JUDICIAL INDEPENDENCE UNDER ARTICLE 19(1) TEU AND ARTICLE 267 TFEU: UNTANGLING THE GORDIAN KNOT

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Abstract: This paper 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. On one hand, Article 267 TFEU presumes that national courts are sufficiently independent to submit references; on the other, some courts simultaneously fail to satisfy stricter standards of independence required under Article 19(1) TEU. Since references are often submitted by courts whose independence has been under attack, the question arises about whether such requests should be held admissible. The paper analyses the Court's answer to this dilemma in three Grand Chamber judgments – Banco de Santander, Getin Noble Bank, *and* LG, *and advances two key hypotheses. First, the three-case saga demonstrates that the Court has moved away from the original scope and purpose of Article 19(1) TEU and Article 267 TFEU as a result of a political decision to limit engagement with 'tainted' Polish courts. Second, irrespective of how these legal bases might be applied, the Court's judgments should not result in the exclusion of national courts from the preliminary reference procedure. Such an approach would undermine the key mechanisms of the functioning of EU law – the uniform application and effectiveness of EU law – and would compromise the parties' right to a fair trial, while weakening mechanisms for combating the 'rule-of-law crisis'.*

Keywords: judicial independence, Court of Justice, Article 19(1) TEU, Article 267 TFEU, Banco de Santander, Getin Noble Bank, LG.

1 Introduction

In recent years, Poland has become a persistent battlefield between judges who were unlawfully appointed and their independent colleagues,

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suffering from a condition called 'rule-of-law backsliding'.[1] Lawfully appointed judges have frequently used the preliminary reference mechanism to voice their concerns over the unlawful appointment of their colleagues. At other times, their 'dependent' counterparts would likewise pose questions on judicial independence to legitimise their position or discredit their colleagues.[2] Article 267 TFEU[3] has traditionally allowed all national courts to submit references.[4] However, as preliminary references have sometimes been misused, the Court has faced a tough question – should it allow references from 'tainted' Polish courts? And how would answering that question affect the relationship between Article 267 TFEU and Article 19(1) TEU?[5] Should the thresholds of the two provisions be equated to block references from compromised courts, or should the Court adopt a more nuanced approach that reflects their distinct purposes?

Understanding this dilemma requires a closer look at how the Court has shaped the concepts of independence under both provisions. As Reyns explains, independence has a dual role in EU law – it is both a formal admissibility requirement under Article 267 TFEU and a substantive obligation imposed on Member States under Article 19(1) TEU and Article 47 of the Charter.[6] Article 267 TFEU initially allowed all national courts to participate in the judicial dialogue; its aim was to expand the number of participants in the procedure, rather than exclude national courts from it. For this reason, the criterion of independence was scrutinised leniently.[7] Article 19(1) TEU, on the other hand, requires a more stringent analysis, since it was developed to shield national judiciaries

[1] Kim Lane Scheppele and Laurent Pech, 'What Is Rule of Law Backsliding?' (*VerfBlog*, 2 March 2018) <https://verfassungsblog.de/what-is-rule-of-law-backsliding/> DOI: 10.17176/20180302-181145 accessed 1 September 2025.

[2] 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' (*Verfassungsblog*, 26 April 2022) <https://verfassungsblog.de/keeping-the-past-and-the-present-apart/> accessed 1 July 2024.

[3] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[4] Case C-718/21 *LG v Krajowa Rada S downictwa* ECLI:EU:C:2023:150, Opinion of AG Rantos, para 21.

[5] Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

[6] Charlotte Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 European Constitutional Law Review 2; Consolidated Version of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

[7] Takis Tridimas, 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' (2003) 40 Common Law Market Review 9.

from the executive branch's interference.[8] In the 'rule-of-law crisis', the two bodies of case law form a Gordian knot – all national courts are presumed independent enough to submit references under Article 267 TFEU, yet some may simultaneously fail to satisfy the standards of independence under Article 19(1) TEU. Would, then, breaches of Article 19(1) TEU necessarily imply that the threshold of Article 267 TFEU is not met, or do the two provisions operate independently of each other?

This conflict between the two strands of case law was addressed in three Grand Chamber judgments: *Banco de Santander*,[9] *Getin Noble Bank*,[10] and *LG*.[11] In *Banco de Santander*, the Court essentially unified all legal bases for judicial independence,[12] holding that a body not independent under Article 19(1) TEU is also not considered independent under Article 267 TFEU. This tied the Gordian knot, as it suggested that references from non-independent courts would be blocked. However, in *Getin Noble Bank* and *LG* the Court adopted a middle-way approach: it presumed that national courts satisfy the *Dorsch* criteria,[13] unless a final international or national decision leads to the conclusion that Article 19(1) TEU read in the light of Article 47 of the Charter is violated.[14] This was precisely the result of *LG,* where the Court declined participation in the dialogue of one of the most influential chambers of Polish courts – the Chamber of Extraordinary Control and Public Affairs of the Polish Supreme Court.[15]

This paper critically examines the results of these judgments by laying down two key hypotheses. First, it argues that the three-case saga has reshaped the purpose and scope of Article 19(1) TEU and Article 267 TFEU, reflecting the Court's reluctance to engage in dialogue with 'tainted' national courts.

Second, regardless of the choice of legal bases, the paper contends that the Court should not exclude national courts from the preliminary reference procedure. First, declining their participation could result in

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[8] See also 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, 639.

[9] Case C-274/14 *Banco de Santander SA* ECLI:EU:C:2020:17.

[10] Case C-132/20 *BN and Others v Getin Noble Bank SA* ECLI:EU:C:2022:235.

[11] Case C-718/21 *LG* ECLI:EU:C:2023:1015.

[12] See also 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, 334–335.

[13] Case C-54/96 *Dorsch Consult* ECLI:EU:C:1997:413.

[14] *Getin Noble Bank* (n 10) para 72; *LG* (n 11) para 44.

[15] *LG* (n 11) para 78.

courts that apply EU law but cannot seek interpretation from the Court, turning them into blind spots on the radar of the Court of Justice. This would compromise the ultimate aim of the preliminary reference procedure – ensuring the uniformity and effectiveness of EU law.[16] Second, as a result, EU law could be applied incorrectly and could compromise parties' right to a fair trial.[17] Third, lawfully appointed judges sitting in panels with their unlawfully appointed colleagues should be able to challenge their independence, as it opens up a valuable avenue for combating the 'rule-of-law crisis'.

Beyond the risks this entails for the functioning of EU law, the paper argues that excluding national courts from the preliminary reference mechanism is also not an effective solution to the 'rule-of-law crisis'. Other measures of the EU's 'rule-of-law toolbox' seem to offer more_efficient solutions, while not compromising the uniformity and effectiveness of EU law.

The paper is divided into two further sections. The first examines settled case law under Article 267 TFEU and Article 19(1) TEU, underscoring the differences between the two provisions not expressly acknowledged by the Court. The second analyses the three cases: *Banco de Santander*, *Getin Noble Bank* (accompanied by the Opinion of Advocate General Bobek),[18] and *LG*. The final part of that section examines a series of cases that followed *LG*, which have so far received limited attention in academic circles.

