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Organisation of the internal functioning of the State's judiciary and the principle of subsidiarity and respect for Member States' competences.

Critical remarks in the light of the ruling of the CJEU of 16 November 2021 in Joined Cases C-748/19 to C-754/19 (on the question of the secondment of judges to higher courts within the domestic judicial system in Poland by the Minister of Justice)

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Abstract. The article examines the division of competences between the European Union and its Member States in the light of the judgment of the Court of Justice of the European Union (CJEU) in joined cases C-748/19 to C-754/19. The analysis focuses on two closely interrelated issues: the delegation of judges from first-instance courts to higher courts by the Polish Minister of Justice and the admissibility of preliminary references submitted by national courts under Article 267 TFEU. The paper reconstructs the reasoning of both the CJEU and the Polish Government, arguing that the secondment of judges essentially belongs to the sphere of internal administrative management of the judiciary, which falls within the exclusive competence of the Member States. It is submitted that, in the case at hand, the CJEU exceeded the limits of its conferred powers by accepting a hypothetical preliminary reference and by intervening in the internal organisation of the Polish judiciary without a clear cross-border element. The article formulates critical remarks regarding the systemic coherence of the judgment with the Court's previous case law and proposes *de lege ferenda* changes to Polish criminal procedure on the submission of preliminary references in order to enhance legal certainty while remaining in line with EU standards of the rule of law.

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1. INTRODUCTION

The subject of this study is the division of competences between the European Union and the Member States under Articles 4-5 of the Treaty on European Union (TEU) and Article 67 of the Treaty on the Functioning of the European Union (TFEU) in matters relating to the organisation and functioning of ordinary courts. The issue arose in connection with the secondment of judges to a higher court by the Polish Minister of Justice. In the background of the case, there was also the question of whether a full bench is required for a court to have the capacity to refer questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling. The ruling in question also gives rise to several *de lege ferenda* observations.

Managing the internal functioning of the judiciary falls within the scope of administrative and technical activities. These activities have the character of directing the work of the courts and are performed by court presidents and, in some cases, by the Minister of Justice of the Republic of Poland, acting within his supervisory competences. Their purpose is to ensure the efficient functioning of the judiciary by organising judicial work in line with actual needs. To that effect, pursuant to Article 77 of the Law on the Organisation of Common Courts (2001), Polish law provides, *inter alia*, for the possibility of seconding judges from a lower-instance to a higher-instance court. Having regard to the rational use of human resources in the ordinary judiciary and the workload of individual courts, the Minister of Justice may second, or delegate, a judge to perform judicial or administrative duties in another equivalent court or, in particularly justified cases, also in a court of higher instance. The secondment may last either for a fixed period (not longer than two years) or for an indefinite period. Secondment entails an increase in the judge's remuneration to the rate applicable at the higher court.

Respect for judicial independence presupposes, however, that the rules governing the secondment of judges provide guarantees of independence and impartiality, *inter alia*, to avoid the risk that secondment could be used to exert political control over the content of judicial decisions[1]. Although the Act does not expressly formulate such guarantees, they follow logically from the regulation of Article 77 of the Law on the Organisation of Common Courts. Under this provision, the consent of the delegated judge is required for secondment, which may be regarded as an important safeguard of judicial independence and impartiality under Polish law. At the same time, Article 77(4) of the same Act makes it clear that secondment is temporary in nature and that the Minister of Justice may recall a judge from secondment regardless of whether the judge has been seconded for a fixed term or for an indefinite period; if the judge has been seconded for a fixed term, recall takes place without any notice period.

In the judgment at issue, the Regional Court in Warsaw raised doubts about the validity of the composition of a bench that included a judge nominated by the new National Council of the Judiciary, whose status had already been contested in earlier preliminary references[2]. A similar doubt was raised with respect to Article 77 of the same Act, which, in the court's view, gives the Minister of Justice a potential possibility of indirectly influencing the

[1] The provisions of this Act do not expressis verbis provide such a guarantee, but it follows logically from Article 77 of the Law on the Organisation of Common Courts (2001).

