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ARTICLE

The Shifting Landscape of Judicial Independence Criteria Under the Preliminary Reference Procedure: A Comment on the CJEU's Recent Case Law and the Trajectory of Article 267 TFEU

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Abstract

The preliminary reference procedure forms the foundation of judge-to-judge dialogue in the EU, which has been imperative to the inclusion of member state courts in the Union's judicial system. In response to the Union's ever-growing rule of law problem, the CJEU strengthened judicial independence criteria to fortify the Article 2 TEU value of the rule of law. Now, it seems the CJEU's fight to save judicial independence is spilling over into the preliminary reference mechanism as it overhauls its judicial independence standards under Article 267 TFEU. In particular, the CJEU has chosen to treat traditional and non-traditional courts in a divergent way and introduced significant reliance on judicial decisions emanating from outside the immediate CJEU court structure; this multi-dimensional change to the operation of the preliminary reference mechanism has far-reaching consequences. As this article highlights, the most notable consequences are to the uniform application of EU law, the principle of subsidiarity and autonomy of EU law. Perhaps the most important point raised is the effect of the new limitation on Article 267 TFEU references on EU citizens and our right to access the 'natural judge' (the CJEU) in matters concerning EU law.

Keywords Court of Justice · Judicial Independence · Article 267 TFEU · Rule of Law

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1 Introduction

The preliminary reference procedure is a keystone of the European Union's (EU) constitutional structure.[1] It is vital for ensuring the uniform application of EU law by providing a means of judge-to-judge dialogue between the Court of Justice of the European Union (CJEU) and national courts.[2] Faced with the ever-growing threats to the status of the rule of law in the EU, the CJEU has endeavoured to strengthen the concept of judicial independence in the Union through the now famous cases of *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (*Portuguese judges*) and *Commission v. Poland*.[3] Through these cases, the CJEU linked Article 19 TEU and Article 47 of the Charter, coupling the principle of judicial independence with the protected concept of effective legal protection. This development was widely accepted as the CJEU taking the reins in protecting the value of the rule of law in the Union against systemic violations of the rule of law occurring at the hands of autocratic governments, particularly in Hungary and, before 2023, Poland.[4] Now, the strengthened notion of judicial independence is being implemented in the context of the preliminary reference procedure under Article 267 TFEU, which has resulted in the CJEU's judicial independence criteria fluctuating when deciding if a referring national body is a 'court or tribunal' under EU law for the purpose of the preliminary reference mechanism.[5]

Notably, the test used by the CJEU in determining the status of a referring entity has been split into two approaches depending on the body's status as a 'classic' court or a 'non-classic' court.[6] The 'classic' or traditional courts established by a member state's separation of powers enjoy a 'presumption of independence' as developed in the *Getin Noble Bank* case in 2022,[7] while other referring bodies have their compliance with judicial independence criteria assessed on their merits by the court each time. The latter approach being the one that has resulted in the Unabhängige Schiedskommission (Independent Arbitration Committee, Austria) ('the USK') being deemed to fail the test for establishing its status as a court or tribunal under EU law in Case C-115/22, *SO v Nationale Anti-Doping Agentur Austria GmbH (NADA) and Others* (*SO v NADA*).[8] This case being the latest decision in the

[1] Opinion 2/13 Accession of the European Union to the ECHR ECLI:EU:C:2014:2454, para 176.

[2] Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* [2014] ECLI:EU:C:2014:265, para 51.

[3] Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117; C-619/18 *Commission v Poland (Independence of the Supreme Court)*, ECLI:EU:C:2019:531.

[4] See Bogdandy et al. 2021, p. 385–388; Pech and 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) http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html accessed 30 May 2024.

[5] Reyns (2021), p.32–39; Frías (2023), p. 331-340.

[6] Opinion of Advocate General Ćapeta in *Case C-115/22SO v Nationale Anti-Doping Agentur Austria GmbH (NADA) and Others* [2024] ECLI:EU:C:2023:676, para 21.

[7] C-132/20 *Getin Noble Bank* [2022] ECLI:EU:C:2022:235, paras 69–77.

[8] Case C-115/22 *SO v NADA* [2024] ECLI:EU:C:2024:384, para 54.

CJEU's jurisprudence concerning judicial independence criteria for the preliminary reference mechanism.

The restrictions on the types of national bodies that are allowed to engage in dialogue with the CJEU under Article 267 TFEU is seen by some authors as a key means of protecting the rule of law in the Union.[9] Conversely, experts have voiced several concerns over the new approach of the CJEU, which primarily focuses on the possibility of blind spots emerging in the map of the Article 267 TFEU provision, which is primarily tasked with ensuring the equal interpretation of EU law.[10] Nevertheless, the new developments in the CJEU's jurisprudence raise essential questions about the future of Article 267 TFEU and the broader evolution of judicial independence in the Union, creating fertile ground for future research.

