Judicial Independence Under Article 19(1) TEU and Article 267 TFEU: Untangling the Gordian Knot

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MASTER THESIS

Judicial Independence Under Article 19(1) TEU and Article 267 TFEU: Untangling the Gordian Knot

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ABSTRACT

This master's thesis explores the conflicting relationship between Article 19(1) TEU and Article 267 TFEU in the Court of Justice's case-law, particularly in the context of the ongoing rule of law crisis in Poland and Hungary. Judges of courts captive by executive and legislative frequently submit references questioning the independence of their colleagues, and the question arises whether this practice is allowed. The simultaneous application of Article 19(1) TEU and Article 267 TFEU in assessing the admissibility of requests for preliminary ruling can lead to a paradox: courts that are not independent may not submit references questioning the independence of their judges precisely because they lack independence. This was the result of the Banco de Santander judgement, which was partially corrected by subsequent cases. However, the following case-law has opened a possibility of excluding large parts of a Member State's judiciary from the preliminary reference procedure. This master thesis first analyses two strands of case-law: case-law under Article 19(1) TEU and case-law under Article 267 TFEU. In that light, it turns to the assessment of three cases in which the Court has decided on this particular issue: Banco de Santander, Getin Noble Bank, and L.G. The paper concludes by emphasising the importance of the preliminary ruling procedure in order to maintain dialogue with the Polish judiciary.

KEY WORDS: judicial independence, Court of Justice, Article 19(1) TEU, Article 267 TFEU, *Banco de Santander, Getin Noble Bank, L.G.*

SAŽETAK

Ovaj diplomski rad analizira odnos između članka 19. stavka 1. UEU-a i članka 267. UFEU-a u sudskoj praksi Suda Europske unije u kontekstu trenutne krize vladavine prava u Poljskoj i Mađarskoj. Suci sudova koji su okupirani od strane izvršne i zakonodavne vlasti često postavljaju prethodna pitanja u vezi nezavisnosti ostalih sudaca što otvara pitanje je li ovakva praksa dopuštena. Simultana primjena članka 19. stavka 1. UEU-a i članka 267. UFEU-a prilikom ocjene dopuštenosti zahtjeva za prethodno pitanje može dovesti do paradoksalnog zaključka: sudovi koji nisu nezavisni ne mogu preispitivati nezavisnost sudaca tih sudova u prethodnom postupku upravo zbog toga što nisu nezavisni. To je bio rezultat presude Banco de Santander, koja je djelomično ispravljena kasnijim slučajevima. Međutim, kasnija sudska praksa otvorila je mogućnost isključivanja većeg dijela sudstva država članica iz sudjelovanja u prethodnom postupku. Ovaj diplomski rad najprije analizira dva pravca

sudske prakse: sudsku praksu prema članku 19. stavku 1. UEU-a i sudsku praksu prema članku 267. UFEU-a. U tom kontekstu raspravlja o tri predmeta u kojima je Sud odlučio o ovom konkretnom pitanju: Banco de Santander, Getin Noble Bank i L.G. Rad zaključuje naglašavanjem važnosti prethodnog postupka u održavanju dijaloga s poljskim pravosuđem.

KLJUČNE RIJEČI: nezavisnost sudstva, Sud Europske unije, članak 19. stavak 1. UEU-a, članak 267. UFEU, *Banco de Santander, Getin Noble Bank, L.G.*

INTRODUCTION

In recent years, Poland has become a perpetual battlefield of judges who were unlawfully appointed and their independent colleagues, suffering from a condition called 'rule of law backsliding'. Poland systematically tried to remove and replace judges unfavourable to the regime, threatened them with disciplinary sanctions heard before an *ad hoc* created body under the siege of the executive.[1] These trends did not go unnoticed by the Court of Justice which became an important ally in the fight against the corrupted legal system.[2] In the landmark case of *Portuguese Judges*,[3] the Court has for the first-time assumed jurisdiction in deciding on the matters of judicial architecture of Member States.[4] Hence, Portuguese judges in a way came to rescue their Polish colleagues.[5] Since then, the Court has established a solid body of case-law under Article 19 TEU[6] and Article 47 of the Charter,[7] imposing substantive obligations on Member States to ensure the right to effective judicial protection.[8]

However, this newer body of case law comes into conflict with an older body of case-law under Article 267 TFEU[9] whose purpose was to detect which bodies can be considered 'courts or tribunals' that may enter into a dialogue with the Court of Justice. One of the requirements for engaging in the dialogue was independence.[10]

Therefore, independence appears to serve a dual role before the Court: it is both a formal admissibility requirement under Article 267 TFEU and a substantive obligation for Member States under Article 19 TEU and Article 47 of the Charter.[11]

In the rule of law crisis, the substantive and formal requirements of independence are necessarily in a clash. Judges of courts captivated by executive and legislative frequently

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[1] Sara Iglesias and Daniel Sarmiento, 'Insight: "Round Two in the EU's Rule of Law Crisis – Is the EU's Toolbox Fit for Purpose?", by Daniel Sarmiento and Sara Iglesias Sánchez' (2023) EU Law Live <https://eulawlive.com/insight-round-two-in-the-eus-rule-of-law-crisis-is-the-eus-toolbox-fit-for-purpose-by-daniel-sarmiento-and-sara-iglesias-sanchez/> accessed 26 June 2024.

[2] Charlotte Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 European Constitutional Law Review 1, 1.

[3] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117 (*ASJP*).

[4] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) 14 European Constitutional Law Review 622.

[5] Ibid.

[6] Consolidated Version of the Treaty on European Union [2020] OJ C 202 7.6.2016, 13.

[7] Consolidated Version of the Charter of Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012/391–407 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/391–407 (GA).

[8] Reyns (n 2) 2.

[9] Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C 326, 26.10.2012/47–390 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/47–390 (GA).

[10] Reyns (n 2) 2.

[11] Ibid 2.

submit references questioning the independence of their colleagues, and yet the Court has not completely decided whether to allow such cooperation. The question which arises is whether national courts that are not independent under Article 19 TEU may question their independence in the preliminary reference procedure if they are not independent enough to submit a reference under Article 267 TEU?

This Gordian knot of two conflicting strands of case-law was first (unsuccessfully) addressed in *Banco de Santander*,[12] and later on (somewhat successfully) resolved in *Getin Noble Bank*,[13] however creating a back door for excluding certain judges applied in *L.G.*[14]

The three-case saga began with *Banco de Santander* case, where the Court essentially unified all legal bases for judicial independence under EU law.[15] It analysed whether Spanish Central Tax Tribunal is a 'court or tribunal' capable of submitting a reference under the joined lens of Article 267 TFEU, Article 19 TEU and Article 47 of the Charter.[16] By aiming to simplify the scope of different legal provisions governing judicial independence, the Court actually tied the Gordian knot – a body that is not independent under Article 19 TEU would not be considered independent under Article 267 TFEU, and not even get the chance to question its independence under EU law. The tightening of independence criteria risked creating blind spots on the EU's judicial map, as courts that apply EU law but lack certain independence requirements would be excluded from the dialogue with the Court.[17]

Two years later, the Court got another chance to review its stance in *Getin Noble Bank*. A Polish judge, whose independence was heavily contested, submitted a reference questioning the independence of other judges appointed during Communist regime. The Court faced a dilemma whether to allow this judge to join the dialogue regardless of his true motives, or to deny him, and subsequently, other judges facing similar accusations, access to the Court.[18]

Advocate General Bobek proposed a more lenient approach to admissibility of preliminary references emanating from non-independent judges. He emphasised that independence as a requirement of a 'court or tribunal' under Article 267 TFEU cannot be equated with independence under Article 19 TEU and Article 47 of the Charter. By suggesting that the referring body is a 'court or tribunal' under the meaning of Article 267 TFEU, he proposed to the Court to assess admissibility in regards to the institution that

[12] Case C-274/14 *Banco de Santander SA* [2020] ECLI:EU:C:2020:17 (*Banco de Santander)*.
[13] Case C-132/20 *BN, DM, EN v Getin Noble Bank S.A.* [2022] ECLI:EU:C:2022:235 (*Getin Noble Bank)*.
[14] Case C-718/21 *L.G. v Krajowa Rada Sądownictwa* [2023] ECLI:EU:C:2023:1015 (*L.G.)*.
[15] Alejandro Sánchez Frías, 'A New Presumption for the Autonomous Concept of "Court or Tribunal" in Article 267 TFEU' (2023) 19 European Constitutional Law Review 320.
[16] Ibid.
[17] Reyns (n 2) 7
[18] Sánchez Frías (n 15).

submitted the reference, rather than the individuals composing it, as long as the institution is not 'hijacked or captive' by other branches of power.[19]

The Court mostly followed, cutting through the Gordian knot by creating a presumption that references emanating from national courts satisfy *Dorsch* criteria.[20] It did not entangle itself in the paradox of simultaneously applying Article 267 TFEU and Article 19(1) TEU, provided that the presumption is not rebutted. This way the Court allowed judges of non-independent courts to question the independence of other judges, but not in absolute terms. The presumption may be rebutted in case of a final international or national decision that leads to the conclusion that Article 19(1) TEU read in the light of Article 47 of the Charter is violated.[21]

This scenario particularly occurred in the last of the three cases, *L.G.*, where the Court used the back door and rebutted the presumption. By doing so, it cut the dialogue with the one of the chambers of high constitutional importance – Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court.[22] This ruling is contentious for several reasons. First, as Advocate General Rantos pointed out, it has alarming potential of turning entire state of Poland into a blind spot on the radar of the Court of Justice.[23] Although, it seems far-fetched that the whole state will be excluded from the preliminary reference procedure, nonetheless large parts of Polish judiciary might be carved out of *dialogue des juges* since thousands of unlawfully appointed judges still hold office.[24] Second, the distinction of legal bases for judicial independence became blurred, showing the Court's casuistic approach to application of these provisions and ultimately causing legal uncertainty.