[2] The doubts as to the validity of judicial appointments of judges nominated by the President on the basis of decisions of the (new) National Council of the Judiciary were, as it were, "woven into" the preliminary reference (see CJEU, Joined Cases C-748/19–C-754/19, 2021, para. 20(2)).

composition of the bench in individual criminal cases. It appears unlikely, however, that such influence could occur in the specific proceedings before that particular court, because for several years now the composition of judicial panels has been determined by random allocation using a specially designed IT system[3]. Nevertheless, it should be borne in mind that the Minister of Justice may delegate a judge to a higher court on the basis of criteria that are not disclosed to the public and that such a decision is not subject to judicial review. Similarly, the Minister of Justice may remove a judge from secondment at any time without stating reasons. One Polish court expressed concern that, under Article 77(4) of the Law on the Organisation of Common Courts, a seconded judge may be recalled at any time and without an explicit reason, which could in itself be a source of apprehension for seconded judges (CJEU, Joined Cases C-748/19–C-754/19, 2021, para. 17).

2. THE FACTUAL SITUATION

In the circumstances described above, the Regional Court in Warsaw (10th Criminal Appeal Division[4]), sitting as a second-instance court, made a preliminary reference to the CJEU concerning the participation, in its bench, of judges seconded from a district court (and thus from a first-instance court). The presiding judge decided, at her own discretion and acting as a single judge, to raise doubts as to the lawfulness and validity of the composition of the bench over which she presided. She justified her doubts by pointing out that one of the judges sitting on the bench had been seconded from a district court and argued that the procedure by which a district court judge is delegated by the Minister of Justice to adjudicate at the Regional Court could, in the future, raise doubts as to the correctness of the composition of the bench in the light of the rule of law under Article 19(1) TEU, given that these judges were delegated pursuant to Article 77(1) of the Law on the Organisation of Common Courts. In her view, this might undermine the validity of judgments delivered in other cases decided by the same bench[5].

An additional doubt stemmed from the fact that some of the district court judges delegated to the Regional Court had been nominated by the new National Council of the Judiciary, whose status had already been contested in earlier preliminary references submitted to the CJEU by other Polish courts[6], which, in the presiding judge's opinion, could give rise to cassation appeals alleging that the judgment was invalid due to the improper composition of the court. Furthermore, it was argued that the fact that the Minister of Justice is not obliged to give reasons either for the decision to delegate a judge or for the decision to terminate a secondment could potentially allow him to exert influence on seconded judges sitting on panels and hearing cases in the main proceedings. This potential influence was described as twofold. First, by seconding a judge to a higher court, the Minister of Justice would "have the opportunity to reward" that judge for previous actions or even to formulate expectations regarding future adjudication, thus turning secondment into a surrogate for career advancement. Second, by terminating a secondment, the Minister of Justice could, in effect, "punish" a seconded judge for delivering an "inappropriate"

[3] Article 1(2)(16) of the Regulation of the Minister of Justice of 18 June 2019 on the Rules of Procedure of Common Courts (Dz.U. 2022, item 2514) regulates the establishment of the System of Random Allocation of Cases.

[4] It is particularly important that this was an appellate court, given the statutory requirement that such a court adjudicates in a three-judge panel.

[5] One can hardly share the court's conviction that, as a rule, defendants or their legal representatives examine the underlying relationship between the appointment of the judge ruling in the case by the President of the Republic of Poland and the composition of the National Council of the Judiciary. However, such an allegation cannot be entirely excluded.

[6] Point 16 of the Opinion of Advocate General A. Bobek: *Does a breach of the requirements referred to in paragraph 1 arise where the parties are entitled to an extraordinary appeal against a decision given in judicial proceedings such as those described in paragraph 1 to a court, such as the Supreme Court, whose decisions are not subject to appeal under domestic law, and national law requires the President of the judicial organisational unit of that court (Chamber), which has jurisdiction to hear the appeal, to allocate cases in accordance with an alphabetical list of the judges of that Chamber, expressly forbidding the omission of any judge, and the person appointed at the request of a collegiate body such as the National Council of the Judiciary also participates in the procedure (...)*.

decision. In this context, the court was particularly concerned about a possible "punishment" of judges who had made a reference to the CJEU for a preliminary ruling (CJEU, Joined Cases C-748/19–C-754/19, 2021, para. 17).

