the judge in the case under consideration was necessary to enable him to rule on the merits of the case. On the basis of its analysis of the initial order for reference, it took the view that the first question did not actually arise and that the second and third questions had no connection with the case. Even more surprising is the second ground for lawfulness adopted, as requested by the public prosecutor, in respect of the first question, namely that it did not in fact seek an interpretation of EU law but to establish that the applicable Hungarian law was not consistent with the principles protected by EU law. That ground, relating to an assessment of the purpose of the questions referred for a preliminary ruling, reflects the application of the settled case-law of the highest Hungarian national court, with the circumstance – in this case, aggravating – that the judgment delivered concerns the order for reference itself and not the decision by the trial judge to refuse to grant a party's application for a reference for a preliminary ruling.

44. That judgment, based on that statement of grounds, seems to me to undermine the referring judge's right to refer questions to the Court for a preliminary ruling and therefore infringes Article 267 TFEU, as interpreted by the Court.

45. In that regard, it should first be recalled that, in accordance with Article 19 TEU, it is for national courts and tribunals and the Court to ensure the full application of EU law in all Member States and judicial protection of the rights of the individual under that law. In particular, the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court

[15] Judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 89, 93, 95 and 98), and of 16 January 1974, *Rheinmühlen-Düsseldorf* (166/73, EU:C:1974:3).

[16] See paragraphs 47 and 66 of the Kúria's judgment.

and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties. [17]

46. Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving the interpretation of provisions of EU law, or consideration of their validity, which are necessary for the resolution of the case before them. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate. Therefore, a rule of national law or case-law cannot prevent a national court from using that discretion, which is an inherent part of the system of cooperation between the national courts and the Court of Justice established in Article 267 TFEU and of the functions of the court responsible for the application of EU law entrusted by that provision to the national courts. [18]

47. The preliminary ruling dialogue thus defined does not take place within a triangular relationship including a court other than the Court of Justice and the referring court with the power to carry out an independent assessment as to whether a reference for a preliminary ruling is appropriate and necessary and then find it unlawful because it lacks those characteristics. [19] That situation is antithetical to the system of references for a preliminary ruling, which is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary. [20] In other words, the Court has exclusive jurisdiction to determine whether questions referred for a preliminary ruling are admissible.

48. Secondly, the effectiveness of EU law would be in jeopardy if the outcome of an appeal to the highest national court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law. [21] That does indeed seem to me to be the case with the Kúria's judgment, which analyses the subject matter of the questions referred, in line with settled case-law in that regard, so as to prevent a review of the compatibility of national rules with EU law. One effect of such a judicial practice is likely to be that a national court which has doubts concerning the compatibility of domestic law with EU law may choose to refrain from referring questions for a preliminary ruling to the Court, in order to avoid a declaration of illegality of the decision making the reference for a preliminary ruling and the suspension of the main proceedings, which could undermine the validity of the decision on the substance of the case in the future. [22]

[17] Judgment of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 36 and 37).

[18] Judgments in *Miasto Łowicz* (paragraphs 56 and 57), and of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 34).

[19] In paragraph 26 of its observations on the first reference for a preliminary ruling, the Hungarian Government does not hesitate to state that it is right that the Court, when assessing the admissibility of the questions referred, 'take account of the Kúria's opinion' since the latter has given its explicit opinion as to the appropriacy of those questions.

[20] See, to that effect, judgments of 16 December 2008, *Cartesio* (C-210/06, EU:C:2008:723, paragraphs 91 and 96), and of 27 February 2014, *Pohotovosť* (C-470/12, EU:C:2014:101, paragraph 31). As Advocate General Poiares Maduro stated in his Opinion in *Cartesio* (C-210/06, EU:C:2008:294), 'through the request for a preliminary ruling, the national court becomes part of [an EU] law discourse without depending on other national powers or judicial instances […]. The [Treaties] did not intend that such a dialogue should be filtered by any other national courts, no matter what the judicial hierarchy in a State may be'.

[21] See judgment of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraph 45).

[22] See, to that effect, judgment of 5 July 2016, Ognyanov (C-614/14, EU:C:2016:514, paragraph 25).

49. Thirdly, it is settled case-law that a judgment in which the Court gives a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the European Union institutions in question, for the purposes of the decision to be given in the main proceedings. [23] After receiving the Court's answer to a question concerning the interpretation of EU law which it has submitted to the Court, a court of first or final instance is itself required to do everything necessary to ensure that that interpretation of EU law is applied. [24] Article 267 TFEU requires the referring court to give full effect to the interpretation of EU law provided by the Court. [25] In the present case, I believe that a judgment of the highest national court, published in the compendium of judgments of principle, containing a final declaration of the unlawfulness under national law of an order for reference made prior to the substantive decision in the main proceedings, which must incorporate the Court's answer as to the interpretation of EU law sought, is liable to hinder the national court from fulfilling that obligation.

50. It is thus apparent that the Kúria's judgment is such as to undermine the essential characteristics of the system of cooperation between the Court of Justice and the national courts established by Article 267 TFEU and the primacy of EU law in the domestic legal order.