This paper explores the different approaches in *Banco de Santander* and *Getin Noble Bank*, that was later implemented in *L.G.* It addresses a contentious topic that has not been widely discussed within the academic community albeit opening complex questions. Should Article 19 TEU, Article 47 of the Charter and Article 267 TFEU be applied simultaneously when assessing whether a body is a 'court or tribunal' able to submit a reference? Should the

[19] Laurent Pech and Sébastien Platon, 'How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling' (Verfassungsblog, 28 July 2021) <https://verfassungsblog.de/how-not-to-deal-with-polands-fake-judges-requests-for-a-preliminary-ruling/> accessed 17 June 2024; Case C-132/20 *BN, DM, EN v Getin Noble Bank S.A.* [2021] ECLI:EU:C:2021:557, Opinion of AG Bobek.
[20] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH v Bundesbaugesellschaft Berlin mbH*. [1997] ECLI:EU:C:1997:413.
[21] *Getin Noble Bank* (n 13).
[22] *L.G.* (n 14).
[23] Case C-718/21 L.*G. v Krajowa Rada Sądownictwa* [2023] ECLI:EU:C:2023:150, Opinion of AG Rantos, para 25.
[24] Marek Safjan, 'Restoring the Rule of Law In Poland: a Particular or a Universal Challenge?' [2024] CEU DI Working Papers 2024/25 1.

Court engage in the dialogue with judges that are not independent, or 'sanction' them by turning a blind eye? Or, put differently, should the Court opt for a lenient approach to admissibility of questions posed by non-independent courts, especially in the light of governmental shift in Poland?

The paper aims to make a small contribution to the discussion by pointing out the Court's inconsistent application of Article 19 TEU, Article 47 of the Charter and Article 267 TFEU, which results in casuistic and ambiguous solutions. It highlights the importance of inclusion of all national courts in the preliminary reference procedure, as the cornerstone of the EU's judicial system.[25] By denying Polish 'dependent' judges the access to the Court, the Court excludes courts that apply EU law from seeking its interpretation, thus risking divergent application of EU law.[26] The fears of creating blind spots on the radar of the Court[27] are slowly being confirmed by ruling in the new *L.G.* case.

This paper is divided into three chapters. The first chapter examines settled case-law under Article 19 TEU and Article 267 TFEU and points out to the differences between the two provisions that were not expressly acknowledged by the Court. The second chapter analyses the three cases: *Banco de Santander*, *Getin Noble Bank* (accompanied by Opinion of Advocate General Bobek) and *L.G.* The third and the last chapter emphasises the central importance of preliminary ruling procedure in creation of EU law and provides concluding remarks.

CHAPTER I: CONFLICTING CASE-LAW UNDER ARTICLE 19 TEU AND ARTICLE 267 TFEU

1. ARTICLE 19(1) TEU – CASE-LAW AND PURPOSE

Article 19(1) TEU establishes obligation for Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'[28] The Court's case-law under Article 19 TEU is quite recent, starting with the *Portuguese Judges* case in 2018, and *Commission v Poland (Independence of the Supreme Court)*[29] in 2019.

[25] Virginia Passalacqua and Francesco Costamagna, 'The Law and Facts of the Preliminary Reference Procedure: A Critical Assessment of the EU Court of Justice's Source of Knowledge' (2023) 2 European Law Open 322.
[26] Reyns (n 2) 8, 12.
[27] Ibid 7.
[28] Second subparagraph of Article 19 (1) TEU (n 6).
[29] Case C-619/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531 (*Commission v Poland*).

In *Portuguese Judges*, the Court for the first-time assumed jurisdiction in deciding on the matters of judicial architecture of Member States.[30] The referring court submitted the question whether the temporary reduction of judges' salaries was in accordance with Article 19(1) TEU and Article 47 of the Charter. Although the Court ultimately ruled that the measure did not violate judicial independence, the judgement paved the way for safeguarding independence of Polish and Hungarian judiciary.[31] The Court decided not to rely on Article 47 of the Charter, that could have also been invoked, since Article 47 of the Charter can only be applied in cases where Member States are implementing EU law in the meaning of Article 51 (1) of the Charter.[32] Instead, the Court applied Article 19(1) TEU, as a concrete manifestation of the principle of rule of law enshrined in Article 2 TEU.[33] It established that material scope of Article 19(1) TEU applies to all 'the fields covered by Union law, irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the Charter.'[34] Therefore, by relying on Article 19(1) TEU and not on Article 47 of the Charter, the Court has significantly extended its jurisdiction to scrutinise various elements of national judicial systems. Since the judgement in *Portuguese Judges*, Article 19(1) TEU can be invoked in all cases concerning any national courts which might apply EU law, virtually encompassing all cases before courts of Member States.[35]

Furthermore, in the explanation of the judgement, the Court emphasized that the principle of effective judicial protection of individuals' rights enshrined in Article 19(1) TEU, is a general principle of EU law, stemming from the common traditions of the Member States and Articles 6 and 13 of the ECHR[36] and Article 47 of the Charter, which enshrine the right to effective judicial protection.[37]

The Court established that Article 19 TEU is a concrete manifestation of the principle of rule of law enshrined in Article 2 TEU[38] and stated that: 'The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of

[30] Bonelli and Claes (n 4).
[31] Ibid.
[32] Laurent Pech and Sébastien Platon, 'Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juízes Portugueses' (*EU Law Analysis*, 13 March 2018) <https://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html> accessed 20 June 2024.
[33] *ASJP* (n 3) para 32.
[34] Ibid, para 29.
[35] Pech 'Some Thoughts on the ECJ Ruling in Associação Sindical Dos Juízes Portugueses' (n 32).
[36] Convention for the Protection of Human Rights and Fundamental Freedoms [1950].
[37] *ASJP* (n 3) para 35.
[38] Ibid, para 32.

law'.[39] It created an obligation for Member States to ensure that the 'courts or tribunals' meet the requirements of effective judicial protection under Article 19(1) TEU, which entail the independent judiciary.[40] The requirements under Article 19(1) TEU were linked to the access to an independent tribunal enshrined in Article 47 of the Charter.[41] It famously stated that the independence presupposes

> 'that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.'[42]

The reason for such a great competence takeover is to ensure the uniform application of EU law. Without independent judiciary, uniform application of EU law, and subsequently the effectiveness of EU law would be at risk. As the Court stated in paragraph 43 of the judgement: 'The independence of national courts and tribunals is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU'.[43]

A year later, the Court finally dealt with the Polish rule of law crisis in *Commission v Poland*[44] following the path created in *Portuguese Judges*. This was the first case in which the Court declared breaches of Article 19(1) TEU, thus solidifying its jurisdiction in dealing with rule of law issues.[45] The Court found that Poland failed to fulfil its obligations under second paragraph of Article 19(1) TEU due to the new Law on the Supreme Court that lowered retirement age of judges of the Supreme Court holding the office at that moment to from 70 to 65 years. It also endowed the Polish President with a discretionary power to decide on the extension of judges' terms past retirement.[46] The ruling further solidified that under Article 19(1) TEU, every Member State must ensure that bodies acting as 'courts or tribunals' within the meaning of EU law provide effective judicial protection in fields covered by EU law.[47]

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[39] *ASJP* (n 3), para 36.
[40] Ibid, para 37, 40-42.
[41] Ibid, para 41.
[42] Ibid, para 44.
[43] Ibid, para 43.
[44] *Commission v Poland* (n 29).
[45] Piotr Bogdanowicz and Maciej Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v Republic of Poland' (2020) 16 European Constitutional Law Review 306.
[46] Ibid.
[47] *Commission v Poland* (n 29) para 55.