2 Conflicting case law under Article 19(1) TEU and Article 267 TFEU

2.1 Article 267 TFEU: case law and purpose

Before the Court undertook the task of assessing whether national judicial systems preserve the separation of powers, it developed the notion of independence under Article 267 TFEU in a different context. Early cases examined whether the preliminary reference procedure may be expanded to encompass a wider range of administrative bodies. In this way, the Court acted as a rational decision-maker, aiming to increase the protection of uniformity by allowing a wider range of bodies at a lower level to seek interpretation of EU law.[19] As a result, the requirement of

[16] Reyns (n 6) 12.

[17] ibid.

[18] Case C-132/20 *Getin Noble Bank SA* ECLI:EU:C:2021:557, Opinion of AG Bobek.

[19] Tridimas (n 7) 30.

independence under Article 267 TFEU was scrutinised leniently.[20] Since the Court was more concerned with expanding the number of participants, it was less preoccupied with scrutinising substantive standards of independence. Rather, a functional approach was developed – namely, the body concerned must perform a judicial function, as opposed to an administrative function, and precisely one of the distinctions between judicial and administrative functions is independence.[21] As Advocate General Darmon stated in *Corbiau*, the idea of independence 'is an integral element of the judicial function'.[22]

The relaxed approach to judicial independence is evident from the first cases, such as *Pretore di Salò*. In that case, the Court concluded that Italian *pretori* are considered independent under Article 267 TFEU even though they are judges who combine the functions of a public prosecutor and an examining magistrate.[23] It merely stated that the Court can reply to requests for a preliminary ruling if they emanate 'from a court or tribunal which has acted in the general framework of its task of judging, independently and in accordance with the law, cases coming within the jurisdiction conferred on it by law'.[24] In *Corbiau*, independence was vaguely outlined as 'acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings'.[25] Later cases – *Dorsch Consult*,[26] *Köllensperger and Atzwanger*,[27] and *Gabalfrisa*[28] relaxed the criterion of independence even further.[29] It was analysed so leniently that Advocate General Ruiz-Jarabo Colomer remarked that even questions referred by Sancho Panza as governor of the island of Barataria would be accepted.[30]

Yet, in *Wilson* the Court fortified the requirement of independence under Article 267 TFEU, aligning it with the practice of the ECtHR.[31] It moved beyond a purely functional approach and filled in the substance

[20] ibid.

[21] ibid, 28; Reyns (n 6) 3.

[22] Case C-24/92 *Corbiau* ECLI:EU:C:1993:59, Opinion of AG Darmon, para 10.

[23] Case 14/86 *Pretore di Salò* ECLI:EU:C:1987:275, para 7.

[24] ibid.

[25] Case C-24/92 *Corbiau* ECLI:EU:C:1993:59, para 15.

[26] *Dorsch* (n 13).

[27] Case C-103/97 *Köllensperger and Atzwanger* ECLI:EU:C:1999:52.

[28] Joined Cases C-110/98 to C-147/98 *Gabalfrisa* ECLI:EU:C:2000:145.

[29] Reyns (n 6) 3.

[30] Case C-17/00 *De Coster* ECLI:EU:C:2001:366, Opinion of AG Ruiz-Jarabo Colomer, para 14.

[31] Case C-506/04 *Wilson* ECLI:EU:C:2006:587; see references in *Wilson*, paras 51 and 53; Reyns (n 6) 4.

of the criterion by adding two dimensions of independence – external and internal. External independence requires protection from outside pressure that could undermine judicial decision-making, while internal independence, closely tied to impartiality, ensures a level playing field for the parties to the proceedings.[32] A threshold for determining breaches of independence was established, as rules must be such as 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'.[33]

Although the requirement of independence was tightened, it should be remarked that *Wilson* was not concerned with assessing the admissibility of references under Article 267 TFEU. Instead, the Court relied on the concept of a 'court or tribunal' under Article 267 TFEU to decide whether the *Ordre des avocats du barreau de Luxembourg* satisfied the requirements of Article 9 of Directive 98/5 on the free movement of lawyers, which obliges Member States to provide remedies before a 'court or tribunal' against negative registration decisions.[34] The Court's aim, therefore, was not to restrict access to the preliminary reference procedure, but to guarantee that individuals had access to an independent body under the Directive.[35]

Nonetheless, the Court stuck with the substantive content of independence in deciding on the admissibility of preliminary references of administrative bodies and later used it as a foundation for creating the substantive obligations under Article 19(1) TEU.[36]

However, this comes with an important side note. The strengthened requirement of independence was not originally intended to be used against national courts. As Advocate General Rantos highlighted, the Court has traditionally carried out the 'independence test' in regard to bodies outside national judicial systems, rather than bodies considered 'courts or tribunals' under national law.[37] The interest of the Court was to protect uniformity at a higher level and not to lower it by excluding national judicial bodies. Although these judgments predate the Court's more direct engagement with the 'rule-of-law crisis', their significance lies in reflecting the original intention of Article 267 TFEU: to secure the uniformity and effectiveness of EU law.

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[32] *Wilson* (n 31) paras 51–52; Reyns (n 6) 4.

[33] *Wilson* (n 31) para 53.

[34] ibid 43; Bonelli and Claes (n 8) 638–639.

[35] Bonelli and Claes (n 8) 638-639; Reyns (n 6) 4.

[36] Reyns (n 6) 4.

[37] *LG*, Opinion of AG Rantos (n 4) para 21.

2.2 Article 19(1) TEU: case law and purpose

Building upon the case law under Article 267 TFEU, the Court established a substantive obligation under Article 19(1) TEU for Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[38] The case law under Article 19(1) TEU is quite recent, starting with *Portuguese Judges*[39] in 2018, and *Commission v Poland (Independence of the Supreme Court)*[40] in 2019.

In *Portuguese Judges*, the Court for the first time assumed jurisdiction in deciding on matters of the judicial architecture of Member States.[41] 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 judgment paved the way for safeguarding the independence of the Polish and Hungarian judiciary.[42] The Court decided not to rely on Article 47 of the Charter, which could also have 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.[43] Instead, it applied Article 19(1) TEU, establishing that the 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'.[44] Therefore, by relying on Article 19(1) TEU and not Article 47 of the Charter, the Court has significantly extended its jurisdiction to scrutinise various elements of national judicial systems. Since the judgment 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 the courts of the Member States.[45]

Furthermore, in the explanation of the judgment, it was emphasised that the principle of effective judicial protection of individuals' rights enshrined in Article 19(1) TEU is a general principle of EU law, stemming

[38] Reyns (n 6) 4; second paragraph of Article 19(1) TEU (n 5).

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

[40] Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531.

[41] Bonelli and Claes (n 8) 622–623.

[42] ibid.

[43] 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.

[44] *ASJP* (n 39) para 29.