51. Finally, it should be added that the Court has held that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently. A provision of national law which prevents the procedure laid down in Article 267 TEFU from being implemented must be set aside without the court concerned's having to request or await the prior setting aside of that provision of national law by legislative or other constitutional means. [26] Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU 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 European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law. [27]

52. In the light of the foregoing considerations, I propose that the answer to the fourth question should be that, where there are rules of national law relating to the exercise of an extraordinary appeal, intended to unify that law against an order for reference, Article 267 TFEU must be interpreted as precluding the application of such rules allowing the higher court hearing the appeal to declare that order unlawful, without affecting the legal effects of that order as regards the stay of the main proceedings and the continuation of the preliminary ruling procedure, on the grounds that the questions referred are not necessary to determining the case and seek a declaration that national law is incompatible with EU law. The primacy of EU law requires national referring courts to disapply those rules and the judicial decisions which give effect to them.

[23] See judgment of 5 October 2010, *Elchinov* (C-173/09, EU:C:2010:581, paragraph 29).

[24] See, to that effect, judgment of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraph 42).

[25] Judgment of 5 July 2016, *Ognyanov* (C-614/14, EU:C:2016:514, paragraph 28).

[26] 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 141)

[27] See judgments of 22 June 2010, *Melki and Abdeli* (C-188/10 and C-189/10, EU:C:2010:363, paragraphs 43 and 44), and of 5 April 2016, *PFE* (C-689/13, EU:C:2016:199, paragraphs 40 and 41).

B. The first question

1. Admissibility

53. The Court may refuse to give a ruling on a question referred by a national court only where it is quite obvious that the interpretation of a rule of EU law that is 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 the questions submitted to it. [28]

54. In the present case, it is not apparent from the file submitted to the Court that the situation in this case corresponds to one of those scenarios. On the contrary, criminal proceedings *in absentia* are currently pending before the referring judge in respect of IS, a Swedish national of Turkish origin, who is being prosecuted for infringing the law on firearms and ammunition following an investigation during which he was questioned by the police with an interpreter present who translated the notification of his rights and the suspicions against him. Clearly, the main proceedings are substantively connected to EU law, in particular to the provisions of Directives 2010/64 and 2012/13 to which the first question relates, and the referring judge is therefore required to apply that law in order to determine the substantive solution to be given in those proceedings.

55. The Hungarian Government's claims are not such as to invalidate that finding and the admissibility of the related question referred. The observations relating to the alleged simplicity of the factual and legal assessment of the main case and the lack of need for an interpretation of EU law since the file relating to the procedure against IS does not contain any evidence such as to cast doubt on the adequacy of the interpreting are thus irrelevant. On that point, it suffices to recall that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part. [29] Otherwise put, even assuming that there was no doubt as to the answer to the first question, such a circumstance cannot prevent a national court from referring a question to the Court for a preliminary ruling and does not have the effect of rendering the question referred inadmissible.

2. Scope and reformulation of the question referred

56. It should be noted that in the procedure that Article 267 TFEU lays down for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court has a duty to interpret all provisions of EU law which national courts require in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred to the Court by those courts. Accordingly, even if, formally, the referring court has limited its questions to the interpretation of certain provisions of EU law, that does not prevent the Court from providing it with all the elements of interpretation of EU law that may be of assistance in adjudicating in the case pending before it, whether or not the referring court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from

[28] See judgment 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, paragraphs 97 and 98).

[29] Judgment of 11 September 2014, *A* (C-112/13, EU:C:2014:2195, paragraph 35).

all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject matter of the main proceedings. [30]

57. In terms of the wording of the two parts of the question, the referring judge is asking the Court about the interpretation of Article 5(2) of Directive 2010/64 (first part), Article 4(5) and Article 6(1) of Directive 2012/13, while also referring to Article 6(1) TEU (second part).

58. Given the facts which gave rise to the main proceedings and with a view to providing a useful and as complete an answer as possible to the question referred, consideration of the question referred cannot be confined solely to the aspects explicitly raised by the referring court. It is appropriate to widen its scope by taking into consideration several other provisions of Directives 2010/64 and 2012/13, as well as Directive 2016/343 and Article 47 of the Charter. It is therefore proposed that both parts of the question be reformulated as follows:

– Must Articles 2, 3 and 5 of Directive 2010/64 be interpreted as requiring Member States to ensure the right of suspected or accused persons who do not speak or understand the language of the criminal proceedings to interpretation of a quality sufficient to safeguard the fairness of the proceedings by establishing a register of independent translators and interpreters who are appropriately qualified and/or judicial control of that quality?

– Must the combined provisions of Directives 2010/64, 2012/13 and 2016/343, and Article 47 of the Charter be interpreted as precluding the trial *in absentia* of an accused person who does not speak or understand the language of the criminal proceedings and who cannot be established to have been informed, in the course of the investigation, of the suspicions or accusation against him or her owing to a lack of adequate interpretation?