The Regional Court in Warsaw observed that "there is currently a high risk of such a sanction in the event where a judge decides to request the Court of Justice of the EU for a preliminary ruling, particularly in the context of derogation from provisions of Polish law that are inconsistent with EU law" (CJEU, Joined Cases C-748/19–C-754/19, 2021, para. 17). It should also be noted that the question for a preliminary ruling was referred to the CJEU by only one member of the bench, namely the presiding judge, even though that bench had several other criminal cases pending and the only reason for the reference was the delegation of one judge from a lower instance (a district court). As a consequence of the preliminary reference made by the Regional Court in Warsaw, seven pending criminal cases had to be suspended, and their hearing was stayed until the CJEU ruled on the questions referred. In at least one of those proceedings, however, a final judgment was delivered despite the fact that a national court which has made a preliminary reference is in principle required to stay its decision until it has received the CJEU's answer[7].

3. RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

In the case at hand, the Republic of Poland was represented by the National Public Prosecutor's Office, which in turn presented the arguments of seven regional public prosecutor's offices acting as prosecuting authorities in the criminal cases covered by the questions referred by the Regional Court in Warsaw for a preliminary ruling. The Polish side, including the National Public Prosecutor's Office, emphasised two key aspects in its response to the questions. First, it argued that the questions from the Regional Court in Warsaw were essentially hypothetical in nature and based on a general presumption of doubt or potential dependence of seconded judges on the Minister of Justice, in view of possible benefits and career advancement for those judges (CJEU, Joined Cases C-748/19–C-754/19, 2021, para. 51). The referring court had not demonstrated that any such situation had actually occurred in the seven cases in question, nor had it shown any concrete link, even in those proceedings, between the delegated district court judges and the Minister of Justice.

Second, the Polish Government and the National Public Prosecutor's Office drew attention to the procedural aspect of the case, namely the fact that the decision to submit a preliminary reference to the CJEU had been taken by the presiding judge alone rather than by the entire bench. This, they argued, departed from the requirements of Polish criminal procedure, under which an appellate court normally adjudicates in a three-judge panel. This argument is particularly important because, in paragraph 42 of the judgment, the CJEU referred to its earlier case law (see C-272/19, Land Hessen, para. 43) and recalled that the question whether "the body making the reference for a preliminary ruling has the nature of a 'court' within the meaning of Article 267 TFEU" is a matter of EU law alone[8]. In assessing the admissibility of the reference, the CJEU reiterated that it takes into account factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law, and whether it is independent (Land Hessen, C-272/19, para. 43). At the same time, contrary to the implications of that earlier judgment—where the requirement that a court be "established by law" would, in the Polish context, normally suggest a three-judge panel—the CJEU treated the

[7] In one of the pending proceedings covered by the preliminary reference, a final judgment was delivered despite the fact that a national court making a preliminary reference is, in principle, required to stay its decision until it receives the CJEU's answer.

[8] The final decision as to whether a body qualifies as a court entitled to refer a preliminary question lies with the CJEU (see, inter alia, ECJ, *Corbiau*, Case C-24/92; *Abrahamsson*, Case C-407/98). Over decades of case law, the ECJ (now the CJEU) has clarified the parameters for such a body: it must operate and be appointed under a provision of law. The one-person action of the presiding judge in the judgment at issue therefore raises serious doubts as to whether it can be regarded as an act of a "court." On the definition of "court" in the context of preliminary references, see Brodecki (2004, p. 77) and, in more detail, Taborowski (2003, pp. 247–295).

unilateral decision of the presiding judge to request a preliminary ruling as an act of a "court established by law." Under Polish criminal procedure, however, the competent court in such appeal cases is a three-judge bench, as expressly provided for in domestic law[9]. The CJEU thus accepted the preliminary reference despite its own prior case law on the notion of a "court," and in a way that stretches its earlier interpretation[10].

At the preliminary stage of the proceedings, the Polish Government further pointed out an inconsistency in the Opinion of the Advocate General, arguing that it contained a *petitio principii* logical error. In the Government's view, the Advocate General had incorrectly inferred from the wording of the questions referred and from national provisions that the secondment of a judge to a higher court entailed additional advantages in the form of career promotion and higher remuneration, without specifying any legal or factual basis for this conclusion (para. 28 of the judgment). It may be presumed that this inference was, to some extent, a "sublimation" of the referring court's own reference to "remuneration," even though the preliminary questions did not directly concern financial issues but rather professional advancement within the judicial hierarchy (Joined Cases C-748/19–C-754/19, 2021, para. 28).