This article focuses on the implications of the shifting landscape of what constitutes a 'court or tribunal' under the Article 267 TFEU procedure. It aims first to outline the key developments around the definition of a court or tribunal for the purpose of the preliminary reference procedure and uses the recent decision of the Court in *SO v NADA* to illustrate the changing jurisprudence around Article 267 TFEU. The differing outcomes and reasoning of the Advocate General and the CJEU in this case illustrate the evolving criteria of the preliminary reference. The second aim of this article is to highlight some inconsistencies in the CJEU's new approach that are now emerging so that further research in this area can be conducted. Specifically, it is essential to highlight the widening gap between 'classical' and 'non-classical' courts as regards the treatment of different national bodies by the CJEU upon receiving a preliminary ruling request. Third, it is argued that no matter one's normative stance on the recent developments of the CJEU restricting the flow of references under judicial independence criteria, the new approach will limit the remit of Article 267 TFEU as fewer national bodies will be permitted to engage in dialogue with the CJEU. This has consequences for the uniform application of EU law and the principle of subsidiarity and autonomy of EU law. Perhaps the most important point raised is the effect of the new limitation on Article 267 TFEU references on EU citizens and our right to access the 'natural judge' (the CJEU) in matters concerning EU law.[11]

This article is divided into five sections. Section one will provide an outline of the timeline of the evolution of the criteria for judicial independence for the purpose of Article 267 TFEU. Section two will highlight how the concept of judicial independence functions between Article 267 TFEU, Article 47 of the Charter and Article 19(1) TEU. Section three will elucidate the role of mutual trust in the operation of the preliminary reference mechanism. Section 4 will analyse the decision in *SO v NADA* in context of the shifting landscape of Article 267 TFEU. The last section

[9] Kochenov and Bárd (2022); 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)' (13 May 2022, Verfassungsblog) https://verfassungsblog.de/drifting-case-law-on-judicial-independence/. accessed 30 May 2024.

[10] Reyns (2021), p. 39–45; Frías (2023), p. 335–337.

[11] Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* [2014] ECLI:EU:C:2014:265, para 51.

concerns consequences of limiting the reach of the preliminary reference procedure and addresses the inconsistency of the new approach, the impact on principle of autonomy of EU law and the impact of the recent changes in the Court's approach for the rights of EU citizens.

2 Brief Timeline of Jurisprudence concerning Judicial Independence Criteria Under Article 267 TFEU

Judicial independence criteria under Article 267 TFEU has been in flux during the last few years. The CJEU's approach to judicial independence standards prior to the *Wilson* case was characterised by an openness to engage in dialogue with bodies carrying out judicial function even if they did not necessarily fall into the category of a constitutionally established court.[12] Gradually this approach morphed into a stricter analysis of the types of bodies that could engage with the preliminary reference procedure. Now that the rule of law crisis has begun to seriously threaten the Union's legal order, the CJEU has adopted a defensive approach to judicial independence criteria in the context of preliminary references.

When the Court first started interpreting what judicial institutions qualified as courts or tribunals for the purpose of Article 267 TFEU in the 1966 case of *Vaassen Göbbels*, a liberal approach was adopted. In this case, the Court considered whether the Scheidsgerecht (Arbitration Tribunal of the fund for non-manual workers employed in the mining industry) satisfied the independence criteria. The Court allowed the preliminary reference request despite the fact the Scheidsgerecht was not deemed to have judicial power under Dutch law. Instead, the Court used its own criteria in assessing the nature of the body. It considered factors such as the Scheidsgerecht's compulsory jurisdiction, procedural methodology and application of rules of law.[13] Following this case, the famous *Dorsch* criteria were established by the Court which consolidated the considerations that will be made in determining whether a national body is a 'court or tribunal' under Article 267 TFEU. The institution must be established by law, be permanent, its jurisdiction must be compulsory, the procedure must be *inter partes* and apply rules of law, and it must be independent.[14] Since the late 1990s these criteria have allowed the Court to accept preliminary reference requests from a wide range of institutions that did not, sensu stricto, embody judicial independence criteria. This meant that the Spanish *Tribunales Economico-Administrativos,* as an example, was considered a court for the purpose of Article 267 TFEU and other institutions that were somewhere between a court and administrative institution were also allowed to refer questions to the Court under this procedure.[15] This liberal approach of the CJEU helped to fulfil the objectives of Article 267 TFEU of uniform application of EU law and was essential in

[12] Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587.

[13] Case C-61/65 *Vaassen-Göbbels* [1966] ECLI:EU:C:1966:39, 266.

[14] Case C-54/96 *Dorsch Consult Ingenieurgesellschaft mbH* [1997] ECLI:EU:C:1997:413, para 23.