3. Substance

59. Since the adoption of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002, L 190, p. 1), the field of judicial cooperation in criminal matters has gradually acquired legal instruments whose coordinated application is intended to strengthen the confidence of Member States in their respective national legal orders with a view to ensuring that judgments in criminal matters are recognised and enforced within the European Union in order to ensure that persons who have committed offences do not go unpunished. [31]

60. Directives 2010/64, 2012/13 and 2016/343 form part of that set of legal instruments giving tangible expression to the Roadmap, adopted by the Council in 2009, designed to strengthen the rights of individuals in criminal proceedings, which was welcomed by the European Council and declared an integral part of the Stockholm Programme. [32] All those provisions of secondary law are intended to enhance the procedural rights of suspects or accused persons in criminal proceedings in order to safeguard their right to a fair trial and accordingly are based, pursuant to their respective recitals, on the rights set out in Articles 6, 47 and 48 of the Charter among other

[30] Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraphs 39 and 40).

[31] See judgment of 12 December 2019, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors' Offices, Lyons and Tours)* (C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077, paragraph 43).

[32] Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p. 1) and The Stockholm Programme – An open and secure Europe serving and protecting citizens, paragraph 2.4 (OJ 2010 C 115, p. 1).

provisions. The respective scopes of those directives are, moreover, defined in almost identical terms so as to cover the full course of criminal proceedings from the time when persons are informed by the competent authorities of a Member State that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings with the decision on the final determination of whether the suspect or accused person has committed the criminal offence concerned.[33] A holistic approach to and understanding of Directives 2010/64, 2012/13 and 2016/343 are, in my view, necessary to answer the question referred.

(a) The first part of the question

61. The referring judge expresses uncertainty as to the right to interpretation of a sufficient quality provided for by Directive 2010/64 in terms of the implementation and verification of that right.

62. According to recital 17 of Directive 2010/64, the common minimum rules contained therein should ensure free and 'adequate' linguistic assistance allowing suspected or accused persons who do not speak or understand the language of the criminal proceedings fully to exercise their right of defence and safeguarding the fairness of the proceedings. Article 1(1) of Directive 2010/64 lays down the right to interpretation and translation in, inter alia, criminal proceedings. The right to interpretation provided for in Article 2 of Directive 2010/64 concerns the translation by an interpreter of the oral communications between suspected or accused persons and the investigative and judicial authorities or, where relevant, legal counsel. In other words, in order to safeguard the fairness of the proceedings and ensure that the person concerned is able to exercise his or her right of defence, that provision ensures that, when he or she is called upon to make oral statements himself or herself within the context, inter alia, of criminal proceedings, either directly before the competent judicial authorities or to his or her legal counsel, that person is entitled to do so in a language that he or she understands. Article 3 of Directive 2010/64 governs the right of translation of certain essential documents drafted in the language of the case by the competent authorities, including but not limited to any decision depriving a person of his or her liberty, any charge or indictment, and any judgment.[34]

63. In addition, Article 5(1) of Directive 2010/64, read in conjunction with Article 2(8) and Article 3(9) of that directive, requires Member States to take measures to ensure that the interpretation and translation are of sufficient quality to safeguard the fairness of the proceedings, which means that that interpretation or translation must, at the very least, enable suspected or accused persons to have knowledge of the case against them and to exercise their rights of defence.

64. Although Directive 2010/64 places Member States unequivocally under a precise obligation as to the result to be achieved in terms of the quality of interpretation and translation, it plainly leaves the Member States discretion as regards the manner in which that obligation is to be met. Thus, contrary to the assessment contained in the order for reference, a straightforward, literal reading of Article 5(2) of Directive 2010/64, with the use of the verb 'endeavour', shows that it is not mandatory to establish a register of independent translators and interpreters who are

[33] It is apparent from the order for reference that, in the main proceedings, IS being prosecuted in criminal proceedings which began with an investigation stage in the course of which he was questioned by the police during his detention with the assistance of an interpreter because he does not speak the language of those proceedings, and that a final decision determining whether he is guilty of the criminal offence concerned has not yet been adopted. In those circumstances, it must be held that Directives 2010/64, 2012/13 and 2016/343 apply to IS and those national proceedings.

[34] See, to that effect, judgment of 15 October 2015, *Covaci* (C-216/14, EU:C:2015:686, paragraphs 33, 40, 44 and 45).

appropriately qualified. The existence or absence of such a register, as is the case in Hungary according to the statements of the Hungarian Government, is therefore not, by itself, decisive in terms of compliance or non-compliance with the obligation on Member States referred to in the preceding point of this Opinion.

65. Nevertheless, in order to ensure the effectiveness of the right to adequate linguistic assistance, Directive 2010/64 requires Member States to provide for the quality control of interpretation and translation by way of procedures under national law. In addition to the right to challenge a decision finding that there is no need for interpretation or the translation of documents, Article 2(5) and Article 3(5) of that directive provide that, where those services have been provided, suspected or accused persons must be able to complain that the quality of interpretation or translation is not sufficient to safeguard the fairness of the proceedings. Again, it should be noted that Directive 2010/64 does not set out how that challenge is to be implemented, other than through control procedures. It follows from the abovementioned provisions, read in conjunction with recitals 24 and 25 of Directive 2010/64, that that right of challenge does not require Member States to provide for a separate mechanism or complaint procedure.