After examining the case, the CJEU delivered its judgment on the questions referred by the Regional Court in Warsaw, relying on Article 267 TFEU to underline that the decision to refer a question lies exclusively with the national court before which the dispute is pending and which is called upon to give judgment in that dispute (see, e.g., Talaga, 2010, pp. 91–115; Maniewska, 2005, p. 57; Mik, 2005, p. 119; Postulski, 2005, p. 101). The Court considered irrelevant the preliminary objection concerning the competence of the presiding judge, who had referred the questions on her own, without involving the rest of the bench, contrary to the procedural rules under Polish law. According to the CJEU, once the questions raised concern the interpretation of EU law, the Court is, as a rule, obliged to give a ruling, and it is for the CJEU to determine, in light of the specific circumstances, whether a preliminary ruling is necessary for the resolution of the dispute and whether the questions referred are relevant[11]. In the author's view, while the CJEU indeed has the final say on whether or not to answer a preliminary reference, its reasoning in this case is overly general; in particular, a "single-person" reference under Article 267 TFEU appears problematic, since individual actions (other than those expressly provided for by law) do not normally qualify as acts of a "court."

In any event, the CJEU dismissed most of the questions (three out of four) referred by the Regional Court in Warsaw on the ground that they were hypothetical. It answered only one question *in concreto*, holding that Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings[12] must be interpreted as precluding national legislation under which the Minister for Justice of a Member State may, on the basis of non-public criteria, delegate a judge to a higher criminal court for a fixed or an indefinite period and may terminate that delegation at any time without stating reasons (Directive (EU) 2016/343, OJ 2016 L 65/1). In the course of the proceedings, the Polish Government relied, inter alia, on paragraph 178 of the Advocate General's Opinion, according to which EU law does not in itself prevent Member States from establishing a system whereby judges may, in the interests of the service, be temporarily transferred from one court to another, whether of the same or a higher instance. From the perspective of the organisation of the judiciary, the CJEU's final ruling thus appears to contradict that Opinion. It should once again be noted that the CJEU declined to answer the remaining three questions submitted by the Regional Court in Warsaw because of their hypothetical nature, while in relation to the

[9] Poland's position – para. 45 of the judgment in question.

[10] Foreign doctrine has long observed that the CJEU enjoys a very wide margin of interpretation and is, in principle, bound in constitutional matters only by the Treaties. The Court has repeatedly gone beyond purely literal interpretation, as illustrated by *Van Gend en Loos*. See Fennelly (1996, pp. 656, 679) and Mertens de Wilmars (1986, p. 13).

[11] Para. 52 of the judgment in question, together with the judgment referred to therein of 24 November 2020, *Openbaar Ministerie*, in which the CJEU articulated its duty to answer a preliminary question.

[12] Final thesis of the judgment in question (*in fine*).

single question it found admissible it engaged in an extensive discussion with the arguments of the Polish Government, relying on its recent case law not only on Poland but also on other Member States, such as Romania and Portugal, on issues relating to the rule of law and the organisation of the courts (Joined Cases C-748/19–C-754/19, 2021, paras. 92–94).

4. CRITICAL ANALYSIS OF THE JUDGMENT AND THE OPINION OF THE ADVOCATE GENERAL

The ruling of the CJEU under review raises legitimate doubts as to its systemic consistency with the Court's previous case law. These doubts concern, in particular, the systemic principles governing the division of competences between the European Union and its Member States and the procedural rules on the admissibility of preliminary references. The CJEU accepted the present case for examination on the basis of the principle that the independence of national courts must be guaranteed. In this respect, the provision of the Polish Law on the Organisation of Common Courts, which allows the Minister of Justice to recall judges from secondment without giving reasons, may indeed raise concerns, in so far as secondment is concerned, about its potential negative impact *in personam*. However, as regards the handling of the preliminary reference itself, the CJEU's ruling should, in the author's view, be assessed critically in procedural, systemic, and logical terms.

From a procedural perspective, the CJEU's acceptance of a preliminary question formulated by a single judge, acting as the presiding judge of the bench but without the participation of the other members of that bench and thus contrary to the statutory composition of the court under national law, deserves strong criticism. In rejecting the arguments of the Polish Government, the CJEU failed, first and foremost, to conduct a proper analysis of the concept of a "court" to which it referred in its reasoning and, consequently, assumed *a priori* that a court may act through a single judge in this context. Yet, in a state governed by the rule of law, an improperly constituted court is, as a rule, a ground for the invalidity of a judgment. Since, however, the CJEU relied *expressis verbis* on its earlier case law to conclude that the referring body in this case was a "court established by law," the absence—both in the present judgment and in the wider line of case law—of any engagement with the effectiveness of a single-judge act taken in place of a multi-judge bench undermines the quality of the Court's conclusion. No explanation of this point was provided, despite the long-standing and well-established case law of the CJEU that links the notion of a "court" in the preliminary reference procedure to a body defined as such by national law[13].