In subsequent cases, the purpose of Article 19(1) TEU has crystallized to address only severe breaches of judicial independence. According to Advocate General Bobek, it covers only issues of a systemic nature or of a certain gravity unlikely to be self-corrected by the domestic system of remedies. The threshold for its breach is rather high. As he emphasised, it is an extraordinary remedy for extraordinary cases, going beyond the individual file. Therefore, determining a breach of this article requires the Court to conduct an in-depth analysis of the national judicial system.[48]

2. ARTICLE 267 TFEU – CASE-LAW AND PURPOSE

Article 267 TFEU has a different purpose from Article 19 TEU. Given the importance of the preliminary ruling mechanism, the Court has defined a 'court or tribunal' under Article 267 TFEU autonomously from its definitions in national law. EU's definition of a 'court or tribunal' encompasses wider range of bodies that are not considered as courts in the meaning of national law. [49]

As Advocate General Bobek stated, the purpose of the concept of a 'court or tribunal' under Article 267 TFEU is purely to 'identify the national bodies which (…) can become the interlocutors of the Court in the context of the preliminary ruling procedure.'[50] This concept has a functional nature,[51] meaning that it encompasses bodies that settle disputes, while complying with requirements established by the case-law.[52]

In order to identify the bodies acting in their judicial capacity that can submit a reference, the Court has established the *Dorsch* criteria.[53] The referring body must be: established by law; it must be permanent; its jurisdiction must be compulsory; its procedure must be *inter partes*, it must apply rules of law; and it must be independent.[54] Therefore, the reason behind introducing 'independence' as a requirement of admissibility, was to ensure that the referring body acts in judicial capacity.[55] As Advocate General Ruiz-Jarabo Colomer emphasised in *De Coster*, the Court has a quite generous and flexible standing in determining 'courts or

[48] *Getin Noble Bank*, Opinion of AG Bobek (n 19) paras 38-39; Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* [2021] ECLI:EU:C:2021:403, Opinion of AG Bobek, para 164.
[49] Sánchez Frías (n 15).
[50] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 50.
[51] Ibid, para 50.
[52] Antonio Herrero Garcías, 'Cuestión Prejudicial En El Derecho de La Unión Europea' (2011) <https://repositorioinstitucional.ceu.es/bitstream/10637/11202/4/Cuestion_Herrero_2011.pdf> accessed 1 July 2024; cited in: Jaime Rodriguez Medal, 'Concept of a Court or Tribunal under the Reference for a Preliminary Ruling: Who Can Refer Questions to the Court of Justice of the EU?' (2015) 8 European Journal of Legal Studies 104.
[53] *Dorsch Consult* (n 20).
[54] Ibid, para 23.
[55] Reyns (n 2) 3; C-24/92 *Corbiau* [1993] EU:C:1993:59, Opinion of AG Darmon, para 10.

tribunals' within the meaning of Article 267 TFEU, particularly in regard to the criterion of 'independence'.[56] This reflects the Court's intention to broaden the range of bodies eligible to engage in the preliminary reference procedure.[57]

In the initial cases, independence under Article 267 TFEU was separate from judicial independence under Article 6 ECHR, whose purpose is to protect individuals' rights to a fair trial.[58] However, in *Wilson*, the Court decided to fortify the requirement of 'independence' under Article 267 TFEU, aligning it with the practice of the ECtHR.[59] It added two dimensions to judicial independence: external, presupposing freedom from the influences of other branches of power,[60] and internal, linked to impartiality.[61] It established a threshold for determining breaches of independence, as rules must be such to 'dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.[62]

The concept of independence, thus established in the context of admissibility under Article 267 TFEU, was later used as foundation for creating the substantial obligations under Article 19(1) TEU.[63] Case-law under Article 19(1) TEU adopted the standard of public perception, as well as the differentiation of external and internal independence.[64] In the rule of law cases, Article 19(1) TEU relied on the concept of a 'court or tribunal' under Article 267 TFEU. For instance, in *Portuguese Judges*, the Court stated that Member States under Article 19(1) TEU have the obligation of ensuring that 'courts or tribunals' meet the requirements of effective judicial protection.[65] Also, it stated that 'the independence of national courts is essential for the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism.'[66] The true border between the two provisions is not yet established by the Court, although Advocates General have proposed a more explicit differentiation.[67]

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[56] Case C-17/00 *De Coster* [2001] ECLI:EU:C:2001:366, Opinion of AG Ruiz-Jarabo Colomer, paras 19-28.
[57] Ibid, para 63.
[58] Reyns (n 2) 3.
[59] Ibid 4; Case C-506/04 *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECLI:EU:C:2006:587 (*Wilson)*.
[60] Karolina Podstawa, *TRIIAL – TRust, Independence, Impartiality and Accountability of Judges* (Karolina Podstawa ed, European University Institute 2023) 23.
[61] *Wilson* (n 59) paras 51-52.
[62] Ibid, para 53.
[63] Reyns (n 2) 4.
[64] *Commission v Poland* (n 29) para 109-111.
[65] *ASJP* (n 3) para 37.
[66] Ibid, para 43.
[67] *L.G.*, Opinion of AG Rantos (n 23) para 19; AG Rantos is referring to Joined cases C-58/13 and C-59/13 *Torresi* [2014] ECLI:EU:C:2014:265, Opinion of AG Wahl, paras 48 to 51; and *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 36.

For instance, Advocate General Bobek argues that purpose and function of Article 19(1) TEU and Article 267 TFEU are not the same,[68] as they were developed in a different context. First, independence under Article 267 TFEU, having an older tradition, was introduced and leniently scrutinised to allow other bodies acting in judicial capacity to participate in the preliminary reference procedure.[69] Its purpose was not to exclude bodies that hold the title of national courts from the procedure. Independence under Article 19(1) TEU, on the other hand, was developed as a response to the sustained attacks on Polish and Hungarian judiciary. Second, Article 267 TFEU is applied to decide whether a specific body is allowed to make a reference for the first time.[70] Unlike Article 19(1) TEU, it does not impose on Member States a general obligation to ensure effective legal protection.[71]

Applying the two articles simultaneously, without acknowledging their specific differences, creates a paradox of impeding non-independent national courts from questioning their own independence in the context of the preliminary reference procedure. As Advocate General Wahl pointed out in *Torresi*: 'the very reasons which plead in favour of a strict application of Article 6 of the ECHR and Article 47 of the Charter seem rather to urge a less rigid interpretation of the concept of "court or tribunal" for the purposes of Article 267 TFEU.'[72] Individuals' rights to a fair trial would not be protected if the Court decides to strictly examine the requirements of a 'court or tribunal' under Article 267 TFEU.[73] The same logic can also be applied to the relationship between Article 19(1) TEU and Article 267 TFEU.

In the light of the explained case-law, this paper turns to examining the relationship between Article 19(1) TEU and Article 267 TFEU in the Court's more recent judgements.

CHAPTER II: THE THREE-CASE SAGA

1. JUDGEMENT IN BANCO DE SANTANDER

In *Banco de Santander* the main dispute did not concern rule of law issues, as it related to the matters of tax law. Although the Court had already decided on a similar issue in

[68] *Prokuratura Rejonowa*, Opinion of AG Bobek (n 48) para 163; *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 36.
[69] *De Coster*, Opinion of AG Ruiz-Jarabo Colomer (n 56) para 63.
[70] Reyns (n 2) 6; see also Bonelli and Claes (n 4).
[71] Ibid, 6.
[72] *Torresi*, Opinion of AG Wahl (n 67) para 48.
[73] Ibid, para 49.

Gabalfrisa,[74] the Court decided to realign its case-law under Article 267 TFEU with the more recent developments under Article 19(1) TEU.[75]

The question arose whether the Central Tax Tribunal, that referred the questions, is a 'court or tribunal' under Article 267 TFEU.[76] The Court found that it undoubtedly satisfies the criteria that it is established by law, that it is permanent, that its jurisdiction is compulsory, that its procedure is *inter partes* and that it applies rules of law. However, the problem occurred in relation to the criterion of independence.[77]

Here the Court decided to depart from its ruling in *Gabalfrisa* from 2000, where it decided that Spanish Tax Tribunals fulfil the requirement of independence under Article 267 TFEU, and consequently are considered 'courts or tribunals' under Article 267 TFEU. Independence was leniently analysed, concluding that Spanish legislation ensured separation of functions in Tax Tribunals between, on the one hand, the departments responsible for management, clearance and recovery of tax and, on the other hand, the Tax Tribunals which rule on complaints lodged against the decisions of those departments.[78] Advocate General Ruiz-Jarabo Colomer and Advocate General Saggio criticised this relaxed approach, pointing out that Tax Tribunals do not satisfy the requisite requirements of impartiality and irremovability because its members may be dismissed at the discretion of the Minister.[79]

However, in *Banco de Santander*, the Court decided to take a more stringent stance in the light of the newly developed case-law starting from the *Portuguese Judges*.[80] It reminded of the paragraph 43 of *Portuguese Judges* which linked independence under Article 19(1) TEU with the preliminary reference procedure in Article 267 TFEU:

> 'the independence of national courts and tribunals is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism established by Article 267 TFEU, in that, in accordance with the settled case-law of the Court referred to in paragraph 51 of the present judgment, that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.'.[81]

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[74] Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] EU:C:2000:145.
[75] *Banco de Santander* (n 12) para 55.
[76] Ibid, para 50.
[77] Ibid, para 52-53.
[78] Ibid, para 54.
[79] Joined Cases C-110/98 and C-147/98 *Gabalfrisa* [1999] ECLI:EU:C:1999:489, Opinion of AG Saggio, para 16; *De Coster*, Opinion of AG Ruiz-Jarabo Colomer (n 56) para 28.
[80] *Banco de Santander* (n 12) para 55.
[81] Ibid, para 56; *ASJP* (n 3) para 43.

With this perspective, the Court continued to examine the independence of the Central Tax Tribunal, concluding that the body does not fulfil external and internal aspect of independence, thus not being considered a 'court or tribunal' under Article 267 TFEU.[82]

Therefore, the Court unified its approach to Article 19(1) TEU and Article 267 TFEU,[83] and thus, established a more rigorous standard of independence requisite not only for complying with the substantive obligations of EU law, but also for passing the admissibility stage. This tied the Gordian knot: if national courts were not independent under Article 19(1) TEU, they would not be able to question its independence in the preliminary reference procedure. However, it is important to add that the Court did not investigate the independence of specific individuals sitting in the Central Tax Tribunal, but the independence of the body on an institutional level, composed of the President and other members, that does not meet the requirements of external and internal independence.[84] Nonetheless, the standard of the independence for passing the admissibility stage was heightened, making the access to the Court of Justice more difficult for the Polish courts. This approach comes with some downsides.