66. In the light of the foregoing considerations, I propose that the answer to the first part of the first question should be that Articles 2, 3 and 5 of Directive 2010/64 must be interpreted as requiring Member States to ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings have the opportunity to complain that the quality of interpretation is not sufficient to enable them to have knowledge of the case against them and to exercise their rights of defence. Article 5(2) of Directive 2010/64 does not require Member States to establish a register of independent translators and interpreters who are appropriately qualified.

(b) The second part of the question

67. The referring judge is uncertain as to the consequences of a breach of the accused person's right to information where it cannot be established that he or she knew of the suspicions or accusation against him or her owing to a failure to provide adequate interpretation, for the conduct of criminal proceedings against him or her *in absentia*. In my view, that question is part of an assessment of respect for the rights of the defence and the fairness of the proceedings, which is necessarily linked to the rights expressly laid down in Directive 2012/13 referred to in the wording of the question, and also concerns Directive 2016/343.

68. While it is for the referring judge to determine whether the provisions of Directive 2012/13 have been complied with in the main proceedings and what specific measures must, if necessary, be adopted to that end, it is the task of the Court to indicate to the referring judge the objective factors that should influence such an assessment. [35]

69. It is apparent from recitals 10 and 14 of Directive 2012/13 that its aim is, by means of the establishment of common minimum rules governing the right to information in criminal proceedings, to increase the mutual confidence of the Member States in their respective criminal justice systems. Article 1 of Directive 2012/13 specifies clearly that that directive lays down rules concerning the right to information of suspects or accused persons, relating to their rights in

[35] Judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 81).

criminal proceedings and to the accusation against them.[36] A reading of Article 3 in conjunction with Article 6 of Directive 2012/13 confirms that the right mentioned in Article 1 of that directive concerns at least two separate rights.[37]

70. First, in accordance with Article 3 of that directive, suspects or accused persons must be informed, at least, of certain procedural rights, which are listed in that provision, including the right of access to a lawyer, any entitlement to free legal advice and the conditions for obtaining such advice, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent.[38] Where suspects or accused persons are arrested or detained, Article 4 of Directive 2012/13 requires Member States to provide a Letter of Rights setting out, inter alia, the abovementioned procedural rights. Article 4(5) of that directive stipulates that the Letter of Rights must be provided to suspects and accused persons in a language which they understand and, where that is not available, they must be informed orally of their rights in a language which they understand.

71. Secondly, Article 6 of that directive sets out rules concerning the right to information about the accusation. Article 6(1) of Directive 2012/13 concerns the rule that suspects or accused persons are to be provided, promptly and in sufficient detail to safeguard the fairness of the proceedings and to enable the effective exercise of the rights of the defence, with information about the criminal act which they are suspected or accused of having committed. Paragraph 2 of that article specifically refers to suspects and accused persons who are arrested or detained, who must be informed of the reasons for their arrest or detention, including the criminal act they are suspected or accused of having committed. In addition and above all, under paragraph 3 of that article, detailed information is to be provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person, at the latest on submission of the merits of the accusation to a court.

72. In order to ensure the effectiveness of the right to information thus provided for, Article 8(2) of Directive 2012/13 states that suspects or accused persons or their lawyers must have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with that directive.

73. At this stage, I note that, although the referring judge cites Article 4(5) and Article 6(1) of Directive 2012/13 in the second part of the question, he refers to a situation where it cannot be established that the accused person, when questioned during the investigation stage with a Swedish interpreter present, was informed orally of the suspicions or accusation against him owing to inadequate interpretation. Those circumstances of the main proceedings seem to me to make Article 6 of Directive 2012/13 the relevant provision for the purposes of the answer to be given to the referring judge.

[36] Directive 2012/13, which is intended to govern the right to information of suspects and accused persons in criminal proceedings, is closely linked to Directive 2010/64, which confers on those same individuals, who do not speak or understand the language of the criminal proceedings concerned, a right to interpretation and translation of the information thus communicated. As recital 25 of Directive 2012/13 expressly states, when information is provided in accordance with that directive, suspects or accused persons must be provided, where necessary, with translations or interpretation into a language that they understand, in accordance with the standards set out in Directive 2010/64.

[37] See, to that effect, judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraphs 34, 42 and 43).

[38] In paragraph 53 of the judgment of 19 September 2019, *Rayonna prokuratura Lom* (C-467/18, EU:C:2019:765), the Court stated that persons suspected of having committed a criminal offence must be informed as soon as possible of their rights, from the moment when they are subject to suspicions which justify, in circumstances other than an emergency, the restriction of their liberty by the competent authorities by means of coercive measures and, at the latest, before they are first officially questioned by the police.

74. What is the position in the case of an accused person who, after being notified of the case against him or her during the investigation stage by an interpreter, in a manner considered to be inadequate, is the subject of a trial in his or her absence?