4.1. The concept of a 'court' and its proper composition - the content of the national statutory regulation

Pursuant to Polish criminal procedure, Article 30 § 2 of the Code of Criminal Procedure provides that criminal appeal cases before regional courts are heard by a three-judge bench. This was also the statutory composition of the bench of the Regional Court in Warsaw. Consequently, the Polish side raised doubts as to whether the presiding judge of that bench had the procedural competence to formulate questions for a preliminary ruling acting alone. The general rules on the composition of benches, contained in Article 30 § 1 of the Code of Criminal Procedure, state that district courts and regional courts adjudicate in a single-judge composition. Polish criminal-law doctrine indicates, however, that the use of the general term "court" in Article 30 § 1 allows for a broad functional interpretation of the grounds for extending the composition of the adjudicating panel "due to the particular complexity of the case or its importance, even where the statute provides for a single-judge panel as the rule" (Szumiło-Kulczycka, 2022).

[13] This concept has been firmly established for decades in the Court's case law (see, e.g., Abrahamsson, C-407/98; more recently Land Hessen, C-272/19).

As regards appellate courts, such as the Regional Court in Warsaw which submitted the preliminary reference, Article 30 § 2 of the Code of Criminal Procedure stipulates that such a court adjudicates in a three-judge panel, and the exceptions provided for in the Act apply only to certain specific complaints (see, for example, Articles 75 § 3, 254 § 3, 263 § 3, and 545 § 3 of the Code of Criminal Procedure). It is therefore legitimate to ask whether it is permissible for the president of an appellate court to act alone in a situation where the law requires a three-judge bench. This question is particularly relevant with regard to the composition of a court authorised to submit preliminary references, since this is not merely a matter of internal organisation but directly affects the merits of the case: the final decision must be based on the CJEU's answer to the question referred. For that reason, an independent formulation of a preliminary question by the president of an appellate court whose statutory composition is a three-judge bench should be regarded as a breach of the Act.

4.2. The systemic aspect and the hypotheticality of questions referred for a preliminary ruling as a basis for the Court's refusal to respond

Consequently, in systemic terms - that is, with regard to the rules on referring questions for a preliminary ruling - the CJEU's ruling exposes the preliminary reference mechanism to a certain distortion. The Court failed to use this opportunity to formulate and clarify an unambiguous criterion of an "authorised court" as a "community notion" applicable in all similar future cases[14]. Instead, the Court of Justice confined itself to a very general reliance on Article 267 TFEU, without engaging in a deeper analysis of this issue. From a systemic perspective, the legitimisation of the CJEU's approach in this case must be criticised because, instead of dispelling doubts as to the concept of a "national court," the Court relied on the general assumption of its "duty to answer a question referred for a preliminary ruling" (Lyckeskog, C-99/00, 2002), as if it were obliged in every case to take up and decide the matter referred.

However, for many years the CJEU has been very flexible with regard to the procedural autonomy of national courts when deciding whether to submit a preliminary reference, for instance by recognising the doctrines of *acte clair* and *acte éclairé*, which allow courts to refrain from referring questions in obvious cases or in situations already clarified by the Court[15]. This line of case law sits uneasily with the Court's suggestion of a quasi-automatic duty to answer in the present judgment. On numerous occasions in the past, the CJEU has refused to deal with preliminary questions precisely because of their defective drafting (for example, questions that were too broad), procedural shortcomings (Szpunar, 2006, p. 126), or, above all, their hypothetical character (as in the well-known *Foglia v. Novello* judgments[16]).