[45] Pech and Platon (n 43).

from the common traditions of the Member States and Articles 6 and 13 ECHR[46] and Article 47 of the Charter, which enshrine the right to effective judicial protection.[47]

The Court established that Article 19 TEU is a concrete manifestation of the principle of the rule of law enshrined in Article 2 TEU 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 law'.[48] It obliged Member States to ensure that the 'courts or tribunals' meet the requirements of effective judicial protection under Article 19(1) TEU, which entails an independent judiciary.[49] The requirements under Article 19(1) TEU were linked to access to an independent tribunal enshrined in Article 47 of the Charter.[50] 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.[51]

The reason for the Court's intervention in Member States' judicial matters was to ensure effective judicial protection. Without an independent judiciary, the effectiveness of EU law would be at stake.[52] As the Court stated in paragraph 43 of the judgment: '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'.[53]

A year later, the Court finally dealt with the Polish rule-of-law crisis in *Commission v Poland*[54] following the path created in *Portuguese Judges*. This was the first case in which it declared breaches of Article 19(1)

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[46] Convention for the Protection of Human Rights and Fundamental Freedoms [1950].

[47] *ASJP* (n 39) para 35.

[48] ibid, paras 32, 36.

[49] ibid, paras 37, 40–42.

[50] ibid, para 41.

[51] *ASJP* (n 39) para 44.

[52] Miguel Poiares Maduro, 'General Report on the Rule of Law in the European Union: Development and Challenges on the European Union Role in Protecting the Rule of Law' (2023) 1 Mutual Trust, Mutual Recognition, and the Rule of Law; The XXX FIDE Congress in Sofia, 2023: Congress Publications 23.

[53] *ASJP* (n 39) para 43.

[54] *Commission v Poland* (n 40).

TEU, thus solidifying its jurisdiction in dealing with rule-of-law issues.[55] The Court found that Poland had failed to fulfil its obligations under the second paragraph of Article 19(1) TEU due to the new Law on the Supreme Court that lowered the retirement age of judges of the Supreme Court holding office at that moment from 70 to 65 years. It also endowed the Polish President with discretionary power to decide on the extension of judges' terms past retirement.[56] The ruling further confirmed 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.[57]

It follows from the aforementioned that independence under Article 19(1) TEU was developed in a context different from that under Article 267 TFEU. Rather than serving to regulate participation in the preliminary reference procedure, it emerged in response to sustained attacks on the Polish and Hungarian judiciary. The following sub-section analyses how these distinct contexts have resulted in specific differences between the two provisions.

2.3 Article 267 TFEU and Article 19 TEU: cutting through the Gordian knot

The Court has not explicitly set the boundaries between Article 267 TFEU and Article 19(1) TEU in rule-of-law cases. However, Advocates General have repeatedly proposed a clearer differentiation between these legal bases.

Advocate General Bobek stated that legal provisions governing judicial independence differ in terms of their function and objective. As a result, the thresholds for their breaches and the intensity of the Court's review of compliance with these provisions vary accordingly.[58]

Under Article 267 TFEU, the concept of a 'court or tribunal' has a functional nature: to identify which national bodies are entitled to engage in the preliminary reference procedure.[59] Consequently, the Court's review of independence is more relaxed.[60] Article 19(1) TEU, on the oth-

[55] 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.

[56] *Commission v Poland* (n 40).

[57] ibid, para 55.

[58] *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 36

[59] ibid, para 50; Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* ECLI:EU:C:2021:403, Opinion of AG Bobek (n 50), para 166.

[60] *Prokuratura Rejonowa*, Opinion of AG Bobek (n 59) para 166.

er hand, imposes much stricter requirements of judicial independence, requiring an in-depth analysis of the national judicial system.[61] Unlike Article 267 TFEU, it imposes on Member States a general obligation to 'provide remedies sufficient to ensure effective legal protection'.[62] It covers only systemic breaches of a certain gravity unlikely to be self-corrected by domestic remedies. In brief, it is an extraordinary remedy for extraordinary cases, going beyond the individual file.[63]

As Advocate General Bobek clarified, the functional approach under Article 267 TFEU does not imply that the referring court is lawfully composed or that its judges have been lawfully appointed. Concerns about judicial appointments in Poland may indeed raise serious rule-of-law issues, but those are to be assessed under Article 19(1) TEU and Article 47 of the Charter, not Article 267 TFEU.[64]

Other Advocates General have reached similar conclusions. AG Rantos supported AG Bobek's differentiation of legal bases, while adding that the 'minimalist' reading of independence under Article 267 TFEU does not collide with the principle of cooperation between the national courts and the Court. It also safeguards the role of preliminary references in protecting individuals' rights through which individuals may 'avail themselves of the effective judicial protection guaranteed by EU law'.[65]

Moreover, AG Tanchev emphasised that the examination of the independence of a 'court or tribunal' under Article 267 TFEU is a 'qualitatively different exercise' from the evaluation of the requirements of judicial independence under Article 47 of the Charter and Article 19(1) TEU.[66] 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 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 conducts a substantive analysis of judicial independence. However, AG Tanchev 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.

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[61] ibid, para 164.

[62] Second paragraph of Article 19(1) TEU; *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 37.

[63] *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 39; *Prokuratura Rejonowa*, Opinion of AG Bobek (n 59) para 164.

[64] *Getin Noble Bank*, Opinion of AG Bobek (n 18) paras 75–76.

[65] *LG*, Opinion of AG Rantos (n 4) para 22.

[66] Joined Cases C-585/18, C-624/18 and C-625/18 *AK v Krajowa Rada Sądownictwa and CP DO v Sąd Najwyższy* ECLI:EU:C:2019:551, Opinion of AG Tanchev, para 111.

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.[67]

Scholars have also observed other differences between the two provisions. In particular, Article 267 TFEU is applied to decide whether a specific body is allowed to make a reference for the first time, whereas Article 19(1) TEU usually imposes obligations on bodies already regarded as part of the European judicial system.[68]

Although the differentiation suggested by the Advocates General falls in line with the provisions' original purpose, the Court has not always followed their logic. The next section examines how the Court has intertwined Article 19(1) TEU and Article 267 TFEU in a more complex system for assessing the admissibility of references and the negative consequences that arise therefrom.

3 The three-case saga

3.1 Banco de Santander

In *Banco de Santander*, the main dispute did not concern rule-of-law issues, but related to matters of tax law. Although the Court had already decided on a similar issue in *Gabalfrisa*,[69] it decided to realign its case law under Article 267 TFEU with the more recent developments under Article 19(1) TEU.[70]

The question arose whether the Central Tax Tribunal, which referred the questions, is a 'court or tribunal' under Article 267 TFEU.[71] 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.[72]

Here, the Court decided to depart from its ruling in *Gabalfrisa* in 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 analysed leniently, concluding that Spanish legislation ensured the separation of functions in Tax Tribunals between, on one hand, departments responsible for management, clearance and recovery of tax and,

[67] ibid, paras 112–114.

[68] Reyns (n 6) 6; see also: Bonelli and Claes (n 8) 639.

[69] *Gabalfrisa* (n 28).

[70] *Banco de Santander* (n 9) para 55.

[71] ibid, para 50.