75. As is clear from Article 1 and recital 9 of Directive 2016/343, that directive is intended to lay down common minimum rules applicable to criminal proceedings concerning certain aspects of the presumption of innocence and the right to be present at the trial. Article 8(1) of that directive provides that Member States are to ensure that suspects and accused persons have the right to be present at their trial. Recital 35 of that directive states that the right of suspects and accused persons to be present at the trial is not absolute and that, under certain conditions, suspects and accused persons should be able, expressly or tacitly, but unequivocally, to waive that right. Accordingly, under Article 8(2) of Directive 2016/343, Member States may provide that a trial which can result in a decision on the guilt or innocence of a suspect or accused person can be held in his or her absence, provided that, in accordance with point (a) of that provision, the suspect or accused person has been informed, in due time, of the trial and of the consequences of non-appearance or that, in accordance with point (b) of that provision, the suspect or accused person, having been informed of the trial, is represented by a mandated lawyer, who was appointed either by the suspect or accused person or by the State. [39]

76. It follows from Article 8(2)(b) of Directive 2016/343 that it is therefore possible to judge an accused person in his or her absence if he or she has been informed beforehand that his or her trial is to be held and he or she is represented by a lawyer whom he or she has chosen or has been appointed by the State. In that regard, according to the documents before the Court, IS, whose summons was returned marked 'unclaimed', did not appear at the pre-trial hearing on 27 November 2018 and, since the public prosecutor has applied merely for a fine to be imposed, the referring judge is required, under national law, to continue the proceedings *in absentia* and therefore to rule on the guilt of the accused person, who is absent but represented by a lawyer appointed by the State.

77. Provided that the conditions for a trial *in absentia* are met, which it is for the referring judge to ascertain, [40] no provision of Directive 2016/343 precludes the possibility for a lawyer, expressly referred to in Article 8(2) of Directive 2012/13, to challenge before the competent court the manner in which the right to information, and more particularly Article 6 of that directive, was applied in the course of the proceedings. [41] A challenge to the lawfulness of procedural steps, and if necessary to the proceedings as a whole, may therefore be brought by the accused person's lawyer before the competent court required to hear the case in the absence of the accused person.

78. That challenge may be based on the failure to provide adequate interpretation of the accusation against a suspect or accused person, as required under Article 5(2) of Directive 2010/64. It should be borne in mind, in that regard, that interpretation of sufficient quality is

[39] See, to that effect, judgment of 13 February 2020, *Spetsializirana prokuratura (Hearing in the absence of the accused person)* (C-688/18, EU:C:2020:94, paragraphs 29, 32 and 33).

[40] I recall, in that regard, given that the right to be present at trial is not absolute, that recital 35 of Directive 2016/343 indicates that, in certain conditions, the accused person should be able, expressly or tacitly, but unequivocally, to waive that right. Recital 38 of that directive adds that, when considering whether the way in which the information is provided is sufficient to ensure the person's awareness of the trial, particular attention should be paid to the diligence exercised by the person concerned in order to receive information addressed to him or her.

[41] Under recital 36 of Directive 2012/13, that right does not entail the obligation for Member States to provide for a specific appeal procedure, a separate mechanism, or a complaint procedure for such a challenge to be made.

understood specifically as interpretation which should permit those individuals to have knowledge of the case against them and to exercise their right of defence, pursuant to Article 2(8) of that directive.

79. That said, the main proceedings also seem to me to raise the issue of the scope of an accused person's right to be informed of the accusation against him or her in a procedure providing for a possible decision on the merits in his or her absence. More specifically, is it possible to remedy a breach of the right to information about the accusation during the investigation stage at the stage of a trial *in absentia* of the accused person? In my view, consideration of the Court's case-law must lead to the answer that it is.

80. As stated, in essence, in recitals 14 and 41 of Directive 2012/13, that directive builds on the rights set out, inter alia, in Article 47 of the Charter and seeks to promote those rights. More specifically, Article 6 of that directive is intended to ensure the effective exercise of the rights of the defence and the fairness of the proceedings and thus expressly establishes an aspect of the right to an effective remedy, enshrined in Article 47 of the Charter.[42] The fact that Directive 2012/13 does not regulate the procedures whereby the information about the accusation, provided for in Article 6 of that directive, must be provided to the accused person cannot undermine the objective of that provision.[43]

81. That objective dictates that the accused person must receive detailed information on the accusation in due time, at a point in time that enables him or her to prepare his or her defence effectively. That objective and the proper conduct of proceedings presuppose, as a general rule and without prejudice, in some cases, to special or simplified procedures, that that disclosure should take place *no later* than the point in time when the hearing of argument on the merits of the accusation in fact commences before the court that has jurisdiction to give a ruling on the merits.[44]