Independent judges, although threatened by disciplinary sanctions, are still willing to point out the systemic issues within their judicial system to the Court. They have been the allies of the combat against the corrupted Polish system, providing the Court with useful inside information. They are initiating proceedings that give the Court an opportunity to declare violations of judicial independence and oblige Poland to realign with the requirements of EU law. Therefore, it would not be in the Court's interest to shut down the door to these judges.

Also, the independent judges have no other legal avenue to question the independence of their colleagues, as they cannot rely on the Commission's discretionary initiation of infringement proceedings. Some violations have never been addressed by the Commission or have not been addressed promptly.[85] Even if the Court finds violations in the infringement proceedings, the violations are declared *ex post facto*, after persisted systemic breaches have already severely damaged the system. Therefore, the only possible way for judges to pose questions in the rule of law crisis, and get the answers in adequate time, is the preliminary reference procedure in which the Court is obliged to provide an answer.

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[82] *Banco de Santander* (n 12) paras 68, 77, 80.
[83] Sánchez Frías (n 15).
[84] *Banco de Santander* (n 12) paras 64-77.
[85] Laurent Pech, 'Polish Ruling Party's "Fake Judges" before the European Court of Justice: Some Comments on (Decided) Case C-824/18 AB and (Pending) Case C-132/20 Getin Noble Bank' (2021) EU Law Analysis <https://eulawanalysis.blogspot.com/2021/03/polish-ruling-partys-fake-judges-before.html> accessed 17 June 2024.

Also, let us examine another situation. What if a 'dependent' judge poses an important question in, for instance, competition law, or any other branch of EU law? Would the Court discredit such a judge and risk incorrect and divergent application of EU law? It is important to note that the lack of judges' independence does not automatically mean that they will be reluctant on applying EU law. They will continue applying it, but with a great risk of applying it incorrectly, thus putting at stake the effectiveness of EU law.[86] Disallowing 'dependent' judges to submit references would thereby place the Court in a contradictory situation, as the effectiveness of EU law was the reason for safeguarding judicial independence in the first place.

Together with *Miasto Lowicz*,[87] delivered the same year, and *IS*,[88] delivered a year later, *Banco de Santander* reflects the Court's unwillingness to engage in the dialogue with Polish and Hungarian judges and its ignorance to their urgent calls for ending the rule of law crisis. *Miasto Lowicz* faced heavy criticism for declaring inadmissible requests from judges fearing disciplinary charges, as it discouraged judges who were the most concerned with the rule of law crisis from ever reaching the Court of Justice.[89] In *IS*, the Court similarly refrained from assessing the appointment process of Hungarian judges, thus declining the referring judge's cries for help.[90]

2. GETIN NOBLE BANK

2.1. ADVOCATE GENERAL BOBEK'S OPINION IN GETIN NOBLE BANK

Getin Noble Bank gave the Court a second chance to review its approach in dealing with the references from non-independent judges. This case, unlike *Banco de Santander*, directly concerned rule of law issues, as a judge of the Polish Supreme Court questioned the independence of judges of the Appeal Court of Wroclaw due to their appointment during Communist-era.[91] In the plot-twist, his independence was challenged by Polish Ombudsman due to the major flaws in his appointment.[92] The referring judge was appointed by the President of the Republic in spite of the suspended Resolution of the Krajowa Rada Sądownictwa (National Council of the Judiciary, thereinafter: KRS) by the Supreme

[86] Reyns (n 2) 12.
[87] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* [2020] ECLI:EU:C:2020:234.
[88] Case C-564/19 *IS* [2021] ECLI:EU:C:2021:949.
[89] Luke Dimitrios Spieker, 'The Court Gives with One Hand and Takes Away with the Other' (*Verfassungsblog*, 26 March 2020) <https://verfassungsblog.de/the-court-gives-with-one-hand-and-takes-away-with-the-other/> accessed 27 June 2024.
[90] *IS* (n 88).
[91] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 4.
[92] Ibid, para 26-27.

Administrative Court.[93] Due to the intervention of the Polish Minister for Justice/General Prosecutor, with whom the referring judge had strong personal ties, the judge was eventually appointed to his position.[94] Some academics pointed out the duplicitous motives of the referring judge who effectively tried to solve two problems at once – to legitimise his own position (given that he is not recognized as a lawful judge by the ECtHR, and thus not considered lawful by authorities across all EU Member States) and to discredit his colleagues.[95] The Court faced the anticipated dilemma – to engage in a dialogue with a 'fake' judge, or to risk creating a blind spot, thus putting at stake the principal aim of the preliminary reference procedure?

Advocate General Bobek opted for the former stance, proposing a more relaxed approach on the formal requirement of independence under Article 267 TFEU. Considering that the referring judge is a 'court or tribunal' under Article 267 TFEU, he proposed to the Court to finally differentiate between independence under Article 19 TEU, Article 47 of the Charter and Article 267 TFEU. He invited the Court to acknowledge different function and objective of these provisions, proposing that the type of examination and thresholds for their breach should vary accordingly.[96]

The concept of a 'court or tribunal' under Article 267 TFEU has a functional nature: it has a sole purpose of determining which national bodies can become the interlocutors of the Court in the preliminary ruling procedure.[97] Hence, the Court should not apply an intense level of scrutiny for the assessment of this legal basis.[98] Article 19(1) TEU and Article 47 of the Charter, on the other hand, impose stricter requirements of judicial independence. Article 19(1) TEU obliges Member States to 'provide remedies sufficient to ensure effective legal protection'[99] in the overall functioning of the judicial system. It covers only systemic breaches of certain gravity unlikely to be self-corrected by domestic remedies. Shortly, it is an extraordinary remedy for extraordinary cases, going beyond the individual file. Out of all three legal bases, Article 19 TEU has the highest threshold for its breach.[100] Furthermore, Article 47 of the Charter protects individuals' rights to an effective remedy in the scope of an

[93] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 44.
[94] Ibid, para 44.
[95] Dimitry Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2022) 60 Journal of Common Market Studies 150; see also: Anna Wójcik, 'Keeping the Past and the Present Apart' [2022] Verfassungsblog <https://verfassungsblog.de/keeping-the-past-and-the-present-apart/> accessed 1 July 2024.
[96] *Getin Noble Bank*, Opinion of AG Bobek (n 19) paras 30-42, 49-51.
[97] Ibid, para 50.
[98] *Prokuratura Rejonowa*, Opinion of AG Bobek (n 48) para 166.
[99] Second subparagraph of Article 19(1) TEU.
[100] *Getin Noble Bank*, Opinion of AG Bobek (n 19) paras 37-39.

individual proceedings. Structural or systemic issues of the national judicial system are relevant only to the extent that they affect individual proceedings. The intensity of Court's review of judicial independence under Article 47 of the Charter is moderate, as certain gravity is required in order to determine its violations.[101]

Due to the differences of these provisions, in *Prokuratura Rejonowa*, Advocate General Bobek emphasised that the Court may determine that Article 267 TFEU has not been violated, while Article 19 TEU has.[102]

Advocate General Tanchev reached a similar conclusion in his Opinion in *A.K*. He emphasised that the examination of the independence of a 'court or tribunal' under Article 267 TFEU is 'qualitatively different exercise' than the evaluation of the requirements of judicial independence under Article 47 Charter and Article 19(1) TEU.[103] In the context of the preliminary ruling mechanism under Article 267 TFEU, the Court addresses questions related to the procedure before it, specifically concerning which bodies are entitled to submit references. This mechanism aims to establish a dialogue between the Court and national courts to ensure the uniform interpretation of EU law. Under Article 47 of the Charter and Article 19(1) TEU, the Court is conducting a substantive analysis of judicial independence. However, he noted that Article 52(3) of the Charter mandates that EU law must guarantee judicial independence to at least the standard set by Article 6(1) ECHR. Therefore, if the Court's case-law under Article 267 TFEU falls short of this minimum threshold, it must be brought up to this standard.[104]

Furthermore, Advocate General Bobek emphasised that starting with the *Vaassen-Göbbels* case, the Court has never analysed whether specific persons that have submitted a reference individually satisfy the *Dorsch* criteria. Admissibility has always been and should be assessed in regard to the institution that submitted the reference, rather than the individuals composing it, as long as the institution is not 'hijacked or captive' by other branches of power.[105] The institutional approach was confirmed in a later case of *Prokuratura Rejonowa*, where the Court in the admissibility stage examined the independence of the referring body as a whole, and not the President that submitted the reference, concluding that the body in question fulfils the standards of independence necessary for submitting a reference.[106] Furthermore, Advocate

[101] *Getin Noble Bank,* Opinion of AG Bobek (n 19) paras 40-41.
[102] *Prokuratura Rejonowa*, Opinion of AG Bobek (n 48) paras 75-76.
[103] Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. v Krajowa Rada Sądownictwa and CP, DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:551, Opinion of AG Tanchev, para 111.
[104] *A.K*., Opinion of AG Tanchev (n 103) para 112-114.
[105] *Getin Noble Bank,* Opinion of AG Bobek (n 19) para 52, 78, note 17.
[106] Joined Cases C-748/19 to C-754/1916 *Prokuratura Rejonowa* [2021] EU:C:2021:931, paras 41-43.