[72] ibid, para 52–53.

on the other, Tax Tribunals which rule on complaints lodged against the decisions of those departments.[73] Advocate General Saggio in *Gabalfrisa* and Advocate General Ruiz-Jarabo Colomer in *De Coster* 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.[74]

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*.[75] It recalled 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.[76]

With this perspective, the Court continued to examine the independence of the Central Tax Tribunal, concluding that the body does not fulfil the external and internal aspect of independence, and is thus not considered a 'court or tribunal' under Article 267 TFEU.[77]

Therefore, the Court unified its approach to Article 19(1) TEU and Article 267 TFEU,[78] regardless of the original purpose of Article 267 TFEU. In this way it established a more rigorous standard of independence, not only for complying with the substantive obligations of EU law, but also for passing the admissibility stage. This drift away from the original purpose of Article 267 TFEU comes with certain consequences, especially relevant for the Polish 'rule-of-law crisis'. Although the case concerned Spanish administrative bodies, by referring to *Portuguese Judges*, it appears that the departure from *Gabalfrisa* aimed at creating a path towards the exclusion of some Polish courts from the dialogue. As seen in *Portuguese Judges,* the problems of separation of powers in Poland are at times indirectly addressed in cases concerning other Member States.

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[73] ibid, para 54.

[74] Joined Cases C-110/98 and C-147/98 *Gabalfrisa* ECLI:EU:C:1999:489, Opinion of AG Saggio, para 16; *De Coster*, Opinion of AG Ruiz-Jarabo Colomer (n 30) para 28.

[75] *Banco de Santander* (n 9) para 55.

[76] ibid, para 56; *ASJP* (n 39) para 43.

[77] *Banco de Santander* (n 9) paras 68, 77, 80.

[78] See also: Sánchez Frías (n 12) 334–335.

Together with *Miasto Lowicz*, delivered the same year, and *IS*, delivered a year later, this judgment demonstrates the Court's restrained approach during that period to references concerning the 'rule-of-law crisis'.[79]

The culmination of this reserved approach in *Banco de Santander* opened the door to adverse effects on the overall functioning of EU law.

First, the principal aims of the preliminary reference procedure – the effectiveness and uniformity of EU law – could come into question if judges of non-independent courts are barred from seeking interpretation or from challenging the validity of EU law.[80] The jurisprudence of the Court is not created by the Court alone, but by constant cooperation with national courts responsible for enforcing EU law. The preliminary reference is a dialogue between two significant interlocutors – one traditionally tasked with the interpretation of EU law, and the other with its application. The importance of the second interlocutor – national courts – should not be forgotten. Indeed, their submission of preliminary references is a *conditio sine qua non* for addressing tough interpretative issues that arise only in the process of applying the law. Without the submission of preliminary references by national courts, the complex EU law questions they routinely deal with would remain unanswered, resulting in diverging application of the law. Therefore, the submission of references by national courts is a precondition for ensuring the uniformity and effectiveness of EU law.

Even in the 'rule-of-law crisis' the Court should not discredit references coming from judges of 'tainted' courts. The lack of independence in the appointment process does not inherently mean that the judges concerned are reluctant to apply EU law. On the contrary, these judges still continue applying it, but with a greater risk of applying it incorrectly, thus putting at stake the effectiveness of EU law.[81] Moreover, to exclude these judges would also place the Court in a contradictory position: it would undermine the very objective of safeguarding the effectiveness of EU law, which justified its intervention in matters of judicial independence in the first place.

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[79] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* ECLI:EU:C:2020:234; Case C-564/19 *IS* ECLI:EU:C:2021:949. *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; see also 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. In *IS*, the Court similarly refrained from assessing the appointment process of Hungarian judges, declaring the reference inadmissible due to the absence of a connecting factor between the provisions of EU law and the dispute in the main proceedings.

[80] Reyns (n 6) 12.

[81] ibid.

However, even if the Court still found it 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._By analogy, the suspension of Member States' voting rights in the legislative process is constructed as a complex multi-levelled procedure, involving the European Parliament, the Commission, the Council, and the European Council, requiring the unanimity of Member States.[82]

Second, the incorrect application of EU law would undermine individuals' right to a fair trial enshrined in Article 47 of the Charter,[83] which is a precondition for ensuring other fundamental rights. Paradoxically, as Advocate General Wahl stated 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.[84]

Individuals' rights to a fair trial would not be protected if the Court decided to strictly examine the requirements of a 'court or tribunal' under Article 267 TFEU.[85]

Lastly, instead of remedying the Polish 'rule-of-law crisis', the Court further tightened the Gordian knot: if lawfully appointed judges from structurally 'dependent' courts are deemed not independent under Article 267 TFEU, they would paradoxically be barred from challenging the independence of their colleagues. Independent judges, although threatened by disciplinary sanctions, are still willing to point out the systemic issues within their judicial system. They have been allies in the combat

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[82] For further insights on the Article 7 TEU procedure, see 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.

[83] *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 68.

[84] Joined Cases C-58/13 and C-59/13 *Torresi* ECLI:EU:C:2014:265, Opinion of AG Wahl, para 48.

[85] ibid, para 49.

against the corrupted Polish system, providing useful inside information on the executive branch's interference. By initiating proceedings, they enable the Court to declare violations of judicial independence in the preliminary reference procedure and oblige Poland to realign with EU standards. For such judges, this channel is indispensable, 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.[86] Even if the Court finds violations in infringement proceedings, the violations are declared *ex post facto*, after persistent systemic breaches have already caused severe harm to the system. Therefore, the only effective way for judges to pose questions in the 'rule-of-law crisis', and receive timely answers, is through the preliminary reference procedure where the Court is obliged to respond.

3.2 Getin Noble Bank

3.2.1 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 emanating 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 the Communist era.[87] In a plot-twist, his independence was challenged by the Polish Ombudsman due to the major flaws in his appointment.[88] The referring judge was appointed by the President of the Republic in spite of the suspended Resolution of the Krajowa Rada S downictwa (National Council of the Judiciary, hereinafter: KRS) by the Supreme Administrative Court.[89] 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.[90] Some academics pointed out the duplicitous motives of the referring judge who in effect tried to solve two problems at once – to legitimise his own position (given that he was not recognised as a lawful judge by the ECtHR, and thus not considered lawful by authorities across all the

[86] 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*' (*EU Law Analysis*, 7 March 2021) <https://eulawanalysis.blogspot.com/2021/03/polish-ruling-partys-fake-judges-before.html> accessed 17 June 2024.

[87] *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 4.

[88] ibid, paras 26–27.

[89] ibid, para 44.

[90] ibid.

EU Member States) and to discredit his colleagues.[91] 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 to the formal requirement of independence under Article 267 TFEU. After suggesting a clearer differentiation between the legal bases (see section 2.3), he proposed that the Court follow an institutional approach to the admissibility of references under Article 267 TFEU, rather than examine the independence of each individual judge.[92]

Starting from the *Vaassen-Göbbels* case,[93] the Court has not analysed whether specific persons that have submitted a reference individually satisfy the *Dorsch* criteria. Admissibility has always been and indeed 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 made 'captive' by other branches of power.[94] Furthermore, Advocate General Bobek applied the institutional approach to the two requirements of a 'court or tribunal' contested by the Polish Ombudsman: 'established by law' and 'independence'.[95]

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.[96] He connected this to the *Nordsee* case,[97] in which the Court explicitly denied the German arbitration court access to the preliminary reference procedure.[98] Unlike 'established by law' in the meaning of Article 6(1) ECHR, 'established by law' under Article 267 TFEU does not concern the 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, as their purposes differ. While Article 267 TFEU aims to identify bodies in Member States which may submit a reference,

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[91] Kochenov and Bárd (n 2).