[15] Bogdanowicz and Taborowski (2023), p. 763–765.

developing the EU's legal culture and contributed to the close judicial cooperation between member states and the CJEU.[16]

In the 2006 case of *Wilson*, the CJEU initially began to restrict the criteria for judicial independence[17] and by the time the *Banco de Santander* case came in front of the Court, it was ready to "re-examine" the criteria for independence of a court or tribunal under Article 267 TFEU in light of the abundance of case law coming in front of the Court at that time as a result of rule of law backsliding, particularly in Poland.[18] Once the *Portuguese Judges* and *Commission v Poland* judgments were handed down,[19] the CJEU hardened its position on what bodies passed as a 'court or tribunal' under EU law. This shift can broadly be interpreted as a response to the general rule of law problem that has been the most concerning threat to the EU legal order, but also, the change in the CJEU's approach can be traced back to the critique of the CJEU's initial flexible approach by Advocate General Ruiz-Jarabo Colomer.[20] In the 2001 case of *De Coster*, Advocate General Ruiz-Jarabo Colomer lamented the gradual relaxation of judicial independence standards relating to Article 234 of the Treaty of Rome (now Article 267 TFEU).[21] His view was that a body which does not form part of a member state's national court system and does not have the power to "state the law" should be excluded from the preliminary reference procedure.[22] Following this reasoning, judicial bodies that were not obviously part of the national court structure were to be dealt with on a case-by-case basis. Although this reasoning was not followed by the CJEU in *De Coster*, Advocate General Ruiz-Jarabo Colomer's reasoning was undoubtedly influential in the shift to a stricter regime in *Wilson*.[23]

It was in *Wilson* that the CJEU formulated its criteria of judicial independence in the form of external and internal independence which was influenced by the European Court of Human Rights (ECtHR) jurisprudence relating to judicial independence and Article 6(1) European Convention on Human Rights (ECHR).[24] In accordance with the current case law of the CJEU, there are two dimensions of judicial independence, i.e. 'external' and 'internal' independence, that must be satisfied by a body to be considered a 'court or tribunal'.[25] The requirement for external independence concerns the autonomy of a body from external influence, either directly or

[16] Broberg and Fenger (2022), p. 196–200.

[17] Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587.

[18] Frías (2023), p. 333–335; Case C-274/14 *Banco de Santander*, para 55.

[19] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*; C-619/18 *Commission v Poland (Independence of the Supreme Court)*.

[20] Opinion of Advocate General Ćapeta in *SO v NADA*, para 54; Opinion of Advocate General Ruiz-Jarabo Colomer in Case C-17/00 *De Coster* [2001] EU:C:2001:366, paras 19-28.

[21] Ibid para 26.

[22] Ibid paras 85–85.

[23] Case C-506/04 *Wilson*, paras 48–53.

[24] Reyns (2021), p. 31–32.

[25] Opinion of Advocate General Ćapeta in *SO v NADA*, para 59; Case C-506/04 *Wilson*, paras 49–52; Case C-274/14 *Banco de Santander* SA, paras 57–62.

indirectly.[26] In this regard, EU law establishes rules to prevent the removal of adjudicators from their positions at the whim of external persons or organisations, particularly a government. That is not to say that there are no circumstances that would warrant the removal of an adjudicator from their position prior to their term expiring. However, the removal must not be related to an appointing person or body disagreeing or disliking the decisions of that adjudicator on arbitrary grounds.[27] After the *Wilson* decision a number of national bodies outside the classic court system were assessed under this new stricter criterion and failed to reach the standard necessary to engage with the CJEU under the Article 267 TFEU mechanism. Such bodies included the Martigues Industrial Tribunal for Matters relating to Fishing,[28] the Licensing and Control Authority of the Broadcasting Authority,[29] the Complaints Board of the European Schools,[30] the Commission for Protection against Discrimination,[31] the Telecommunications Complaints Board[32] and the Single-Member Court dealing with matters involving violence against women.[33] While only a limited number of such quasi-judicial bodies now satisfied the independence criteria under Article 267 TFEU.[34]

Notably, in the 2020 *Banco de Santander* case the CJEU went against the Opinion of Advocate General Saggio and its own analysis of the independent nature of the Tribunal Económico-Administrativo Central (Spanish Central Tax Tribunal) from 1998 in *Gabalfrisa*.[35] It decided that this body now lacked internal independence under the new stricter regime and was not permitted to request preliminary references.[36] Since this landmark decision that essentially reversed the CJEU's own evaluation of this national body's independence, the case of *Getin Noble Bank* in 2022 added further nuance to the CJEU's approach in this context. This case dealt directly with the admissibility of a preliminary reference emanating from the Polish Supreme Court and the highly politicized context of the appointment of some of its members.[37]

The *Getin Noble Bank* case allowed the CJEU to address the question of what constitutes a 'court or tribunal' under Article 267 TFEU in the context of the escalating rule of law crisis in Poland. Advocate General Bobek, in his Opinion, argued in favour of allowing such requests from courts with compromised independence

[26] Opinion of Advocate General Ćapeta in *SO v NADA*, para 59.

[27] Ibid, para 61–62.

[28] Case C-109/07 *Pilato* [2008] ECLI:EU:C:2008:274.

[29] Case C-517/09 *RTL Belgium* [2010] ECLI:EU:C:2010:821.

[30] Case C-196/09 *Miles and Others* [2011] ECLI:EU:C:2011:388.

[31] Case C-394/11 *Belov* [2013] ECLI:EU:C:2013:48.

[32] Case C-222/13 *TDC* [2014] ECLI:EU:C:2014:2265.

[33] Case C-503/15 *Margarit Panicello* [2017] ECLI:EU:C:2017:126.