General Bobek applied the institutional approach on the two requirements of a 'court or tribunal' contested by the Polish Ombudsman: 'established by law' and 'independence'.[107]

First, he stated that the criterion 'established by law' under Article 267 TFEU means that the referring body must be provided for in national law. The purpose of this requirement was to exclude from the preliminary reference bodies which were established by virtue of contracts, precisely certain forms of arbitration panels.[108] Here he connects this to the *Nordsee* case,[109] in which the Court explicitly denied access to the preliminary reference procedure to the German arbitration court.[110] Unlike 'established by law' in the meaning of Article 6(1) ECHR, 'established by law' under Article 267 TFEU does not concern examination of individual appointments of the referring judges. Article 6(1) ECHR, replicated in the EU legal order in Article 47 of the Charter, and Article 267 TFEU should not be equated. The purpose of Article 267 TFEU is, as already mentioned, to identify bodies in Member States which may submit a reference to the Court, whereas Article 47 of the Charter has the aim of protecting individuals' rights to an effective remedy and a fair trial. Analysis of whether a court is independent under Article 47 of the Charter has to be examined in regard to the judicial panel that decided in an individual case, which is not the case with Article 267 TFEU.[111]

Regarding the requirement of 'independence' under Article 267 TFEU, Advocate General Bobek reiterated that according to the Court's case-law, that criterion:

> 'requires rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.'[112]

He emphasised that in the previous case-law the Court's focus was not on the individual judges, but on the structural independence of the referring body from both the parties in a dispute and from any external influence.[113]

Lastly, Advocate General Bobek finished the admissibility part with four systemic reasons why the Court should continue examining a 'court or tribunal' in the meaning of Article 267 TFEU in relation to the institutions, and not individuals composing the institutions.[114]

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[107] Ibid, paras 44-45, 49-64.
[108] Ibid, para 54.
[109] Case 102/81 *Nordsee* [1982] ECLI:EU:C:1982:107.
[110] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 55.
[111] Ibid paras 59-61.
[112] Ibid, para 62.
[113] Ibid, para 63.

First, he argues that it would be counterintuitive to cut from the dialogue bodies which exercise judicial functions in a Member State and seek the answers on interpretation and application of EU law. Since the Courts judgements are binding on all national courts, such a court is showing its willingness to cooperate with the Court and apply EU law correctly.[115]

Second, individual parties in the main proceedings have the right to have the relevant EU law provisions applied correctly as a part of their right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter. Hence, an institutional approach to defining a 'court or tribunal' within the meaning of Article 267 TFEU would be more in line with Article 47 of the Charter.[116]

Third, the admissibility stage is not an adequate stage to assess the independence and impartiality of individual judges, as this endeavour requires a detailed and in-depth analysis. Also, if independence is scrutinised in great details in the admissibility stage, then the requirements of either Article 47 of the Charter or Article 19 TEU would be examined both in the admissibility stage, and in the merits (if that stage is reached). Hence, the analysis would potentially become somewhat circular.[117]

Fourth, there is an issue of horizontal consistency of the Court's case-law. Advocate General Bobek found the suggestion that the Court should accept or decline the reference based on the 'quality' of the individual judge(s) rather puzzling. This approach would imply examining the integrity of judges, conflicts of interest in a specific case, possible allegations of corruption, and similar intricacies.[118]

Lastly, Advocate General Bobek concluded that the body in question is a 'court or tribunal' within the meaning of Article 267 TFEU with two important caveats.[119]

Firstly, the notion that the referring court is considered a 'court or tribunal' under Article 267 TFEU does not mean that the body is independent under Article 19(1) TEU and/or Article 47 of the Charter.[120] In fact, in *W.Ż.*, the Court declared that Article 19(1) TEU was violated in the case in which the judge was appointed by the President of the Republic in disregard of the suspension of the appointment procedure by an order of the Supreme Administrative Court.[121]

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[114] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 66.
[115] Ibid, para 67.
[116] Ibid, para 68.
[117] Ibid, para 69.
[118] Ibid, para 70.
[119] Ibid, para 74.
[120] Ibid, paras 75-76.
[121] Case C-487/19, *W.Ż.* [2021] ECLI:EU:C:2021:798, para 162.

Secondly, in the end, the individuals may still be important. Advocate General Bobek proposed that if an institution is composed of a greater number of individuals who are not independent, such an institution would then be completely cut off from the dialogue with the Court. This situation might occur when pattern of, for instance, issues with appointment show that the political influence is exercised over the decision-making process.[122] The proposed exception remains rather unclear. Pech and Platon justifiably ask: what would be the threshold? At what point would an institution become hijacked? Which individual would be the last straw? [123] Would then the Court completely shut the door to a part of Polish judges counting individuals that were lawfully appointed and those that were not? Also, what if a minority of judges loyal to the executive influence the rest of judges on lower positions? Can one rotten apple spoil the whole barrel? Opinion of Advocate General Bobek in *Getin Noble Bank* opens up questions whether some sort of threshold should be set, or should the breaches be assessed on a case-by-case basis leaving the national courts wondering whether they are allowed to submit a reference.[124] Besides, it is unclear what would happen if an entire tier of judiciary is appointed unlawfully. Would then the Court completely close the door on a large part of the state?

If the Court determines that an institution is hijacked, then no judge from that court, regardless of its overall lawful appointment, would be able to submit a reference.[125] Although Advocate General Bobek leans towards enabling the dialogue with non-independent judges, by introducing this exception, he completely shuts the door on the few remaining independent judges of the hijacked courts. Even if one individual is lawfully appointed in an otherwise non-independent court, he must be able to submit a reference questioning independence of his colleagues.

Conversely, one may argue that the Court must not engage in the dialogue with courts plagued with the influence of the executive because independent judges may be easily influenced by their non-independent colleagues. They are oftentimes sitting in panels composed of 'dependent' judges, who might be presidents of the panels or courts. Out of fear of disciplinary sanctions, even the 'good' judges can be dissuaded from applying EU law. This phenomenon, referred to as the 'chilling effect', has raised concerns about the overall

[122] *Getin Noble Bank*, Opinion of AG Bobek (n 19), para 77-78.
[123] Pech and Platon (n 19).
[124] Ibid.
[125] Ibid.

functioning of courts.[126] Therefore, how can the Court of Justice engage in a dialogue with such a 'tainted' court? However, if the Court decides to exclude such a court, what would be the criteria for establishing that a judge is 'dependent' despite his lawful appointment? It would be almost impossible to determine in each specific case whether a lawfully appointed judge was feeling the 'peer pressure' and decided to take the path of least resistance, especially in the admissibility stage.

2.2.JUDGEMENT OF THE COURT IN GETIN NOBLE BANK

The Court mostly followed Advocate General Bobek's Opinion and departed from its ruling in *Banco de Santander* case. It found the reference admissible, as it considered the referring judge a 'court or tribunal' under Article 267 TFEU.[127] The Court refrained from determining the lawfulness of the referring judge's appointment. Rather, it established a presumption that a preliminary ruling that emanates from a national court or tribunal satisfies the *Dorsch* criteria.[128] As Advocate General Rantos noted, this presumption reflects the Court's standing in *FORMAT Urządzenia i Montaże Przemysłowe*,[129] *Koleje Mazowieckie*,[130] *W.Ż.*,[131] *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie*[132] and other cases, in which the Court did not investigate whether the Polish Supreme Court is independent under Article 267 TFEU.[133] In *Getin Noble Bank*, the Court reminded of its rulings in *Reina* and *Prokuratura Rejonowa*, where it held that:

> 'it is not for the Court to determine whether the order for reference was made in accordance with the rules of national law. The Court is therefore bound by an order for reference made by a court or tribunal of a Member State, in so far as that order has not been rescinded on the basis of a means of redress provided for by national law.'[134]

The presumption may be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting

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[126] Laurent Pech, 'The Concept of Chilling Effect Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU' (2021) Open Society European Policy Institute <https://www.opensocietyfoundations.org/uploads/c8c58ad3-fd6e-4b2d-99fa-d8864355b638/the-concept-of-chilling-effect-20210322.pdf> accessed 17 June 2024.
[127] *Getin Noble Bank* (n 13) para 76.
[128] Ibid, para 69.
[129] Case C-879/19 *FORMAT Urządzenia i Montaże Przemysłowe* [2021] EU:C:2021:409.
[130] Case C-120/20 *Koleje Mazowieckie* [2021] EU:C:2021:553.
[131] *W.Ż.* (n 121).
[132] Case C-866/19 *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* [2021] EU:C:2021:865.
[133] *L.G.* Opinion of AG Rantos (n 23), para 21, note 35.
[134] *Getin Noble Bank* (n 13) para 70; Case 65/81 *Reina* [1982] EU:C:1982:6, para 7; *Prokuratura Rejonowa* (n 107) para 44.

the referring court is not an independent and impartial tribunal previously established by law for the purposes of Article 19(1) TEU, read in the light of Article 47 of the Charter.[135] The Court also followed Advocate General Bobek's Opinion by making an exception of the presumption in the case of a court that is captive or hijacked.[136]