[92] *Getin Noble Bank*, Opinion of AG Bobek (n 18) paras 51–72.

[93] Case 61-65 *Vaassen-Göbbels* ECLI:EU:C:1966:39.

[94] *Getin Noble Bank,* Opinion of AG Bobek (n 18) paras 52, 78, note 17.

[95] ibid, paras 44–45, 49–64.

[96] ibid, para 54.

[97] Case 102/81 *Nordsee* ECLI:EU:C:1982:107.

[98] *Getin Noble Bank*, Opinion of AG Bobek (n 18) para 55.

the purpose of Article 47 of the Charter is to protect individuals' rights to an effective remedy and a fair trial.[99]

Regarding the requirement of 'independence' under Article 267 TFEU, AG Bobek emphasised that in the previous case law the Court's focus was not on individual judges, but on the structural independence of the referring body from both the parties in the dispute and from any external influence.[100]

Lastly, AG 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.[101]

First, he argues that it would be counterintuitive to cut from the dialogue bodies which exercise judicial functions in a Member State and which seek answers regarding the interpretation and application of EU law. Since the Court's judgments are binding on all national courts, such courts demonstrate a willingness to cooperate with the Court and apply EU law correctly.[102]

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.[103]

Third, the admissibility stage is not an appropriate point to assess the independence and impartiality of individual judges, as this endeavour requires a detailed and in-depth analysis. Moreover, if independence were scrutinised in great detail at the admissibility stage, then the requirements of either Article 47 of the Charter or Article 19 TEU would be examined both at the admissibility stage, and on the merits if that stage were reached. Hence, the analysis would potentially become somewhat circular.[104]

Fourth, there is an issue of horizontal consistency of the Court's case law. Advocate General Bobek found rather puzzling the suggestion that the Court should accept or decline the reference based on

[99] ibid, paras 59–61.

[100] *Getin Noble Bank*, Opinion of AG Bobek (n 18) paras 62–63.

[101] ibid, para 66.

[102] ibid, para 67.

[103] ibid, para 68.

[104] ibid, para 69.

the 'quality' of the individual judge(s). Examining the integrity of judges, conflicts of interest in a specific case, possible allegations of corruption, and similar intricacies is not the Court's task under Article 267 TFEU.[105]

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.[106]

First, 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.[107]

Second, ultimately, 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 dialogue with the Court. This situation might occur when, for instance, the pattern of issues with appointment shows that political influence is exercised over the decision-making process.[108] The proposed exception remains rather unclear. *Pech* and *Platon* justifiably ask: what would the threshold be? At what point would an institution become hijacked? Which individual would be the last straw?[109] It remains unclear whether some sort of threshold should be set, and what this would be, or whether the breaches should be assessed on a case-by-case basis, which would leave the national courts wondering whether they are allowed to submit a reference.[110] Additionally, this exception risks opening Pandora's box – if an entire tier of the judiciary is appointed unlawfully, would the Court completely shut the door on a large part of a State?

Besides, what if a minority of judges loyal to the executive influence the rest of the judges in lower positions? Can one rotten apple spoil the whole barrel? Some may argue that independent judges may be susceptible to pressure from their non-independent peers, a phenomenon commonly described as the *chilling effect*.[111] Such risks are particular-

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[105] ibid, para 70.

[106] ibid, para 74.

[107] ibid, paras 75–76.

[108] ibid, paras 77–78.

[109] Laurent Pech and Sébastien Platon, 'How Not to Deal with Poland's Fake Judges' Requests for a Preliminary Ruling: A Critical Analysis of AG Bobek's Proposal in Case C-132/20' (*VerfBlog*, 28 July 2021) <https://verfassungsblog.de/how-not-to-deal-with-polands-fake-judges-requests-for-a-preliminary-ruling/> DOI: 10.17176/20210729-020032-0 accessed 17 June 2024.

[110] Pech and Platon (n 109).

[111] See more about the 'chilling effect' in Laurent Pech, 'The Concept of Chilling Effect Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental

ly relevant when independent judges sit in panels alongside 'dependent' judges, who may also serve as presidents of panels or courts. In these circumstances, the threat of disciplinary sanctions may dissuade them from applying EU law. However, if the Court decides to exclude such courts, what would the criteria be for establishing that a judge is 'dependent' despite his lawful appointment? It would almost be impossible to determine in each specific case whether a lawfully appointed judge was feeling 'peer pressure' and decided to take the path of least resistance, especially at the admissibility stage.

Lastly, 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.[112] Although Advocate General Bobek leans towards enabling dialogue with non-independent judges, this exception poses issues for the uniformity and effectiveness of EU law in all fields regulated by EU law. Moreover, it bars independent judges from questioning the lawfulness of their colleagues' appointment.

3.2.2 Judgment 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*. Unlike in *Banco de Santander,* the Court distinguished between the concept of judicial independence under Article 267 TFEU, Article 19(1) TEU, and Article 47 of the Charter.[113]

It found the reference admissible, as it considered the referring judge a 'court or tribunal' under Article 267 TFEU.[114] 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.[115] As Advocate General Rantos noted, this presumption reflects the Court's standing in *FORMAT Urządzenia i Montaże Przemysłowe*,[116] *Koleje Ma-*

Rights in the EU' (2021) Open Society European Policy Institute <www.opensocietyfoundations.org/uploads/c8c58ad3-fd6e-4b2d-99fa-d8864355b638/the-concept-of-chilling-effect-20210322.pdf> accessed 17 June 2024.

[112] Pech and Platon (n 109).

[113] 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*, 13 May 2022) <https://verfassungsblog.de/drifting-case-law-on-judicial-independence/> accessed 18 June 2024.

[114] *Getin Noble Bank* (n 10) para 76.

[115] ibid, para 69.

[116] Case C-879/19 *FORMAT Urządzenia i Montaże Przemysłowe* EU:C:2021:409.

zowieckie,[117] *WŻ*,[118] *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie*[119] and other cases, in which the Court did not investigate whether the Polish Supreme Court is independent under Article 267 TFEU.[120] In *Getin Noble Bank*, the Court recalled 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.[121]

It also stated that the preliminary ruling procedure is the keystone of the judicial system established by the Treaties, which has the objective of securing uniformity in the interpretation of EU law.[122]

The presumption may nevertheless 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 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.[123]

The Court also followed Advocate General Bobek's Opinion by making an exception to the presumption in the case of a court that is deemed to be captured or hijacked.[124] However, it did not establish further rules on how the national courts' capture by the executive branch would be determined.