[34] Case C-58/13 *Torresi* [2014] ECLI:EU:C:2014:2088; Case C-203/14 *Consorci Sanitari del Maresme* [2015] ECLI:EU:C:2015:664; C-396/14 *MT Højgaard and Züblin* [2016] ECLI:EU:C:2016:347.

[35] Case C-110/98 *Gabalfrisa* [2000] EU:C:2000:145.

[36] Case C-274/14 *Banco de Santander.*

[37] C-132/20 *Getin Noble Bank* [2022].

in the interest of consistent and effective application of EU law.[38] However, in this instance, the CJEU disagreed with this reasoning, possibly due to the mounting political tension surrounding the rule of law crisis and the need to uphold high standards of judicial independence within the Union. Instead, the CJEU adopted a new approach, leaving the possibility open for referrals from national courts with alleged independence concerns. The CJEU operated on a presumption of independence for national courts from the traditional court structure unless proven otherwise by final judicial rulings indicating a lack of independence.[39] This approach aimed to maintain judicial dialogue between the CJEU and national courts in line with the objectives of Article 267 TFEU while safeguarding against illegitimate courts' influence on the EU legal system. However, this approach essentially means that the CJEU has delegated its duty to establish the status of referring bodies to courts outside the immediate EU court system, a new problematic development that will be considered in section five. The new, more reflexive approach to judicial independence in the context of Article 267 TFEU established in *Getin Noble Bank* was confirmed in the recent decision of *L.G.* where the CJEU refused to answer questions referred by the Polish Supreme Court Chamber of Extraordinary Control and Public Affairs (Sąd Najwyższy (Izba Kontroli Nadzwyczajnej i Spraw Publicznych) as this chamber's presumption of independence had been successfully rebutted. In its judgment, the CJEU heavily relied on the decisions of *Dolińska-Ficek and Ozimek v. Poland* of the ECtHR and a judgment of the Supreme Administrative Court.[40]

3 The Distinction Between the Standard of Judicial Independence for Article 267 TFEU, Article 47 of the Charter and Article 19(1) TEU

Aside from the distinction between internal and external judicial independence, there is a further dimension to the understanding of judicial independence in the CJEUs jurisprudence. There has long been a tension between the standard of independence to be applied in the context of different conceptualisations of a judicial body derived from Article 267 TFEU and Article 47 of the Charter, even prior to the rule of law crisis and the *Portuguese Judges* decision. It was Advocate General Wahl in the *Toressi* case that argued in favour of different standards of application of judicial independence criteria between Article 47 of the Charter and Article 267 TFEU, with the latter requiring satisfaction of a higher standard than the former as Article 47 of the Charter (and relatedly Article 6 ECHR) "is necessary to strengthen the protection of individuals and ensure a high standard of protection of fundamental rights."[41] Due to the nature and purpose of Article 267 TFEU, a strict application of independence standards in the context of a preliminary reference

[38] Opinion of Advocate General Bobek in Case C-132/20 *BN and Others v Getin Noble Bank,* Case C-132/20*,* para 65.

[39] C-132/20 *Getin Noble Bank*, paras 69–77.

[40] Case C-718/21 *L.G. v Krajowa Rada Sądownictwa*; ECtHR 8 November 2021, Nos. 49868/19 and 57,511/19, *Dolińska-Ficek and Ozimek v. Poland*.

[41] Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* paras 48–49.

request would produce opposite results to those intended by the provision by unduly restricting citizens access to the CJEU.[42] The subsequent decision in the *Portuguese Judges* case added a further point of reference for the understanding of judicial independence as now Article 19(1) TEU, the provision guaranteeing effective legal protection, had been linked to the concept of judicial independence and, to a certain extent, the concept of a judicial body.

The distinction between the standard of judicial independence to be applied depending on the context of the legal provision i.e. Article 47 of the Charter, Article 19(1) TEU or Article 267 TFEU, was endorsed by Advocate General Bobek in *WB and Others,*[43] *Pula Parking*[44] and *Getin Noble Bank*.[45] Advocate General Bobek essentially argued that there is only one principle of judicial independence in EU law and that this principle has many iterations across different legal provisions because it is so integral to the rule of law and the functioning of the Union's legal system.[46] However, different examinations to verify the satisfaction of this principle may be employed to reflect the different function and objective of each of the three provisions.[47]

Advocate General Tanchev's understanding of the relationship between the second sub-paragraph of Article 19(1) TEU and Article 47 of the Charter is that the two provisions are related and complimentary but have a distinct scope.[48] The second sub-paragraph of Article 19(1) TEU post-*Portuguese Judges* has an autonomous grounding and is intended to rectify systemic threats to judicial independence in a member state.[49] In comparison, Article 47 of the Charter is applicable to individual cases only when they concern union law as per Article 51(1) of the Charter.[50] The Court also takes a similar view to Advocate General Tanchev that the two provisions are substantively alike, as made evident by the fact that the Court refers to case law on one provision when adjudicating based on the other as in *L.M.* and *Commission v Poland (Independence of the Supreme Court)*.[51] However, the Court does not follow the reasoning that the scope of application of standards of judicial independence depends on the *type* of problems around judicial independence – structural

[42] Ibid, para 49.