Finally, the Court enabled the referring judge to join the dialogue, by applying the mentioned presumption that has not been rebutted by a final decision of a national or international court or tribunal.[137] It is interesting to point out that prior to issuing the judgement, the ECtHR delivered a judgement in *Advance Pharma*,[138] declaring that the judge that submitted a reference in *Getin Noble Bank* is not a court previously established by law. Although the decision was not final, the Court has not reopened the oral part of the procedure while waiting for the decision of the ECtHR to become final. It still remains unclear why the Court refused to do so.[139]

Some academics have strongly contested the ruling in *Getin Noble Bank*,[140] however I believe that the Court is heading in the right direction. *Banco de Santander* hindered the possibility of dependent courts questioning their independence. The Court had not only cut a lifeline for these judges, but also had narrowed down the effects of using the preliminary reference procedure as a mechanism for combating the rule of law crisis. In *Getin Noble Bank*, the Court partially cut through this Gordian knot by not entangling itself in the detailed analysis of independence in the admissibility stage. However, the exception of the presumption still poses risks to the uniformity of EU law. In the present moment, the presumption would protect most national courts, but currently one in four judges of Polish ordinary and administrative courts is appointed under the new rules that severely diminish rule of law.[141] If the ECtHR finds that most or all Polish or Hungarian courts are not independent under Article 6(1) of the ECHR, essentially a large part of the state could be cut off the preliminary reference procedure. This fear of removing entire Polish judiciary from the

[135] *Getin Noble Bank* (n 13) para 72.
[136] Ibid, para 75.
[137] Ibid, para 73.
[138] *Advance Pharma* App no. 1469/20 (ECtHR 3 February 2022).
[139] Paweł Filipek, 'Drifting Case-Law on Judicial Independence: A Double Standard as to What Is a "Court" under EU Law? (CJEU Ruling in C-132/20 Getin Noble Bank)' (Verfassungsblog, 2022) <https://verfassungsblog.de/drifting-case-law-on-judicial-independence/> accessed 18 June 2024.
[140] Ibid. Grabowska-Moroz, Barbara, Judicial Dialogue about Judicial Independence in terms of Rule of Law Backsliding (May 16, 2023) CEU Democracy Institute Working Papers No. 12, 2023, Available at SSRN: https://ssrn.com/abstract=4450094 or http://dx.doi.org/10.2139/ssrn.4450094.
[141] *L.G.*, Opinion of AG Rantos (n 23) para 25.

EU's judicial system was highlighted by Advocate General Rantos in his Opinion in *L.G.*[142] However, the Court did not follow.

Furthermore, some have criticised the Court's willingness to engage in the dialogue with the corrupted judge in *Getin Noble Bank*, arguing that it effectively legitimises the unlawfully appointed judge.[143] This enables the bogus judges, who were never judges in the first place, to claim in the media that they are recognised as lawful judges in the eyes of the Court of Justice.[144] Although those arguments are compelling, it is questionable whether the Court has legitimised the referring judge since it had in a previous case *W.Ż.* indicated a breach of Article 19(1) TEU in the appointment process similar to the one in *Getin Noble Bank*.[145] Moreover, allowing non-independent judges to pose questions relating to the independence of their colleagues, would allow the Court of Justice to affirm the legitimacy of judges whose independence was unjustly challenged. In this way, the Court would shield them from further attacks by their non-independent colleagues. This precisely happened in the *Getin Noble Bank* judgement, where the Court of Justice claimed that Article 19(1) TEU and Article 47 of the Charter were not breached by the initial appointment of judges during Communism.[146] Furthermore, some academics claimed that *Getin Noble Bank* is problematic from the perspective of the *Bosphorus* presumption, claiming that EU law poses a threat to the proper functioning of the ECHR within its territory in order to attain short-term goals, and that it lowers the standard of independence far below the standard of Article 6(1) ECHR.[147] However, I do not agree. Article 6(1) ECHR has different function than Article 267 TFEU. It protects individuals' right to a fair trial, distinct from the formal identification of bodies able to submit a reference. Relaxed approach to independence under Article 267 TFEU does not mean lenient approach to Article 19(1) TEU and Article 47 of the Charter. In fact, following Advocate General Wahl's logic in *Torresi*, less stringent analysis of independence under Article 267 TFEU would achieve higher level of protection of individuals' rights. Effectively, it would allow individuals to have their claims heard before a 'natural judge' (the Court).[148]

Getin Noble Bank indicates the Court's increasing willingness to engage in dialogue with Polish dependent judges. By establishing the presumption, it seemed that the Court separated between a 'court' under Article 267 TFEU for assessing admissibility, and a 'court' under

[142] *L.G.*, Opinion of AG Rantos (n 23) para 25.
[143] Grabowska-Moroz (n 140) 22; see also: Pech and Platon (n 19).
[144] Pech 'Polish Ruling Party's "Fake Judges" before the European Court of Justice' (n 85).
[145] *W.Ż* (n 118) para 162.
[146] *Getin Noble Bank* (n 13) para 134.
[147] Kochenov and Bárd (n 95); Grabowska-Moroz (n 140) 18.
[148] *Torresi*, Opinion of AG Wahl (n 67) para 48-49.

Article 19(1) TEU and Article 47 Charter.[149] This would be in line with Reyns' suggestions and the case-law under Article 267 TFEU and Article 19(1) TEU, since independence under Article 267 TFEU would be assessed as a formal requirement, and independence under Article 19(1) TEU and Article 47 Charter as a substantive obligation.[150] It would ensure that the case-law under Article 19(1) TEU does not overrule case-law under Article 267 TFEU, thus securing uniformity of EU law.[151] However, in the case that the presumption is rebutted like in *L.G.*, Article 19(1) TEU and Article 47 Charter can be invoked in the admissibility stage denying participation in the preliminary ruling procedure. Hence, it seems that Article 19(1) TEU and Article 47 Charter are not only imposing substantive obligations, but also formal requirements. This unclear line between Article 19(1) TEU, Article 47 Charter and Article 267 TFEU will be further elaborated in the next section.

4. JUDGEMENT IN THE L.G. CASE

L.G. is essentially a case rebutting the presumption from *Getin Noble Bank*, thus manifesting the concerns of cutting the dialogue with a large part of Polish judiciary. In deciding on the admissibility of a reference submitted by the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court, the Court declared that one of the most influential Polish chambers, dealing with extraordinary complaints, electoral disputes, validity of referendums and elections, is not a 'court or tribunal' under Article 267 TFEU.[152] This deviates from the previous case-law in which the Court has not examined the requirement of 'independence' under Article 267 TFEU in references submitted by the Polish Supreme Court even before it established the presumption in *Getin Noble Bank*.[153] Hence, this case set a precedent for further rejections of references from national courts in the context of the rule of law crisis due to the lack of independence.

The main dispute concerned a familiar issue about the extension of judges' term past retirement at the discretion of the KRS. However, again in the plot-twist, the referring court's independence was rebutted due to the unlawful appointment of judges. The President of the Republic appointed the referring judges despite the Supreme Administrative Court annulling the KRS resolution on which these appointments were based.[154] Also, at the time of new appointments of the judges of the Supreme Court, the process of election of the members of

[149] Filipek (n 139).
[150] Reyns (n 2) 12-13.
[151] Ibid.
[152] *L.G.* (n 14) paras 12, 78.
[153] *L.G.*, Opinion of AG Rantos (n 23) para 21.
[154] *L.G.* (n 14) paras 31, 33.

the KRS had arbitrarily changed and became more influenced by the legislative and executive.[155]

The Court rebutted the presumption that the *Dorsch* criteria are fulfilled based on the final decisions of the ECtHR in *Dolińska-Ficek and Ozimek v. Poland*,[156] and of the Polish Supreme Administrative Court.[157] In *Dolińska-Ficek and Ozimek v. Poland*, the ECtHR found that the appointment of the judges of the Chamber of Extraordinary Control and Public Affairs represents a flagrant breach of the requirement of a 'tribunal established by law' in Article 6(1) of the ECHR.[158] The ECtHR identified two major breaches. First, the Court found a manifest breach in the radical change of the election model that shifted from electing the fifteen judicial members of the KRS by their peers to election by the Parliament. The second breach involved the President of the Republic appointing judges to the Chamber of Extraordinary Review and Public Affairs of the Supreme Court despite an interim measure by the Supreme Administrative Court to stay the implementation of the Resolution of the KRS. The ECtHR criticized the President's actions as showing blatant disregard for judicial independence and the rule of law, relying on the Court of Justice's judgements in *A.B.* and *W.Ż.*[159]

On the national level, the Supreme Administrative Court annulled Resolution of the KRS which was the basis for appointing the judges of the Chamber of Extraordinary Review and Public Affairs. It also condemned the legislative amendments prohibiting appeals on the appointment of judges of the Supreme Court and the change in election of the members of the KRS.[160]

Based on these judgments, the Court undertook its own analysis to assess whether these findings in the light of the Court's case-law on judicial independence can rebut the presumption. By doing so, the Court explicitly reminded that it is the only body responsible for interpreting EU law.[161] It found manifest breaches of Article 19(1) TEU read in the light of Article 47 of the Charter, which led to the conclusion that the referring court is not a 'court or