The hypothetical nature of the question submitted by the Regional Court in Warsaw is particularly evident in its reference to a presumed "presumption of guilt" attaching to seconded judges, who would allegedly and automatically become dependent and subservient to the Minister of Justice (Joined Cases C-748/19–C-754/19, 2021, paras. 81-83). This assertion was not supported by even the slightest suspicion expressed by any member of the bench at the time the preliminary reference was made. Similarly, the fact that the reference was premised on a vague "possibility that doubts may arise" on the part of the persons concerned as to the independence of judges, or as to the correctness of the composition of the appellate bench, confirms that the questions were hypothetical in nature and therefore inadmissible. For this reason, the CJEU ultimately refused to answer three out of the four questions put forward by the Regional Court. Moreover, in one of the pending proceedings covered by the reference,

[14] European legal doctrine indicates that the Court of Justice sometimes moves beyond the rigid framework of the Treaties, creating additional concepts not expressly contained therein; see Tridimas (2006, p. 18).
[15] An example is the *acte clair* and *acte éclairé* doctrines, which allow national courts to refrain from referring preliminary questions in obvious cases or where the matter has already been clarified by the Court; see Kastelik-Smaza (2007, p. 28).
[16] *Foglia*, C-104/79, 1980; *Foglia*, C-244/81, 1981.

the Warsaw court issued a final judgment without waiting for the CJEU's ruling, which casts further doubt on the necessity and practical relevance of the preliminary questions submitted (see below, footnote 20).

4.3. Inconsistency in reasoning with regard to previous CJEU judgments on the remuneration of judges

From a logical perspective, the CJEU accepted an internally inconsistent Opinion of the Advocate General, even though the Court itself implicitly acknowledged the merits of the arguments put forward by the Polish side. The Court did not base any of its reasoning on the alleged financial dependence of judges, namely higher remuneration, which the Advocate General had highlighted. Instead, the CJEU referred to its earlier judgment of 18 May 2021 on judicial remuneration in Romania, *Asociaţia "Forumul Judecătorilor din România" and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19), and to its judgment of 6 October 2021 in *W.Ż.* (C-487/19, Poland), concerning the transfer of judges between divisions within the same court. Both rulings, which the CJEU used as a basis for its reasoning, concerned fundamentally different factual situations and focused on the financial aspects of judicial remuneration. Relying on those precedents therefore rested on a rather remote analogy, which weakens the logical persuasiveness of the Court's argument in the present case (for a detailed analysis, see Sokołowski, 2022).

Furthermore, the CJEU referred to two judgments of the European Court of Human Rights (ECHR): *Richert v. Poland* (25 October 2011, § 44)[17] and *Dryzek v. Poland* (20 March 2012, § 49)[18]. This reference is also problematic, since both judgments clearly confirm that Member States are entitled, in the interests of the service, to establish systems under which judges may be temporarily seconded from one court to another. In doing so, the CJEU indirectly reaffirmed the prerogative of the State to organise and manage its own national judiciary, a prerogative which directly follows from the Treaties themselves (Article 4(2) TEU and Article 67(1) TFEU).

In the case at hand, the Polish side also pointed out that the referring court not only failed to suspend the proceedings, but on 11 December 2019 delivered a final judgment terminating one of the cases covered by the preliminary reference (Case C-754/19)[19]. The Advocate General correctly noted that, according to settled case law, where no dispute remains pending before the referring court and the answer to the question can no longer contribute to its resolution, the CJEU should declare that there is no need to adjudicate on the reference. However, he went on to argue that, since the Regional Court in Warsaw had neither informed the CJEU of the termination of that case nor withdrawn its reference, the Court could continue to deal with the remaining six cases in which identical questions had been referred. This reasoning appears to overlook a crucial aspect that undermines the very essence of the reference: its hypothetical character. One case had already been definitively decided, and all the proceedings were covered by essentially the same hypothetical questions.

Although one may agree with the Advocate General that the existence of six still-pending proceedings could, in his view, justify continuing the preliminary ruling procedure and delivering a judgment, this circumstance nonetheless significantly weakens the internal coherence of his argument in this specific case. Above all, the conduct of the Regional Court in Warsaw may be regarded as a clear breach of EU law, since submitting a preliminary question in principle obliges the national court to await the CJEU's answer before issuing a final decision, as highlighted in the *Köbler* judgment (C-224/01)[20].

[17] *Richert v. Poland*, CE:ECHR:2011:1025JUD005480907.
[18] *Dryzek v. Poland*, CE:ECHR:2012:0320DEC001228509.
[19] One of the cases covered by the preliminary reference of the Regional Court in Warsaw.
[20] CJEU judgment in Case C-224/01 *Köbler*, in which the Austrian court failed to take into account the Court's answer to its own preliminary reference.