[43] Opinion of Advocate General Wahl in Case C-748/19 to C-754/19 *W.B. and Others*, paras 161 and 162.

[44] Opinion of Advocate General Bobek in Case C-551/15 *Pula Parking*.

[45] Opinion of Advocate General Bobek in Case C-132/20 *Getin Noble Bank*.

[46] Opinion of Advocate General Bobek in Case C-132/20 *BN and Others v Getin Noble Bank,* Case C-132/20, para 35.

[47] Ibid, para 36.

[48] Opinion of Advocate General Tanchev in *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, C-585/18 and C-619/18, para 85; Opinion of Advocate General Tanchev in C-192/18, Commission v Poland (Independence of the ordinary courts), para 97; Leloup (2020), p.164.

[49] Opinion of AG Tanchev of 24 September 2019 in C-558/18, Łowicz, para. 125; Opinion of AG Tanchev in A.K., CP and DO, supra n. 23, para. 145; Opinion of Advocate General Tanchev in Commission v Poland (Independence of the ordinary courts), para. 115.

[50] Leloup (2020), p.164.

[51] Minister for Justice and Equality (Deficiencies in the system of justice); Commission v Poland (Independence of the Supreme Court); Leloup, p.164.

or individual, but rather whether the issue arises while a member state is applying EU law.[52] When it comes to the interaction of Article 267 TFEU with second subparagraph of Article 19(1) TEU and Article 47 of the Charter Advocate General Tanchev follows the view of Advocate General Bobek that different thresholds apply for the concept of judicial independence across the three provision of EU law based on their scope and purpose.[53]

4 The Role of Mutual Trust in the Operation of the Preliminary Reference Mechanism

Through dialogue between the ECtHR and the ECJ, a further dimension has emerged in the understanding of judicial independence in European law: the requirement that courts are established by law, including that the judges presiding over individual cases are independent. This requirement was conceptualised by the CJEU in *Simpson v Council* and *HG v Commission*[54] and in great detail in *Guðmundur Andri Ástráðsson v Iceland*[55] by the ECtHR. The independence of judges on the bench must be ensured not only by the procedural safeguards guaranteeing impartiality but also by the state of mind of the individual judge to be impartial.[56] Thus, this development around the impartiality of the particular judge rather than the independence of the court or tribunal adds a further layer to the CJEU's jurisprudence on judicial independence standards. This point is critical when considering the relationship between the Area of Freedom, Security and Justice, which facilitates the 'free movement of judicial resolutions', and the fundamental requirement of mutual trust between member states.[57] As Gisbert argues, this level of judicial cooperation requires an exceptionally high degree of trust between member states' courts; therefore, high standards of judicial independence must be maintained.[58] The issue of mutual trust arose in the context of the European Arrest Warrant and the Irish High Court refusing to extradite a Polish national to Poland under the EAW due to concerns about the state of judicial independence in Poland.[59] This situation famously gave rise to the *L.M.* decision, which clarified the crucial role of national courts in upholding judicial independence and the rule of law standards in the Union.

In employing an automatic presumption of judicial independence in *Getin Noble Bank*, the CJEU can be interpreted as applying the *Reverse Solange Doctrine* long

[52] Leloup (2020), p.165.

[53] Opinion of Advocate General Tanchev in *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, C-585/18 and C-619/18, para 111.

[54] Joined Cases C-542/18 RX-II and C-543/18 RX-II *Simpson v Council and HG v Commission*, ECLI:EU:C:2020:232.

[55] ECtHR 1 December 2020, No. 26374/18*, Guðmundur Andri Ástráðsson v Iceland*.

[56] Gisbert 2022, p.614.

[57] Ibid.

[58] iIbid, p.597.

[59] Case C-216/18 PPU *LM*, ECLI:EU:C:2018:586; Bonelli (2021).

advocated for by von Bogdandy.[60] The *Reverse Solange Doctrine* aims to provide a means of securing an individual's fundamental rights against a member state's public authorities in cases of systemic deficiency.[61] This doctrine also advocates for a presumption of a member state's compliance with Union values contained in Article 2 TEU such as the rule of law, and by implication, judicial independence with a high threshold for rebuttal.[62] A high threshold for rebuttal of such a presumption being justified in the literature by the underlying principle of mutual trust between member states (horizontal) as well as between member states and the EU (vertically).[63] This interpretation of the CJEU as being inspired to utilise the *Reverse Solange* reasoning is also supported by the fact the CJEU's recent formulation of the principle of non-regression of EU values in the *Repubblika* case in 2020 which has been described as a the CJEU building a 'bridge' so it can protect Article 2 TEU values.[64]