[155] *L.G.* (n 14) para 57.
[156] *Dolińska-Ficek and Ozimek v. Poland* (2021) App nos. 49868/19 and 57511/19 (ECtHR 8 November 2021).
[157] Judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021; *L.G.* (n 14) paras 44-78.
[158] *L.G.* (n 14) para 32; Johan Callewaert, 'The Polish Chamber of Extraordinary Review and Public Affairs Not an "Independent and Impartial Tribunal Established by Law": Judgment by the ECHR in the Case of Dolińska-Ficek and Ozimek v. Poland' (Prof. Dr. iur. Johan Callewaert, 21 November 2021) <https://johan-callewaert.eu/the-polish-chamber-of-extraordinary-review-and-public-affairs-not-an-independent-and-impartial-tribunal-established-by-law-judgment-by-the-echr-in-the-case-of-dolinska-ficek-and-ozi/> accessed 1 July 2024.
[159] Callewaert (n 158).
[160] *L.G.* (n 14) para 56.
[161] Ibid, para 46.

tribunal' under the meaning of Article 267 TFEU.[162] While it is not surprising that the Court found systemic deficiencies in the appointment of judges of the Supreme Court, until this ruling, breaches of Article 19(1) TEU have not been the cause of inadmissibility of references submitted by the Polish Supreme Court. The Court turned the analysis of independence upside down – Article 19(1) TEU and Article 47 of the Charter were examined already in the admissibility stage. However, Article 19(1) TEU and Article 47 of the Charter were not envisaged as formal requirements of independence, but rather as substantive obligations.[163] Also, according to Advocate General Bobek, the admissibility stage is not an adequate stage for assessment of independence.[164] Moreover, the Court did not follow Advocate General Rantos' Opinion, in which he proposed the same differentiation of legal bases like Advocate General Bobek: Article 19(1) TEU pertains to systemic breaches of independence, Article 47 of the Charter ensures individuals' right to effective judicial protection, and Article 267 TFEU determines bodies that can join the preliminary reference procedure.[165] He stated that:

> 'It follows that, in view of its specific function, the interpretation of the concept of independence of a 'court or tribunal' within the meaning of Article 267 TFEU does not prejudge the interpretation of that concept in the context of the second subparagraph of Article 19(1) TEU or Article 47 of the Charter. In other words, we cannot rule out a situation where a body might in principle constitute a "court or tribunal" within the meaning of Article 267 TFEU, irrespective of the fact that elements of the case – whether of a systemic or ad hoc nature – might lead to the conclusion that the same court or tribunal does not constitute an independent, impartial court or tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU or of Article 47 of the Charter.'[166]

Advocate General Rantos, like Advocate General Wahl and Advocate General Bobek, called out for a less rigid approach towards the assessment of independence under Article 267 TFEU that would enable national courts to examine their own independence.[167] However, the Court did not follow, but rather blurred the lines between different legal bases for assessing judicial independence, adding Article 6(1) ECHR to the mix. Contrary to the Court's findings, Advocate General Rantos considered that the breaches of Article 6(1) ECHR cannot lead to

[162] Ibid, paras 58, 77-78.
[163] Reyns (n 2) 2.
[164] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para. 69.
[165] *L.G.*, Opinion of AG Rantos (n 23) para 20.
[166] Ibid, para 23.
[167] Ibid, para 24; *Torresi*, Opinion of AG Wahl (n 67) paras 48-49; *Prokuratura Rejonowa*, Opinion od AG Bobek (n 48) para 166.

breach of Article 267 TFEU. Article 6(1) ECHR has the purpose of safeguarding the individuals' rights to a fair trial, that can play a role in the application of Article 47 of the Charter, but not in the assessment of independence under Article 267 TFEU.[168]

After *L.G.*, the Court's complex formula for determining whether a non-independent court can submit a reference appears as follows:

a) if a dependent national court submits a reference, it is presumed that the *Dorsch* criteria are fulfilled. The requirement of an independent and impartial court previously established by law will not be examined in the admissibility stage under the Article 267 TFEU, although in the merits the Court may find violations of substantial obligations under Article 19(1) TEU and Article 47 of the Charter;

b) in the case of a final decision of international or national court declaring violations of judicial independence, the Court must consider whether this judgment leads to a conclusion that Article 19(1) TEU and Article 47 of the Charter are violated. If that is the case, the Court will also find the violations of Article 267 TFEU.

This confusing interplay between the different legal bases is a result of the Court's indecisiveness on whether to allow non-independent judges to join the dialogue. In *Banco de Santander*, the Court decided to completely exclude the dependent courts from the dialogue. Later in *Getin Noble Bank*, the Court acknowledged the flaws of this approach, and decided to allow the continuation of the dialogue, but not in absolute terms. Some dependent judges, that were indeed recognised as such by prior international or national judgements, must be carved out of the preliminary ruling mechanism. This standing was affirmed in *L.G*.

Cutting off the chamber of the Supreme Court of a constitutional importance from the dialogue is essentially a form of a sanction since Poland has not effectively complied with the requirements set out in Article 19(1) TEU. In *A.K.*,[169] *A.B.*,[170] and *W.Ż.*,[171] the Court has

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[168] *L.G.*, Opinion of AG Rantos (n 23) para 35.

[169] Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. v Krajowa Rada Sądownictwa and CP, DO v Sąd Najwyższy* [2019] ECLI:EU:C:2019:982 (*A.K.*); in *A.K.* the Court of Justice called into question the appointment of judges by the President of the Republic based on the resolution of the KRS, but in the end left the matter for the assessment of the national court.

[170] Case C-824/18 *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa* [2021] ECLI:EU:C:2021:153. (*A.B.*); see also: Łukasz Bucki, Marcjanna Dębska and Michał Gajdus, '"You Cannot Change the Rules in the Middle of the Game" – an Unconventional Chapter in the Rule of Law Saga (Case C-824/18 A.B. And Others v the KRS)' (*European Law Blog* 22, April 2021) <https://europeanlawblog.eu/2021/04/22/you-cannot-change-the-rules-in-the-middle-of-the-game-an-unconventional-chapter-in-the-rule-of-law-saga-case-c-824-18-a-b-and-others-v-the-krs/> accessed 27 June 2024; in *A.B.* judges that were not granted a position as judges of the Supreme Court appealed on the KRS's decisions which denied them the appointment to the Supreme Court. In the meantime, a new law was introduced targeting these judges, that ordered discontinuation of those proceedings. Simultaneously, the seats in the Supreme Court were taken by other candidates in favour of the ruling party in Poland. The Court suggested breaches of Article 19(1) TEU, Article 4(3) TEU and Article 267 TFEU, however, again left the matter for the assessment of the national court.

acknowledged sustained violations of Article 19(1) TEU in the appointment of the judges of the Supreme Court.[172] As a result, after *A.K.* judgment, Poland enacted the 'muzzle law' enforcing harsher disciplinary sanctions on judges fighting against the regime.[173] In *A.K.*, *A.B.* and *W.Ż.*, the Court had a tendency of acknowledging the sustained violations, but refrained from explicitly declaring violations of Article 19(1) TEU.[174] However, the Court's patience had its limits. In *L.G.* the Court has decided that it will no longer tolerate the unlawful appointment of the members of the Supreme Court and exclude them from the dialogue. However, the question is whether this is the right strategy for persuading the Polish judiciary to finally respect the rule of law since the EU has already other effective mechanisms at its disposition that do not undermine the importance of the dialogue. An entire toolbox of measures was created in order to solve this crisis as soon as possible: Commission has initiated numerous infringement proceedings, imposed sanctions and withheld access to EU funds through the newly created conditionality mechanism.[175] In the meantime, Poland faced a governmental change welcomed by the EU. Therefore, it is questionable whether excluding Polish courts from the preliminary reference procedure is indeed necessary. Moreover, impeding courts from the preliminary ruling procedure is a rather ineffective sanction. The courts that are already dissuaded from applying EU law would not object being excluded from the dialogue with the Court.

Another point worth mentioning is that this ruling is in direct clash with *CILFIT*,[176] as the court of the last instance is ultimately banned from submitting a reference. Since a chamber that deals with extraordinary remedies cannot submit a reference, it seems that in most proceedings no national court would have the obligation to submit a reference. Such understanding is severely diminishing the effectiveness of EU law, thus creating blind spots that are far greater than the Chamber of Extraordinary Control and Public Affairs. It would be interesting to see how the Court will solve this conflict. Will it declare that the courts below

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[171] *W.Ż.* (n 122) paras 152-162; in *W.Ż.*, a decision mentioned in a few places in the *L.G.* judgement, the Court suggested the breach of Article 19(1) TEU in the case of a single judge in the Chamber of Extraordinary Control and Public Affairs who was appointed by the President, despite of the suspended resolution of the KRS. However, the matter was finally also left upon the determination of the national court.

[172] Ewa Zelezna, 'The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy' (2020) 2019 4 European Papers - A Journal on Law and Integration 907; Human Rights Watch, 'Poland: Events of 2023' (Human Rights Watch, 2024) <https://www.hrw.org/world-report/2024/country-chapters/poland> accessed 27 June 2024.

[173] Zelezna (n 172).

[174] *A.B.* (n 170) para 169; *W.Ż.* (n 122) paras 152-162; *A. K.* (n 169) paras 133-144, 153-155; Bucki, Dębska and Gajdus (n 170).