82. In addition to determining the final point in time at which the disclosure of detailed information on the accusation must take place, the Court has stated that it is by means of that disclosure that an accused person *or his or her lawyer* is informed in detail of what he or she is alleged to have done and the legal classification of the acts committed. The opportunity to become acquainted with that information and that evidence no later than the commencement of the hearing of argument is essential if that person, or his or her lawyer, is to be able to participate properly in that argument with due regard for the adversarial principle and equality of arms, so that he or she is able to state his or her position effectively.[45] The Court has also made clear that, in any event, whenever the point in time when detailed information of the accusation is provided, the person and his or her lawyer must have, inter alia, with due regard for the adversarial principle and the principle of equality of arms, sufficient time to become acquainted with that information, and must be placed in a position to prepare the defence effectively, submit any observations and,

[42] See judgment of 14 May 2020, *Staatsanwaltschaft Offenburg* (C-615/18, EU:C:2020:376, paragraphs 70 and 71). The Court added, in paragraphs 72 and 73 of that judgment, that, like Article 47 of the Charter, which is sufficient in itself and does not need to be made more specific by provisions of EU or national law to confer on individuals a right which they may rely on as such, Article 6 of Directive 2012/13 must be regarded as having direct effect and that it is therefore for the referring judge, within the limits of his jurisdiction, to take all necessary measures to ensure that Article 6 is given full effect.

[43] Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraph 51).

[44] See, to that effect, judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraphs 90 and 92).

[45] See, to that effect, judgment of 5 June 2018, *Kolev and Others* (C-612/15, EU:C:2018:392, paragraph 93).

when necessary, to make any application, such as an application for further investigation, that they are entitled to make under national law. That requirement dictates that the case should, where necessary, be stayed and the case postponed to a subsequent date.[46]

83. In so far as, as in the main proceedings, an accused person not attending the trial is represented by a lawyer, who receives detailed information on the accusation in sufficient time to prepare the defence, he or she has the opportunity effectively to participate in the proceedings by challenging, where appropriate, the lawfulness of procedural steps and the proceedings as a whole, and the validity of the accusation.

84. In the light of the foregoing considerations, I propose that the answer to the second part of the first question should be that the combined provisions of Directives 2010/64, 2012/13 and 2016/343 must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, they do not preclude the trial *in absentia* of an accused person who does not speak or understand the language of the criminal proceedings and who cannot be established to have been informed in the course of the investigation of the suspicions or accusation against him or her owing to inadequate interpretation as long as the lawyer representing the accused person has the opportunity to challenge the lawfulness of procedural steps and, if necessary, the proceedings as a whole on the grounds of an infringement of that right to information. Article 6(3) of Directive 2012/13, read in the light of Article 47 of the Charter, must be interpreted as not precluding the disclosure of detailed information on the accusation to the defence of an accused person tried *in absentia* before the court begins to examine the merits of the accusation and to hear argument, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.

C. The second and third questions

85. In contrast to the first question referred, the Hungarian Government's objections to the admissibility of the second and third questions, stated in almost identical terms by the Commission, must, in my view, result in a finding that they are inadmissible. In view of the guidance provided in *Miasto Łowicz*, there is no longer any doubt, in my opinion, that they are inadmissible. The second and third questions are a topical example of questions which the Court wished to exclude from the preliminary ruling procedure as being contrary to the spirit and purpose of that legal remedy, namely the co-construction, by the Court and the national court, in accordance with their respective jurisdictions, of a solution to the specific dispute before the latter.

86. By its second and third questions, the referring judge asks the Court, in essence, whether Article 19 TEU and Article 47 of the Charter must be interpreted as precluding:

– a national system for appointing senior members of the judiciary, responsible for allocating cases, appraising judges and bringing disciplinary proceedings and conferring on the President of the NOJ, an official appointed by the parliament, the power to make direct temporary appointments, circumventing calls for applications and ignoring the opinion of the competent judicial bodies;

– a national remuneration system providing for lower pay for judges than for prosecutors and the discretionary grant by the President of the NOJ and senior judges of various allowances that are

[46] Judgment of 13 June 2019, *Moro* (C-646/17, EU:C:2019:489, paragraph 53).

exceedingly high compared to judges' basic pay and may thus potentially constitute undue influence and entail a breach of judicial independence.

87. Should the Court answer these questions in the affirmative, the referring judge raises the question of whether due regard has been had to the right to a fair hearing in one set of proceedings.

88. It should be borne in mind that the justification for a reference for a preliminary ruling under Article 267 TFEU is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute, the Court's task, in a preliminary ruling procedure, being to assist the referring court in disposing of the case pending before it. The preliminary ruling must be necessary to enable the referring court to give judgment in the case before it, and it is subject to that condition that the questions referred at issue may be classified as relevant and give rise to a reference for a preliminary ruling. [47]

89. However, the main proceedings consist of the trial *in absentia* of a Swedish national accused of infringing Hungarian law on firearms and ammunition who was notified of the accusation during the investigation by an interpreter. In view of his doubts as to the compatibility of national rules of criminal procedure, the referring judge asks the Court about the scope of the accused person's right to interpretation and information about the accusation against him or her in the specific context of an accused person who does not appear but is represented by a lawyer, a situation necessitating the interpretation of several provisions of Directives 2010/64, 2012/13 and 2016/343.