5 The Decision in *SO v NADA* in Context of the Shifting Landscape of Article 267 TFEU

The case of *SO v NADA* came before the CJEU as a preliminary reference from the Unabhängige Schiedskommission (Independent Arbitration Committee of Austria) (the USK), which sought clarification on whether the practice of publishing the details of a professional athlete's breaches of Austria's national anti-doping rules on a publicly accessible website was compatible with the General Data Protection Regulation (the GDPR).[65] The differing outcomes and reasoning of the Advocate General and the CJEU in this case illustrate the evolving criteria of the preliminary reference. The applicant, SO, was a professional athlete in Austria who, in 2021, was found to have breached national and international anti-doping rules.[66] As a result of these findings, the Österreichische Anti-Doping-Rechtskommission (Austrian Anti-Doping Legal Committee) (the ÖADR) revoked, inter alia, the applicant's right to participate in sporting events. Part of the applicant's punishment was the mandatory publication of details of her ban on the Unabhängige Dopingkontrolleinrichtung's (Independent Anti-Doping Agency, Austria) (the NADA) website.[67] The applicant sought to stop the publication of these details which led the applicant to submit a request to review the contested decision to the USK. The USK subsequently sought the CJEU's clarification on whether the practice of publicising an athlete's ban online was compatible with the GDPR. However, the reference did not emanate from what Advocate General Ćapeta refers to as a 'classical' court, so an assessment of the USK's status as a 'court or tribunal' within the meaning of Article 267

[60] Bogdandy et al. 2012.

[61] Ibid, Bogdandy et al. (2017), p. 219–221.

[62] Spieker (2019), p. 1212; Von Bogdandy and Spieker (2019), p. 406–409.

[63] Spieker (2019), p. 1212.

[64] Leloup et al. (2021), P.16–17.

[65] Opinion of Advocate General Ćapeta in *SO v NADA*, paras 19-20.

[66] Ibid paras 4–9.

[67] Ibid paras 11–18.

TFEU needed to be conducted first before the question of GDPR compliance could be addressed.[68] Notably, the decision in SO cements the restricting of the CJEU's conception of what national bodies comply with the criteria for a 'court or tribunal'. The line of case law since *Banco de Santander* and, most recently, *L.G.* has been indicative of the shifting landscape of this area of EU law, which the Union's rule of law crisis has undoubtedly spurred on.[69] However, the CJEU's new approach, guided by the prevailing need to safeguard the rule of law value, is not without consequence and will have lasting practical implications for the interpretation of EU law across the Union, which are discussed in the next section.

Advocate General Ćapeta was of the view that the USK fully satisfied the criteria required relating to the concept of a 'court or tribunal' for the purpose of Article 267 TFEU and went on to interpret the questions referred by the USK. In the Advocate General's view, the GDPR was not breached by the Austrian Authority's practice of publicising details of an athlete's ban as *inter alia* the publication of PO's ban was proportional to the aims of the national authority to punish and deter the use of prohibited substances.[70] However, the CJEU refused the USK's preliminary ruling request in its judgement of 7 May 2024 and did not engage with the questions asked regarding GDPR compliance.[71]

Advocate General Ćapeta made an interesting distinction between a 'classical' court and a court (or body) that is not part of the traditional national judicial structure as prescribed by the constitutional division of powers.[72] Courts that are part of the traditional understanding of the judiciary are welcome to engage in dialogue with the CJEU through the preliminary reference mechanism without having their status questioned.[73] That is until the recent decision of *Getin Noble Bank* in 2022 which indicated a shift in the established approach.[74] Now if there have been final judicial decisions from a national or international court that establish a lack of independence of a referring court or tribunal, the presumption of independence enjoyed by a referring court can be revoked and their question(s) deemed inadmissible on those grounds.[75] The *Getin Noble Bank* 'rebuttable presumption' approach was implemented in the landmark decision of *L.G.* late in 2023, which led the Polish Supreme Court's Chamber of Extraordinary Control and Public Affairs to have fallen short of the requirements needed to be considered a 'court or tribunal' under EU law as the European Court of Human Rights and the Polish Supreme Administrative Court had established that this division of the Polish Supreme Court had severe independence concerns.[76] Conversely, referring 'non-classical' courts that are

[68] Ibid para 3.

[69] Case C-274/14 *Banco de Santander* SA [2020] ECLI:EU:C:2020:17; Case C-718/21 *L.G. v Krajowa Rada Sądownictwa*, [2024] ECLI:EU:C:2023:1015.

[70] Ibid, paras 130–143.

[71] Case C-115/22 *SO v NADA,* para 57.

[72] Opinion of Advocate General Ćapeta in *SO v NADA*, para 38.

[73] Ibid.

[74] C-132/20 *Getin Noble Bank.*

[75] Ibid paras 69–77.

[76] Case C-718/21 *L.G. v Krajowa Rada Sądownictwa*, para 58.

not part of the traditional court structure do not enjoy an automatic presumption of independence but are subject to an analysis by the CJEU prior to acceptance of preliminary ruling requests.[77]

Under these circumstances, the USK's compliance with the criteria for a court or tribunal under EU law was assessed by Advocate General Ćapeta. The Advocate General noted that although there has never been a definitive definition of a 'court or tribunal', the CJEU has developed several criteria that it will consider most important in its determination, namely, whether the referring body is established by law, whether it is permanent; whether its jurisdiction is compulsory; whether its procedure is inter partes; whether it applies rules of law and whether it is independent.[78] The Advocate General considered the USK to satisfy all the above criteria with ease except the requirement for independence, to which she gave more careful consideration.