Finally, the Court enabled the referring judge to join the dialogue by applying the mentioned presumption that had not been rebutted by a final decision of a national or international court or tribunal.[125] It is interesting to point out that prior to issuing the judgment, the ECtHR delivered a judgment in *Advance Pharma* declaring that the judge that submitted a reference in *Getin Noble Bank* was not a court previously es-

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[117] Case C-120/20 *Koleje Mazowieckie* EU:C:2021:553.

[118] Case C-487/19 *WŻ* ECLI:EU:C:2021:798.

[119] Case C-866/19 *Zakład Ubezpieczeń Społecznych I Oddział w Warszawie* EU:C:2021:865.

[120] *LG*, Opinion of AG Rantos (n 4) para 21, note 35.

[121] Case 65/81 *Reina* ECLI:EU:C:1982:6, para 7; Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim* ECLI:EU:C:2021:403, para 44; *Getin Noble Bank* (n 10) para 70.

[122] *Getin Noble Bank* (n 10) para 71.

[123] ibid, para 72.

[124] ibid, para 75.

[125] ibid, para 73.

tablished by law.[126] Although the decision was not final, the Court did not reopen the oral part of the procedure while waiting for the decision of the ECtHR to become final. It still remains unclear why it refused to do so.[127]

By establishing the presumption, at first it seems that the concept of a 'court' under Article 267 TFEU and a 'court' under Article 19(1) TEU and Article 47 of the Charter were separated,[128] which would be in line with Reyns' suggestions.[129] As stated in the judgment, even if a national court is presumed independent under Article 267 TFEU, it does not necessarily imply that it constitutes an independent and impartial tribunal previously established by law, for the purposes of Article 19(1) TEU or Article 47 of the Charter.[130]

However, if the presumption is rebutted, Article 19(1) TEU and Article 47 of the Charter impose both substantive obligations and formal requirements. In the upside-down logic of this judgment, the Court first examines the substance, on the basis of which it may *a maiore ad minus* conclude that the threshold of Article 267 TFEU is not met. Interestingly, independence under Article 267 TFEU was initially used to shape independence under Article 19(1) TEU. In *Getin Noble Bank*, however, the opposite happened: independence under Article 19(1) TEU impacted the assessment of the concept of a 'court or tribunal' under Article 267 TFEU. This new legal framework departs from previous case law in which Article 19(1) TEU and Article 47 of the Charter were not envisaged as admissibility requirements. One of the possible reasons for this shift is the Court's intention to align its case law with that of the Strasbourg Court, which has consistently held that Polish courts do not meet the standard of an 'independent and impartial tribunal established by law'.[131]

Additionally, the Court departed from its previous case law on another point. Although the presumption follows the institutional approach, it may be rebutted by conducting an individual assessment of referring judges, which differs from the Court's original stance.

This shift from previous case law is not automatically negative. From early landmark cases such as *Van Gend en Loos*[132] and *Costa*,[133]

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[126] *Advance Pharma* App no 1469/20 (ECtHR 3 February 2022).

[127] Filipek (n 113).

[128] ibid.

[129] Reyns (n 6) 12-13.

[130] *Getin Noble Bank* (n 10) para 75.

[131] See, for instance, the following judgments of the ECtHR: *Advance Pharma* (n 127); *Dolińska-Ficek and Ozimek v Poland* App nos 49868/19 and 57511/19 (ECtHR, 8 November 2021).

[132] Case 26-62 *Van Gend En Loos* ECLI:EU:C:1963:1.

[133] Case 6-64 *Costa v ENEL* ECLI:EU:C:1964:66.

the Court has continuously adapted EU law provisions in the light of changing political contexts. In the 'rule-of-law crisis', a degree of flexibility enables the Court to adjust its approach to the changing circumstances. Yet, when such adaptability results in a departure from case law, it raises concerns regarding legal certainty and the coherence of the Court's jurisprudence. Arguably, Advocate General Bobek's proposal offers a clearer picture of how these provisions would be applied and thus a higher level of legal certainty. Ultimately, however, the most pressing issue lies less in the theoretical discussion over the boundaries between the legal bases and more in the practical consequences that arise from it.

The exception to the presumption still poses risks to the uniformity and effectiveness of EU law. At the moment, about one quarter of ordinary and administrative judges have been appointed under procedures that compromise judicial independence.[134] Currently, the presumption would protect most national courts due to a lower number of national and international decisions on independence. However, if the ECtHR or the Court finds that most or all Polish or Hungarian courts are not independent under Article 6(1) ECHR or Article 19(1) TEU, a large part of the State could be cut off from the preliminary reference procedure. Nonetheless, in contrast to some critical voices after *Getin Noble Bank*,[135] I believe that this judgment is an advancement on *Banco de Santander* rather than a step back, as it provides clearer criteria for excluding national courts from the dialogue, thereby enabling most courts at the moment to submit references.

The ruling has attracted criticism due to the Court's willingness to engage in dialogue with an unlawfully appointed judge, which some contend amounts to legitimising an unlawful appointment.[136] They argue that it enables 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.[137] Although these arguments are compelling, it is questionable whether the Court has legitimised the referring judge, since in the previous case of *WŻ* it had indicated a breach of Article 19(1)

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[134] *LG*, Opinion of AG Rantos (n 4) para 25; Marcin Szwed, 'Restoring the Integrity of Judicial Appointments: The Venice Commission and Council of Europe's Opinion on Poland', *ConstitutionNet*, International IDEA, 7 November 2024 <https://constitutionnet.org/news/voices/restoring-integrity-poland-judicial-appointments> accessed 28 November 2024.

[135] Filipek (n 113); Barbara Grabowska-Moroz, 'Judicial Dialogue about Judicial Independence in terms of Rule of Law Backsliding' 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.

[136] Grabowska-Moroz (n 135) 22; see also Pech and Platon (n 109).

[137] Pech (n 86).

TEU in the appointment process similar to that in *Getin Noble Bank*.[138] 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 from their non-independent colleagues. Precisely this happened in the *Getin Noble Bank* judgment, where the Court claimed that Article 19(1) TEU and Article 47 of the Charter were not breached by the initial appointment of (contested) judges during Communism.[139]

Furthermore, some academics claim that *Getin Noble Bank* is problematic from the perspective of the *Bosphorus* presumption, arguing 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.[140] However, I do not agree. Article 6(1) ECHR has a different function from that of Article 267 TFEU. It protects individuals' right to a fair trial, distinct from the formal identification of bodies able to submit a reference. A more relaxed approach to independence under Article 267 TFEU does not mean a lenient approach to Article 19(1) TEU and Article 47 of the Charter. In fact, following Advocate General Wahl's logic in *Torresi*, a less stringent analysis of independence under Article 267 TFEU would achieve a higher level of protection of individuals' rights. Effectively, it would allow individuals to have their claims heard before a 'natural judge' (the Court).[141]

3.3 The judgment in LG

LG is essentially a case rebutting the presumption set in *Getin Noble Bank*, thus manifesting the concerns relating to cutting the dialogue with a large part of the Polish judiciary set out in the previous sub-section. 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, the validity of referendums and elections, is not a 'court or tribunal' under Article 267 TFEU.[142] *LG* marks the first case in which a national court – remarkably, the chamber of the Supreme Court – was not considered a 'court or tri-

[138] *WŻ* (n 118) para 162.