90. Accordingly, the answers expected from the Court regarding the compatibility with EU law – in this case Article 19 TEU, read in conjunction with Article 47 of the Charter – of national law concerning the direct appointment by the President of the NOJ of temporary senior judges [48] and judges' remuneration do not satisfy the criterion of necessity referred to above. [49] In other words, the main proceedings do not concern the Hungarian judicial system as a whole, of which some aspects are liable to undermine the independence of the judiciary and, more particularly, of the referring judge in his implementation of EU law.

91. The fact that there may be a substantive connection between the main proceedings and Article 47 of the Charter, if not more broadly with Article 19 TEU, is not sufficient to satisfy the criterion of necessity. It would also be necessary for the interpretation of those provisions, as requested in the second and third questions, to be objectively required for the decision to be taken by the referring judge, which is not the case here. It is not apparent how the referring judge might be required, following the guidance provided by an interpretation of those provisions in the light of the wording of those questions, to make a decision needed in order to rule on the main case. [50]

[47] See, to that effect, judgments of 3 July 2014, *Da Silva* (C-189/13, not published, EU:C:2014:2043, paragraph 36) and *Miasto Łowicz* (paragraphs 44 and 45).

[48] I note that the doubts of the referring judge as to the lawfulness of judicial appointments relate specifically to the appointment to the post of President of the Fővárosi Törvényszék (Budapest High Court), without it being alleged that the President of that court may be required to participate in the criminal proceedings before the referring judge, assigned to the Pesti Központi Kerületi Bíróság (Central District Court, Pest).

[49] See, by analogy, order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, not published, EU:C:2020:800).

[50] See, to that effect, judgment in *Miasto Łowicz* (paragraphs 48 and 52) and order of 6 October 2020, *Prokuratura Rejonowa w Słubicach* (C-623/18, not published, EU:C:2020:800, paragraph 30).

92. Moreover, although the Court has already held to be admissible questions referred for a preliminary ruling on the interpretation of procedural provisions of EU law which the referring court is required to apply in order to deliver its judgment, that is not the scope of the second and third questions referred in this case. Similarly, an answer by the Court to those questions does not appear capable of providing the referring judge with an interpretation of EU law which would allow him to resolve procedural questions of national law before being able to rule on the substance of the case before him. Accordingly, those questions do not therefore concern an interpretation of EU law which meets an objective need for the determination of that case, but are of a general nature and hence inadmissible. [51]

D. The fifth question

93. By his fifth question, the referring judge asks, in essence, whether Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU must be interpreted as precluding national law which allows disciplinary proceedings to be brought against a judge on the ground that he or she submitted a request for a preliminary ruling to the Court. Both the Hungarian Government and the Commission contend that this question is inadmissible, a submission which, in my view, can be accepted from a strictly legal point of view, despite the particularly worrying and regrettable circumstances – a euphemism if ever there was one – following the reference for a preliminary ruling.

94. It is common ground that, on 25 October 2019, the President of the Fővárosi Törvényszék (Budapest High Court) adopted a decision to start disciplinary proceedings against the referring judge, the first stage of a process leading to the case being referred to a disciplinary tribunal that could decide actually to bring proceedings and to impose a disciplinary penalty. In that decision, the referring judge was criticised for having:

– first, harmed the prestige of the profession of judge with reference to, inter alia, the Kúria's judgment declaring the reference for a preliminary ruling to be unlawful (Article 105(b) of the Law on the status and remuneration of judges);

– secondly, culpably breached the obligations associated with the office of judge, in that it could be inferred from the Kúria's judgment that there existed a ground for the judge concerned to withdraw on account of personal grievances against certain senior members of the judiciary, and that he should have declared that ground for withdrawal to the president of his court and not continued to be a judge in the main proceedings (Article 105(a) of the Law on the status and remuneration of judges).

95. On 22 November 2019 – four days after the submission of the supplementary request for a preliminary ruling – the President of the Fővárosi Törvényszék (Budapest High Court) withdrew the decision initiating disciplinary proceedings, thereby terminating those proceedings, on the ground that, although, in his capacity as President of the court concerned, he had been obliged to initiate disciplinary proceedings, the interests of the judiciary now required that decision to be withdrawn.

[51] See judgment in *Miasto Łowicz* (paragraphs 50, 51 and 53).

96. As has been stated, the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is 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 the questions submitted to it. [52]

97. In that respect, it should be noted that the main proceedings in the context of which the Court has been requested to provide a preliminary ruling do not concern the bringing of disciplinary proceedings against the referring judge, nor do they concern the status of the judiciary and provisions concerning the disciplinary regime for judges. Furthermore, it is common ground that the decision initiating the disciplinary proceedings was withdrawn and those proceedings terminated. In that context, the fifth question referred to the Court does not concern an interpretation of EU law which meets a need inherent in the determination of the main case, and an answer to that question would result in the Court delivering an advisory opinion on general or hypothetical questions, such as the possible psychological reaction of Hungarian judges to the disciplinary proceedings brought on the basis of the Kúria's judgment in terms of the future referral of questions for a preliminary ruling. The fifth question must therefore be declared inadmissible. However, in view of the intrinsic gravity of the decision initiating proceedings seeking the imposition of a disciplinary penalty on a judge on the ground that he submitted a reference for a preliminary ruling, it seems to me essential that the Court reiterate, in its judgment, paragraphs 55 to 59 of *Miasto Łowicz* in order to enlighten the competent national authorities and prevent any recurrence of actions of this type. [53]