5. GENERAL CONCLUSIONS BASED ON THE MOST RECENT RULING OF THE POLISH CONSTITUTIONAL TRIBUNAL OF NOVEMBER 2022

By delivering the judgment under discussion, the CJEU - as an institution of the European Union - intervened in an area in which the Union has no clearly conferred competence. In the light of the principle of conferral laid down in Articles 4 and 5 TEU, such an intervention may be regarded as a breach of the Treaties. As noted by the Polish Constitutional Tribunal in the reasoning of its judgment of 7 October 2021 (Case K 3/21), the interpretation of EU primary law by the CJEU cannot lead to *de facto* amendments of the Treaties[21]. At the same time, this position arises in parallel with serious doubts as to the validity of that judgment itself, given the contested personal composition of the Constitutional Tribunal (Szumiło Kulczycka & Kozub Ciembroniewicz, 2021, p. 83).

In the absence of any Treaty provision on the method of interpreting EU law and against the background of the open-ended formula of an "ever closer union" between the EU and the Member States, the Polish Constitutional Tribunal felt compelled to ask whether such an interpretative approach could produce unlimited, quasi-legislative effects (Muszyński, 2020, pp. 84-112). The judgment analysed here has resulted in the CJEU becoming entangled in the internal administration and organisation of the judiciary of a Member State, without any clear cross-border element justifying such intervention (Radziewicz, 2020, p. 3). It must be recalled that the Union has no competence to interfere in the internal sphere of substantive criminal law[22] - or substantive family law (Mostowik, 2011, pp. 12-13) - of the Member States, insofar as a given matter is not linked to cross-border cooperation between them under what used to be the "third pillar" of Justice and Home Affairs (now covered by the Area of Freedom, Security and Justice) (Gerecka Żołyńska, 2009, p. 264). In the judgment at issue, the CJEU attempted to justify its intervention (paras 46, 48, 52) by referring to the absence of horizontal harmonisation of national criminal law. Nevertheless, interference with the internal functioning of the criminal justice system and, in particular, the practical effect of altering - at least potentially - the composition of judicial benches and excluding one member of a given panel from adjudicating, has no basis in EU law and constitutes an unauthorised intrusion into the internal organisation of the judiciary of a Member State.

Continuing to draw on the written reasons of the Polish Constitutional Tribunal's judgment of 7 October 2021 - itself highly contested in doctrine[23] - one may nonetheless agree with the assertion that the CJEU's most recent case law on EU primary law departs significantly from what the Member States had generally agreed upon at the time of accession and following the Lisbon Treaty amendments. At present, the CJEU, as an organ of the Union, appears to seek, through its jurisprudence, to ascribe to itself a competence not provided for in the Treaties, namely a form of "(negative) legislative competence." This occurs when the Court endorses solutions that effectively deny Polish courts the possibility of applying binding Polish law and, as a result, directly influences the internal organisation of the judiciary in the Member States (in this case, Poland), including the structure and functioning of constitutional judicial bodies[24].

[21] The main problem submitted to the Constitutional Tribunal concerned the incorrect appointment of some of its judges, which calls into question the validity of this judgment. See Wróbel (2021, p. 20). For further remarks, see the statement of the Polish Academy of Sciences committee: press release of 12 October 2021, available at https://www.prawo.pl/prawnicy-sady/wyrok-tk-w-sprawie-unijnego-prawa-wg-komitetu-pan-szkodliwy,511131.html.

[22] The idea of a "Europe of the judges," already criticised in constitutional court case law of several Member States (Germany, Denmark, the Netherlands) in the 1990s–2000s; see Lecourt (1976, p. 307).

[23] Judgment of the Polish Constitutional Tribunal of 7 October 2021, Case K 3/21 (written reasons published November 2022).

[24] From the position of the Prosecutor General in Case K 3/21: *The assessment by the CJEU of whether a given regulation of national law in the judicial sphere is incompatible with EU primary law amounts to determining, in normative terms, the limits within which a Member State may regulate this area. The consequences of such an approach are, in practice, the same as if an EU institution had adopted a legislative act on the matter.*

The CJEU's decision to admit the preliminary reference from the Regional Court in Warsaw led to the suspension of as many as seven parallel domestic criminal proceedings (the fact that expedited treatment was requested does not materially alter this effect). This could even be viewed as - likely unintentional - obstruction of the functioning of the judiciary, one of the core state structures. Such a consequence may be considered an additional breach of the Treaty obligation to respect the essential functions of the State, including the maintenance of public order, enshrined in Article 4(2) TEU. Rather than strengthening the rule of law, the legal certainty of citizens of the European Union (in this case, Polish citizens) was adversely affected as a side effect of the paralysis of several criminal proceedings, which in turn jeopardised the legal security of the State and its society. In this way, an institution designed to safeguard the rule of law at the European level contributed, in this specific constellation, to a threat to the internal rule of law of a Member State[25].