[139] *Getin Noble Bank* (n 10) para 134.

[140] Kochenov and Bárd (n 2); Grabowska-Moroz (n 135) 18.

[141] *Torresi*, Opinion of AG Wahl (n 86) paras 48–49.

[142] *LG* (n 11) paras 12, 78.

bunal' under Article 267 TFEU, thus establishing a precedent for further rejections of references emanating from 'tainted' courts.

The main dispute concerned a familiar issue about extending judges' terms 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.[143] Besides, at the time of the new appointments of the judges of the Supreme Court, the process of election of the members of the KRS had arbitrarily changed, coming even more under the influence of the legislative and executive.[144]

The Court rebutted the presumption that the *Dorsch* criteria were fulfilled based on the final decisions of the ECtHR in *Dolińska-Ficek and Ozimek v Poland*,[145] and of the Polish Supreme Administrative Court.[146] 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 represented a flagrant breach of the requirement of a 'tribunal established by law' in Article 6(1) ECHR.[147] The ECtHR identified two major breaches. First, the Court found a manifest breach in the radical change of the election model: the election of the fifteen judicial members of the KRS shifted from election by their peers to election by 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 criticised the President's actions as showing blatant disregard for judicial independence and the rule of law, relying on the Court of Justice's judgments in *AB* and *WŻ*.[148]

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[143] ibid, paras 31, 33.

[144] ibid, para 57.

[145] *Dolińska-Ficek and Ozimek v Poland* (n 131).

[146] Judgment of the Naczelny Sąd Administracyjny (Supreme Administrative Court) of 21 September 2021.

[147] *LG* (n 11) 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.

[148] Callewaert (n 147); Case C-824/18 *AB, CD, EF, GH, IJ v Krajowa Rada Sądownictwa* ECLI:EU:C:2021:153.

At the national level, the Supreme Administrative Court annulled the 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 the election of members of the KRS.[149]

Based on these judgments, the Court undertook its own analysis to assess whether these findings in the light of the Court's case law can rebut the presumption established in *Getin Noble Bank*. By doing so, it explicitly emphasised that it was the only body responsible for interpreting EU law.[150] The Court 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 was not a 'court or tribunal' under the meaning of Article 267 TFEU.[151] Hence, the Court further affirmed the new relationship of these provisions at the admissibility stage, while adding Article 6(1) ECHR to the mix. It did not follow Advocate General Rantos' Opinion, in which he proposed the same differentiation of legal bases as 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 the bodies that can join the preliminary reference procedure.[152] Contrary to the Court's findings, Advocate General Rantos considered that the breaches of Article 6(1) ECHR cannot lead to the conclusion that the threshold of Article 267 TFEU has not been met. Article 6(1) ECHR has the purpose of safeguarding individuals' rights to a fair trial, which can play a role in the application of Article 47 of the Charter, but not in the assessment of independence under Article 267 TFEU.[153] Yet, by acknowledging the violations of Article 6(1) ECHR, it seems that the Court aimed to align its case law with the jurisprudence of the Strasbourg court.

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 had not been the cause of the inadmissibility of references submitted by national courts, let alone the Polish Supreme Court. This outcome raises serious concerns both for the uniformity of EU law and for the protection of individual rights, since the chamber of the highest national court, tasked with adjudicating the

[149] *LG* (n 11) para 56.

[150] ibid, para 46.

[151] ibid, paras 58, 77–78.

[152] *LG*, Opinion of AG Rantos (n 4) para 20.

[153] ibid, para 35.

most complex legal issues, is effectively barred from seeking interpretative guidance from the Court.

On top of this, the ruling clashes directly with *CILFIT*, as the court of last instance is ultimately banned from submitting a reference.[154] Consequently, it seems that in most proceedings no national court would be under the obligation to refer. Such an understanding severely diminishes the uniformity of EU law, thus creating blind spots far beyond the Chamber of Extraordinary Control and Public Affairs. This fear of removing considerable parts of the Polish judiciary from the EU's judicial system was also highlighted by Advocate General Rantos,[155] which yet remained unacknowledged by the Court. It would be interesting to see how the Court will resolve this conflict. Will it declare that the courts below the Supreme Court are courts of final instance under EU law, although this contravenes national law?

4 Aftermath of the three-case saga

After *LG*, the Court has in a number of cases repeatedly declined references from the Chamber of Extraordinary Control and Public Affairs, as well as the Civil Chamber of the Polish Supreme Court.[156] As the referring judges were appointed in similar circumstances as those in *LG*, the references were declared inadmissible or manifestly inadmissible.

These rulings further deepen the concerns expressed in the previous sections.

First, the Court has entrenched the blind spot with regard to the Chamber of Extraordinary Control and Public Affairs, while also extending it to the Civil Chamber of the Polish Supreme Court.[157] These judgments may have a ripple effect on other Polish courts whose judges were appointed in a similar manner, thus raising a pressing question – where will the Court draw the line? Applying this standard rigorously could result in barring a quarter of Polish judges from the preliminary reference procedure, stretching the blind spots to the extreme limits. Worse still, if this approach were to spill over onto other Member States, the consequences for the uniformity of EU law could be even more alarming.

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

[155] *LG*, Opinion of AG Rantos (n 4) para 25.

[156] See Case C-390/23 *Rzecznik Finansowy* ECLI:EU:C:2024:419; Case C-326/23 *CWSA and Others v Prezes Urzędu Ochrony Konkurencji i Konsumentów* ECLI:EU:C:2024:940; Case C-43/22 *Prokurator Generalny v DJ and Others* ECLI:EU:C:2024:459; Case C-720/21 *Rzecznik Praw Obywatelskich* ECLI:EU:C:2024:489; Case C-22/22 *TSA v Przewodniczący Krajowej Rady Radiofonii i Telewizji* ECLI:EU:C:2024:313.

[157] Regarding the Civil Chamber of the Supreme Court, see Case *CWSA* (n 156).

Second, orders in *Prokurator Generalny v DJ and Others*[158] and *Rzecznik Praw Obywatelskich*[159] underline the potential concerns for rule-of-law cases. In these orders, the Court examined whether a panel composed of two judges appointed under the contested procedure at issue in *LG* and a lay-judge could submit a preliminary reference. Although the lay-judge had not been appointed in the same circumstances, the Court held that the presence of even a single unlawfully appointed judge suffices to deprive the body of participation in the preliminary reference procedure.[160] This conclusion was based on an incorrect interpretation of *Simpson*.[161] In that case, the Court reviewed judgments of the General Court, which had held that the unlawful appointment of a third panel member amounted to a breach of Article 47 of the Charter. While the Court acknowledged the irregularities of the judge's appointment, it considered them insufficiently serious to constitute a violation of the right to a fair trial.[162] Consequently, the Court set aside the judgments of the General Court. By contrast, in *Prokurator Generalny v DJ and Others* and *Rzecznik Praw Obywatelskich* the Court appeared to adopt the overruled reasoning of the General Court, thereby declaring that the flaws in the appointment of one judge violate both Article 19(1) TEU and Article 47 of the Charter, thus resulting in the manifest inadmissibility of the reference.[163]

Besides the incorrect reading of *Simpson*, the Court continued to rely heavily on the individual assessment of judges' independence under Article 267 TFEU, instead of following the originally intended institutional approach. Since the presence of even one unlawfully appointed judge on the bench may block the dialogue, lawfully appointed judges could be barred from seeking interpretation of EU law, as well as questioning the independence of their colleagues. This seems an unfair and unnecessary punishment for both the judges willing to cooperate with the Court and the parties involved in the proceedings. In fact, allowing judges to submit references regarding the 'rule-of-law crisis' would be more effective than ultimately blocking the dialogue. It is precisely their initiation of preliminary references that has enabled the development of

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[158] *Prokurator Generalny v DJ* (n 156).