98. For the sake of fully completing my task of providing assistance to the Court, I will nevertheless briefly mention the tenuous means by which the fifth question could be considered admissible. It is thus conceivable that the supplementary request for a preliminary ruling could be regarded as an indivisible whole, in which the fourth and fifth questions are closely linked, if not indissociable. By those questions, the referring judge seeks to ascertain whether he may, under EU law, disapply the Kúria's judgment so as to rule on the substance of the main case taking into account the preliminary ruling without having to fear the resumption of disciplinary proceedings against him based on that very judgment, the whole forming the procedural issue which must be resolved at the outset.

99. I observe, in that regard, that the expression 'procedural questions of national law', used in paragraph 51 of *Miasto Łowicz*, is characterised by a welcome generality, since the choice of the term 'questions' and not 'provisions' is likely to reflect the Court's wish to allow for a certain flexibility in interpreting the criterion of necessity arising from Article 267 TFEU. That expression may therefore cover any question which does not relate to the substantive resolution

[52] Judgment 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, paragraphs 97 and 98).

[53] It is worth recalling the words of Advocate General Geelhoed in his Opinion in *Commission* v *Italy* (C-129/00, EU:C:2003:319), according to which the national courts 'form both a safeguard and a counterweight within a Member State in the event that other organs of State fail to fulfil obligations under the Treaty'.

of the dispute but is indirectly connected with it, even if that question does not strictly concern the implementation of a legal or case-law rule governing the bringing of an action before a competent court, the conduct of proceedings, its outcome and appeals.[54]

100. Accordingly, an answer from the Court to the fourth and fifth questions, considered together, would be capable of providing the referring judge with an interpretation of EU law allowing him to resolve a procedural question of national law before being able to rule on the substance of the case before him. In the present case, that question concerns the conditions for the continuation of the main criminal proceedings following a judgment of the Court replying to an order for reference declared unlawful beforehand by a judgment of the highest national court which also served as the basis for initiating disciplinary proceedings against the referring judge. Should the Court choose to declare the fifth question admissible, the substantive answer would appear to me to be clearly set out in paragraphs 55 to 59 of *Miasto Łowicz*.

V. Conclusion

101. In the light of the foregoing considerations, I propose that the Court should answer the Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) as follows:

(1) Where there are rules of national law relating to the exercise of an extraordinary appeal, intended to unify that law, against an order for reference, Article 267 TFEU must be interpreted as precluding the application of such rules allowing the higher court hearing the appeal to declare that order unlawful, without affecting the legal effects of that order as regards the stay of the main proceedings and the continuation of the preliminary ruling procedure, on the grounds that the questions referred are not necessary to determining the case and seek a declaration that national law is incompatible with EU law. The primacy of EU law requires national referring courts to disapply those rules and the judicial decisions which give effect to them.

(2) Articles 2, 3 and 5 of Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings must be interpreted as requiring Member States to ensure that suspects or accused persons who do not speak or understand the language of the criminal proceedings have the opportunity to complain that the quality of interpretation is not sufficient to enable them to have knowledge of the case against them and to exercise their rights of defence. Article 5(2) of Directive 2010/64 does not require Member States to establish a register of independent translators and interpreters who are appropriately qualified.

(3) The combined provisions of Directives 2010/64, 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings and (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 must be interpreted as meaning that, in

[54] That situation is exactly different from that in which the Court held to be admissible questions referred for a preliminary ruling on the interpretation of procedural 'provisions' of EU law which the referring court is required to apply in order to deliver its judgment, as is pointed out in paragraph 50 of *Miasto Łowicz*. Significantly, the Court has also held that the terms 'give judgment', within the meaning of the second paragraph of Article 267 TFEU, encompass the whole 'procedure leading to the judgment' of the referring court and must, therefore, 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 (judgment of 28 February 2019, *Gradbeništvo Korana* (C-579/17, EU:C:2019:162, paragraph 35 and the case-law cited)).

circumstances such as those at issue in the main proceedings, they do not preclude the trial *in absentia* of an accused person who does not speak or understand the language of the criminal proceedings and who cannot be established to have been informed in the course of the investigation of the suspicions or accusation against him or her owing to inadequate interpretation as long as the lawyer representing the accused person has the opportunity to challenge the lawfulness of procedural steps and, if necessary, the proceedings as a whole on the grounds of an infringement of that right to information. Article 6(3) of Directive 2012/13, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as not precluding the disclosure of detailed information on the accusation to the defence of an accused person tried *in absentia* before the court begins to examine the merits of the accusation and to hear argument, provided that all necessary measures are taken by the court in order to ensure due regard for the rights of the defence and the fairness of the proceedings.