As noted previously, there are two dimensions of judicial independence, i.e. 'external' and 'internal' independence, that must be satisfied by a body to be considered a 'court or tribunal'.[79] In the case of the USK, even though the Federal Minister for Arts, Cultural, Civil Service and Sport is tasked with appointing its members, the Advocate General considered that the relationship between the Minister and their appointee was sufficiently removed after the appointment and that there are sufficient safeguards against the removal of an appointee before the expiry of their term.[80] Therefore, the criteria for external independence was satisfied. By contrast, the lack of protection against arbitrary dismissal of the members of the Económico-Administrativo Central (Central Tax Tribunal, Spain; 'the TEAC') was deemed to be one of the central reasons for the determination that the TEAC was not a court or tribunal in the *Banco de Santander* case.[81]

The other dimension of independence that needed to be satisfied by the USK was the internal aspect relating to the impartiality of the referring body to the proceedings that were before it.[82] In this regard, the Advocate General deemed the USK internally independent as its loose links with the NADA and ÖADR were not by themselves indicative of any overarching influence over its decision-making capacity.[83] Therefore, having satisfied the established criteria for a 'court or tribunal' developed in the case law of the CJEU, the Advocate General deemed the request for a preliminary ruling from the USK admissible and continued to answer the questions asked.[84]

[77] Opinion of Advocate General Ćapeta in *SO v NADA*, para 38.

[78] Ibid, para 39.

[79] Opinion of Advocate General Ćapeta in *SO v NADA*, para 59; Case C-506/04 *Wilson* [2006] ECLI:EU:C:2006:587, paras 49–52; Case C-274/14 *Banco de Santander* SA [2020] ECLI:EU:C:2020:17 paras 57–62).

[80] Ibid para 59–62.

[81] Ibid para 63.

[82] Ibid para 66.

[83] Ibid para 69.

[84] Ibid para 72.

In its judgement, the CJEU disagreed with the evaluation of the admissibility of the questions referred by the USK in the Advocate General's Opinion. The CJEU did agree that the USK fulfilled the criteria relating to whether the body was established by law, whether it was permanent, whether its jurisdiction was compulsory and whether the proceedings before it were inter partes.[85] However, the USK failed to fulfil the criterion of independence. On this point, the CJEU noted that the external aspect of the requirement for independence requires that the body concerned exercises its duties wholly autonomously and does not take instructions from any other source.[86] The CJEU noted that the USK did not fulfil the criterion of external independence because there was a lack of specific rules guaranteeing the irremovability of USK members. Even though Points 1(3) and 5 of the USK rules of procedure under the 2021 Federal Law on Anti-Doping state that its members are independent in the performance of their duties and that they are subject to the principle of impartiality.[87] Also, paragraph 83 of the ADBG states that the members of the USK are appointed by the Federal Minister for Arts, Cultural, Civil Service and Sport for a renewable term of four years, which may be revoked earlier on "on serious grounds" but without the concept of 'serious grounds' being defined by legislation.[88] This lack of definitive grounds for what constitutes sufficiently serious meant that the USK was deemed to fail the criteria for a 'court or tribunal' under EU law and, therefore, could not refer questions under the Article 267 TFEU procedure to the CJEU.[89] The CJEU also indicated that in its view, the USK was not the court of final instance as it stated that the applicant also notified the Austrian Data Protection Authority of the complaint pursuing to a breach of Article 77 (1) of the GDPR.[90] The Austrian Data Protection Authority has adopted a rejection decision, which is being challenged before the Federal Administrative Court of Austria. Those proceedings were stayed, pending judgment from the CJEU to the question referred to in the present case.[91]

6 The Nature and Consequences of Limiting the Reach of the Preliminary Reference Procedure

6.1 The Inconsistency of the New Approach

From the CJEU's recent jurisprudence on the issue of independence of bodies issuing preliminary reference requests outlined above, it is clear that the gap between the treatment of 'classical' courts and 'non-classical' courts is widening. Classical courts enjoy an automatic presumption of independence since the decision of the

[85] Case C-115/22 *SO v NADA,* para 37.

[86] Ibid para 41.

[87] Ibid, paras 47–48.

[88] Ibid paras 49–50.

[89] Ibid para 54.

[90] Ibid para 56.

[91] Ibid para 56.

CJEU in *Getin Noble Bank*, however, this presumption is rebuttable if a national or an international court has issued a final ruling finding that a particular body has not met the requirements defining a court or tribunal under EU law.[92] Conversely, it seems that 'non-classical courts' such as the USK, for example, do not have the privileged position of presumed independence and will be assessed by the CJEU on its merits each time a preliminary ruling request is made. This means that 'non-classical' courts have a much higher standard of independence imposed on them for Article 267 TFEU references. Of course, the higher standard of analysis is applied to these bodies as they are not traditional courts. However, the stakes are lower for such administrative entities with quasi-judicial functions that settle disputes in specific substantive areas, such as competition authorities, patent courts or arbitration committees. As they do not pose a severe risk of facilitating a miscarriage of justice. Especially when a referring body is asking a *bona fide* question of the CJEU through the Article 267 TFEU process in order to apply EU law correctly and there is no evidence that a referring body is attempting to abuse the preliminary reference procedure.[93] It is submitted that such genuine circumstances are true in regard to the refence in *PO v NADA*.