5.1. Detailed conclusions. EU competence and the internal organisation of the justice system in the Member States

The ruling in question may be regarded as a breach by the CJEU of the Treaty principle of sincere cooperation, under which the EU and the Member States are required to respect each other's competences and assist one another (Article 4(3), first sentence, TEU). The admission of a preliminary reference in a criminal-law context which falls outside the Union's conferred competences constitutes an infringement of the Treaties and, in this particular case, also a violation of Article 67(2) TFEU, which expressly requires respect for the different legal systems and traditions of the Member States. Viewed in this light, the judgment gives the impression that the CJEU, by freely moving beyond the scope and limits of the competences of Union institutions - including its own powers under the Treaties, which do not encompass a general criminal-law competence - is once again attempting to revive the concept of a "Europe of the judges" (see Lecourt, 1976, p. 307), understood as the judicial expansion of EU competences beyond the Treaty framework through judicial activism (see Sokołowski, 2022, p. 657). This concept, present in European legal doctrine several decades ago, envisaged precisely such a free extension of Community/Union competences by case law, but it was firmly criticised by the constitutional courts of Member States around the time of the Maastricht and Amsterdam Treaties. By way of example, the Danish Supreme Court in its judgment of 6 April 1998 (Carlsen, I 361/1997) expressly rejected an expansive interpretation of EU competences justified solely by the need to attain the "objectives of EU law."

In the author's opinion, while Member States shape their judicial systems on the basis of their own sovereignty, they should at the same time seek to comply with general principles of law and maintain contemporary international standards as developed, inter alia, in the case law of the CJEU.

More generally, the judgment has contributed to a distortion of the previously uniform rules on the admissibility of preliminary references by accepting questions of a fundamentally hypothetical nature, whereas such hypothetical character used to be one of the key grounds for refusing to entertain a reference. It cannot be ruled out that, in the future, other courts may be encouraged to submit similarly hypothetical questions, relying on the precedent set in the present case[26]. This development risks transforming the CJEU from a *court of facts* into a *court of hypotheses*, which would fundamentally contradict the idea of objective truth underpinning the principle of the rule of law.

[25] Polish doctrine of EU law assumes that CJEU judgments delivered by collective benches should embody a form of "collective wisdom" if they are to be applied across different Member States and legal systems; see Koncewicz (2003, pp. 102-103).

[26] European doctrine has long emphasised that the CJEU often formulates rather general legal principles (as in the judgment under review, concerning the rule of law and judicial independence in relation to the notion of "court") rather than *in concreto* standards, which makes it more difficult to apply its rulings in diverse national legal systems; see Kutscher (1976, p. 13).

5.2 Detailed conclusions. *De lege ferenda* remarks

Assessing the ruling in question on its merits in the context of the rule of law and against the background of Polish criminal-procedure rules, it seems reasonable to consider amending Section XIII of the Code of Criminal Procedure (Proceedings in Criminal Cases from International Relations) by introducing a specific provision governing the procedure for submitting preliminary references to the CJEU by criminal courts. This is a *de lege ferenda* proposal; any change in the current legal framework lies exclusively within the competence of the national legislature (in this case, the Polish Parliament) and should not be imposed by the CJEU. At the same time, notwithstanding the CJEU's apparent overstepping of its competences in the present case, a statutory regulation of the formal aspects of preliminary references from national courts could help clarify certain procedural issues, such as whether pending proceedings must be suspended until a reply is received from the CJEU and whether this depends on the Court's decision to examine the reference or to declare it inadmissible. A clear framework of this kind would enable Polish courts to resume ordinary proceedings more swiftly and to schedule further hearings without unnecessary delay.

Such a provision could also address situations in which, for compelling reasons, it is necessary to deliver a final judgment as a matter of urgency - for example, due to the imminent risk of limitation of the offence - as was the case in one of the proceedings covered by the preliminary reference at issue.

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