[159] *Rzecznik Praw Obywatelskich* (n 156).

[160] *Prokurator Generalny v DJ* (n 156) paras 28–29; *Rzecznik Praw Obywatelskich* (n 157) paras 29–30.

[161] *Prokurator Generalny v DJ* (n 156) para 28 refers to Joined Cases C-542/18 RX-II and C-543/18 RX-II *Erik Simpson v Council of the European Union and HG v European Commission* ECLI:EU:C:2020:232 *(Simpson).*

[162] *Simpson* (n 161) paras 81–82.

[163] *Prokurator Generalny v DJ* (n 156) paras 29–30; *Rzecznik Praw Obywatelskich* (n 156) paras 28–29.

the refined case law under Article 19(1) TEU and will continue to further fuel its progress.

Considering these heavy risks to the overall functioning of EU law, it would be beneficial for the Court to rethink its strategy towards unlawfully appointed Polish judges. Blocking the judicial dialogue is a rather ill-suited sanction, as it targets both lawfully and unlawfully appointed judges regardless of their willingness to apply EU law. This measure is based on an incorrect assumption that unlawfully appointed judges are inherently unwilling to apply EU law or that they seek to obstruct justice by posing preliminary references. While such cases may exist, references such as the one submitted in *TSA v Przewodnicz cy Krajowej Rady Radiofonii i Telewizji* rebut this myth.[164] In that case, an unlawfully appointed judge submitted a question concerning TV advertisements targeting children, showing the judge's concern for the correct application of EU law. The request was nonetheless declared inadmissible solely due to the irregularity of the appointment.[165] Thus, the Court again put at stake the uniformity and effectiveness of EU law, risking the incorrect application of EU law, and consequently the parties' right to a fair trial.

Other mechanisms seem more suitable for tackling this issue on a larger scale. For instance, imposing financial sanctions and freezing access to EU funds create more concrete financial and political incentives for governments to restore judicial independence than excluding some individual judges from the dialogue. The latter sanction punishes more the judges willing to cooperate with the Court and the litigants concerned than the judges aiming to sidestep EU law obligations. Namely, such judges would hardly be troubled by exclusion from the dialogue. Furthermore, such a measure does not solve the root cause of the issue – it is a sign of disregard towards Polish judges, without any concrete mechanisms or incentives for the State as a whole to remedy the underlying structural deficiencies. Blocking EU funding, although not sufficient on its own to resolve the rule-of-law crisis, puts pressure on the Polish government, incentivising it to take further steps towards restoring the rule of law. The proceedings before the Court complement this measure, providing more guidance as to the concrete measures to take.

Finally, the developments in 2024 reveal a striking contrast between the two powerful EU institutions. After a change in the Polish government, the Commission acknowledged this as a positive development by unblocking €137 billion in EU funds.[166] In May 2024, it decided to close

[164] *TSA v Przewodniczący Krajowej Rady Radiofonii i Telewizji* (n 156).

[165] ibid, paras 11 and 24.

[166] '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/commis-

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'.[167] On the other hand, in the same year, the Court repeatedly issued orders against Polish Supreme Court judges. Ultimately, whether these institutional approaches converge will remain an important factor in shaping the EU's response to the ongoing rule-of-law issues.

5 Conclusion

This paper has examined two interrelated questions. First, how the Court's stance towards engaging with the Polish judiciary has shaped the relationship between Article 19(1) TEU and Article 267 TFEU. Second, whether the Court should engage in the dialogue with judges of non-independent courts, or instead risk turning parts of Poland into blind spots on the EU's judicial map.

In regard to the first question, the paper has shown that while Advocates General have proposed a clearer delineation of these provisions, the Court has moulded their application depending on its changing stance on engaging with the Polish judiciary. In *Banco de Santander* it first unified Article 19(1) TEU, Article 47 of the Charter, and Article 267 TFEU, irrespective of the different purposes of these provisions. The equal thresholds of the provisions signal that the Court initially aimed to exclude 'dependent' courts from the dialogue. Then, in *Getin Noble Bank* and *LG*, the Court acknowledged the flaws of this approach, and consequently, in cases where the presumption applies, made a more nuanced distinction between Article 19(1) TEU, Article 47 of the Charter, and Article 267 TFEU. However, in the case where the presumption is rebutted, as in *LG*, breaches of substantive obligations under Article 19(1) TEU read in conjunction with Article 47 of the Charter, can lead to the conclusion that the threshold of Article 267 TFEU was not met. This approach departs from earlier case law where Article 19(1) TEU imposed substantive obligations, while Article 267 TFEU laid down formal requirements that were analysed leniently. Besides, to rebut the presumption, the Court relies on an individual assessment of judges' independence, as opposed to the originally performed institutional approach. The paper underscores that this shift from the original purposes of EU law provisions should be

sion/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) <www.euronews.com/my-europe/2024/05/29/poland-exits-article-7-the-eus-special-procedure-on-rule-of-law> accessed 1 July 2024.

[167] '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.

viewed as a reflection of the Court's political decision to limit engagement with Polish 'dependent' judges.

Although retailoring legal provisions is not in itself negative, the second question points to the worrying consequences arising from such an approach. First, the principal aims of the preliminary reference procedure – the uniformity and effectiveness of EU law – are put at stake if national courts are excluded from the dialogue. Second, this may result in the incorrect application of EU law that would compromise the parties' rights enshrined in Article 47 of the Charter.[168] Third, by blocking certain judges from the procedure, the Court is in effect cutting off a valuable legal avenue for combatting the 'rule-of-law crisis'.

Weighing these risks against other instruments in the EU's 'rule-of-law toolbox' reveals that excluding judges from the preliminary reference procedure carries greater risks while offering fewer benefits. Measures such as financial sanctions and the conditionality mechanism do not affect the fundamental principles of the functioning of EU law – uniformity and effectiveness – yet provide strong incentives to remedy the underlying structural issues. Together with the preliminary reference and infringement procedure, they address the root problems of national judicial systems. It appears that blocking judicial dialogue would not be a valuable contribution to the toolkit, but would instead add dead weight to the broader effort to safeguard the uniform and effective application of EU law. To this end, the Court should be careful to preserve the procedure considered as the keystone of the judicial system established by the Treaties.[169]

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[168] Reyns (n 6) 12.

[169] Opinion 2/13 ECLI:EU:C:2014:2454, para 176.