[175] Iglesias and Sarmiento (n 1).

[176] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECLI:EU:C:1982:335.

the Supreme Court are courts of final instance under EU law, although it contravenes national law?

CHAPTER III: THE IMPORTANCE OF THE PRELIMINARY REFERENCE PROCEDURE

Chapters I and II emphasised that the Court's approach has a potential of excluding large parts of Polish judiciary from the dialogue. This chapter will remind that this is not the right path and underscore the cardinal importance of the preliminary reference procedure. It will analyse how would that measure affect different functions of the preliminary reference procedure.

To begin with, it must be highlighted that the Court acknowledged the constitutional importance of the dialogue, by establishing that national courts enjoy the widest discretion in submitting requests for preliminary ruling.[177] It has created a presumption of relevance, which protects most references from inadmissibility. Only in a small number of cases the Court may refuse to rule on the referred question where it is quite obvious that the sought interpretation of EU law 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.[178]

Furthermore, I shall turn to the analysis of how different functions of the preliminary reference procedure are affected by the new tendencies of the Court of Justice.

First, by engaging in the dialogue, the Court provides assistance to national judges in questions of interpretation and validity of EU law.[179] Consequently, it ensures correct application of EU law, essential for the individuals' rights to an effective remedy and to a fair trial enshrined in Article 47 of the Charter.[180] If the Court decides to exclude national courts from this procedure, it will not make them disappear. They will continue existing and applying EU law, but with a great risk of applying it incorrectly.[181]

Second, the incorrect application of EU law in some Member States would lead to divergent application of EU law, thus hindering the primary objectives of the preliminary reference procedure – uniform application and the effectiveness of EU law.

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[177] Case 166-73 *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECLI:EU:C:1974:3, para 4; Case C-416/10 *Jozef Krizan and Others* [2013] ECLI:EU:C:2013:8, para 64.
[178] Case C-621/18 *Wightman and Others* [2018] ECLI:EU:C:2018:999, para 27.
[179] Think Tank European Parliament, 'Preliminary Reference Procedure' (www.europarl.europa.eu, 6 July 2017) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)608628> accessed 27 June 2024.
[180] *Getin Noble Bank*, Opinion of AG Bobek (n 19) para 68.
[181] Reyns (n 2) 12.

Third, excluding some Member States from the dialogue undermines their Treaty-based rights to participate in the process of creation of law. Generally, it seems that Member States have a limited influence on the end-result of the judgements. Their courts can only initiate the preliminary reference procedure and propose interpretations of EU law in their submissions. But despite their slight impact on the Court's judgements, they should not be deprived of their right of participating in the procedure of creating laws that ultimately bind them. There already exists a possibility of suspending some Member States's voting rights in the legislative process, however only through a complex multi-levelled process involving European Parliament, Commission, the Council, the European Council, that requires unanimity of Member States.[182] Therefore, if the Court of Justice would still find necessary to exclude some national courts from the dialogue, it would be reasonable to expect a higher level of cooperation of EU institutions and all Member States in a more regulated procedure.

Lastly, the preliminary reference procedure is an effective mechanism used for combating the 'rule of law crisis'. As already mentioned, the Court of Justice serves as a lifeline for independent judges that fight against the corrupted Polish system.[183] It allows judges of non-independent courts to address systemic deficiencies and provides the Court with valuable inside information. Other mechanisms, such as the infringement proceedings, are not as effective since its initiation and continuation depend on the discretionary assessment of the Commission and does not address the violations in adequate time. Therefore, the dialogue holds a significant importance both for the Court of Justice and for national courts in solving the 'rule of law crisis'.

CONCLUSION

The newer tendencies in *Getin Noble Bank* and *L.G.* should be welcomed, as they finally enable judges of dependent courts to question its independence. But the back door of the

[182] Steve Peers, 'EU Law Analysis: Can a Member State Be Expelled or Suspended from the EU? Updated Overview of Article 7 TEU' (EU Law Analysis, 4 April 2022) <https://eulawanalysis.blogspot.com/2022/04/can-member-state-be-expelled-or.html> accessed 1 July 2024.; according to Article 7(1) TEU, the Council, with a four-fifths majority and the Parliament's consent, on a reasoned proposal by one third of the Member States, the European Parliament, or the Commission, may determine a clear risk of a serious breach of values enshrined in Article 2 TEU. Article 7(2) TEU, known as the 'red card process,' allows the European Council, by unanimity and a proposal from one third of Member States or the Commission, after obtaining the consent of the European Parliament, to determine a serious and persistent breach of values enshrined in Article 2 TEU after inviting the Member State to submit observations. The procedure is tough, as it requires Member States' unanimity. Subsequently, the Council, by a qualified majority, can suspend certain rights of the Member State, including voting rights in the Council, while considering the impact on individuals and legal entities.

[183] Mathieu Leloup, 'The Untapped Potential of the Systemic Criterion in the ECJ's Case Law on Judicial Independence' (2023) 24 German Law Journal 995, 997

presumption may preclude this option depending on the Court's interpretation of the ECtHR's and national judgements. The Court is not bound by the ECtHR's judgements, nevertheless in *L.G.* it has shown a tendency to align with its case-law under Article 6(1) ECHR. Ultimately, how often the back door will be used will determine whether the entire Poland or its parts will become a blind spot in the preliminary ruling mechanism. Despite the fall of the PiS government, most Polish courts are still filled with unlawfully appointed judges during the PiS regime. One of the biggest issues is the Polish Constitutional Court taken over by the PiS. Donald Tusk is facing a tough assignment: to restore the rule of law without compromising it in the process.[184] This makes the Court's direction unpredictable. Presumably how the new government will respond to the corrupted judiciary will determine the Court's strategy. However, considering that the Commission has marked an end of the 'rule of law crisis', at least the end of its first and more dangerous phase, it seems redundant to exclude Polish judiciary from the preliminary ruling mechanism.[185] Since Donald Tusk's government reformed the dangerous disciplinary regime, ensuring compliance with the obligations stemming from EU law, the Commission unblocked €137 billion euros in the EU funds.[186] In May 2024, the Commission decided to close the Article 7(1) TEU procedure for Poland and declared that 'there is no longer a clear risk of a serious breach of the rule of law in Poland within the meaning of that provision'.[187]

Furthermore, the three-case saga shows that the scope of Article 19 TEU, Article 47 of the Charter and Article 267 TFEU is still a matter of contention between the Court, Advocate Generals and the academics. The borders delineated by Advocate Generals were crossed by the Court resulting in a confusing mix of legal bases that are applied in an inconsistent and casuistic manner.

First, *Banco de Santander* unified Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU,[188] irrespective of the different purposes of the case-law under Article 19(1) TEU,

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[184] 'Poland Is Trying to Restore the Rule of Law without Violating It' (*The Economist*, 7 February 2024) <https://www.economist.com/europe/2024/02/07/poland-is-trying-to-restore-the-rule-of-law-without-violating-it> accessed 1 July 2024.

[185] 'Poland's Rule of Law Crisis at an End' (*Scottish Legal News*, 7 May 2024) <https://www.scottishlegal.com/articles/polands-rule-of-law-crisis-at-an-end> accessed 1 July 2024.

[186] 'Poland's Efforts to Restore Rule of Law Pave the Way for Accessing up to €137 Billion in EU Funds' (*European Commission*, 29 February 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1222> accessed 1 July 2024; Jorge Liboreiro, 'Poland Exits Article 7, the EU's Special Procedure on Rule of Law' (*euronews*, 29 May 2024) <https://www.euronews.com/my-europe/2024/05/29/poland-exits-article-7-the-eus-special-procedure-on-rule-of-law> accessed 1 July 2024.

[187] 'Daily News 29 / 05 / 2024' (*European Commission*, 29 May 2024) <https://ec.europa.eu/commission/presscorner/detail/en/mex_24_2986> accessed 1 July 2024.

[188] Sánchez Frías (n 15).

Article 47 of the Charter and Article 267 TFEU. Furthermore, *Getin Noble Bank* attempted to correct these ambiguities by introducing the presumption that national courts satisfy the *Dorsch* criteria. It was clear that in the case the presumption is not rebutted, Article 19(1) TEU and Article 47 of the Charter would not be invoked in the context of admissibility. However, when the presumption is rebutted, as in *L.G.*, breaches of Article 19(1) TEU read in the light of Article 47 of the Charter, *a maiore ad minus* lead to breaches of Article 267 TFEU. In this upside-down logic the Court first essentially examined the substance, on the basis of which it concluded that the reference is inadmissible. Such reasoning in an opportunistic way exploits Article 19(1) TEU as a mechanism for examining admissibility, which is not fully aligned with its true nature and purpose. Although the case-law under Article 19(1) TEU had developed under the influence of the earlier case-law under Article 267 TFEU, substantive obligations of independence under Article 19(1) TEU should not overrule the formal requirement of independence under Article 267 TFEU.[189] This approach, as this paper has shown, poses a risk of excluding large parts of Polish judiciary from the preliminary reference procedure.

On the basis of current case-law, it is hard to unequivocally determine when will these legal bases be applied. It can only be concluded that the scope of Article 267 TFEU, Article 19(1) TEU, and in that relation Article 47 of the Charter, will be dictated by the Court's willingness to engage in the dialogues with the dependent judges.

[189] Reyns (n 2) 12-13.

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