There are several potential implications of this new line of reasoning adopted by the CJEU. First, the new divergent standard of analysis of independence criteria misses the fact that many 'classical' courts in Poland and Hungary have now been tainted by the rule of law crisis that has spanned many years. For over a decade now, the PiS and Fidesz government have been cultivating an illiberal turn in these countries, which has deeply affected the status of judicial independence domestically.[94] As seen in the recent *L.G.* decision, the Polish Supreme Court Chamber of Extraordinary Control and Public Affairs was composed of judges appointed in "manifest breach" of fundamental national rules and the government had "deliberately sought to interfere with the effective course of justice".[95] Therefore, this chamber was held to lack the independence necessary to engage in dialogue with the CJEU. However, it must be highlighted that *all* Polish Courts have been negatively affected by the rule of law crisis. Even when the PiS government lost its grip on power in 2023, the illiberal reforms imposed on the judiciary will take years to resolve. For instance, the Disciplinary Chamber for Polish Judges, which was only recently abolished after five years, directly and indirectly, affected the autonomy of judges in the country.[96] Therefore, relying on the decisions of courts outside the CJEU's immediate jurisdiction regarding the independence of courts in member states risks introducing an uneven evaluation of the independence standards of referring bodies, especially when the rule of law situation in Hungary and Poland is in such profound flux.

Furthermore, the politicised Polish National Council of the Judiciary (NCJ) that was heavily reformed and politicised by the previous Law and Justice (Prawo i Sprawiedliwość, PiS) government has been selecting neo-judges since 2017 to

[92] C-132/20 *Getin Noble Bank*, paras 69–73.

[93] Broberg and Fenger (2022), p. 197.

[94] See Pech and Scheppele (2017) p. 5–12, Pech et al. (2021) p. 5–17; Schmidt (2023) p. 57–82.

[95] Case C-718/21 *L.G. v Krajowa Rada Sądownictwa* para 45–53.

[96] Pech, Wachowiec and Mazur 2021 p. 14–15.

Polish courts from the lowest to highest benches in the court hierarchy.[97] Notably, the NCJ itself has been the subject of national and international judicial decisions invalidating its independence.[98] Nevertheless, the CJEU continues to accept Article 267 TFEU requests from these courts to this day as a final judicial decision emanating from a national or international court has yet to rebut the independence of these courts. So, they continue to enjoy an automatic stamp of approval from the CJEU. Another worrying example of the inconsistency of the CJEU's approach can be applied to Hungarian Kúria which is an apex court that has been the subject of the Venice Commissions, the Hungarian Helsinki Committee's and academic concern since the Fidesz government took power in 2010.[99] The President of the Kúria, Justice Varga, has been criticised for being a crony of the government who was deliberately appointed as Chief Justice to help further Fidesz's political policies.[100] It is particularly worrisome that this position of the Kúria has been politicised as the Chief Justice has extensive powers in the functioning of the Kúria and also wide-reaching influence over adjudication at all levels of the rest of the Hungarian judiciary, as noted by a recent opinion from the Venice Commission.[101] However, as the Kúria has not yet been the subject of final judicial decisions denouncing its independence, the CJEU has continued to unquestioningly accept preliminary ruling requests from this Court to this day.

Considering these inconsistencies, it seems somewhat trivial and counterintuitive that an administrative dispute settling body such as the USK has failed to satisfy the CJEU's assessment because it did not meet external independence standards due to loose links to the Minister by the nature of appointment procedures to the USK.[102] Such links to a member of an executive through nomination procedures to courts and tribunals are standard practice in many constitutional democracies. The Venice Commission does not note such circumstances as significant grounds for doubting

[97] Pech, 'Doing Justice to Poland's Muzzle Law' (11 June 2023, Verfassungsblog). https://verfassungsblog.de/doing-justice-to-polands-muzzle-law/ accessed 22 May 2024.

[98] See Case C-487/19 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* [2021] ECLI:EU:C:2021:798; ECtHR 22 July 2021, Nos. 43447/19*, Reczkowicz v Poland*; Case BSA I-4110–1/20, 'Resolution of the formation of the combined Civil Chamber', Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020; *Grabowska-Moroz* and *Szuleka,* 'Judicial Transitology (Verfassungsblog, 12 October 2023) accessed 22/05/2024 https://verfassungsblog.de/judicial-transitology/ .

[99] Venice Commission, Opinion No. CDL-AD(2021)036-e, 'Hungary—Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session' (15-16 October 2021); Hungarian Helsinki Committee, 'The New President of The Kúria: A Potential Transmission Belt of the Executive within the Hungarian Judiciary (22 October 2020) https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf accessed 11 June 2023; Bánkuti, Gábor and Scheppele 2012.

[100] Farkas and Kádár, '*Trick and Treat?: Hungary's Game of Non-Compliance' (Verfassungblog,* 12/12/2023), https://verfassungsblog.de/trick-and-treat/ accessed 11/06/2024.

[101] Venice Commission, Opinion No. CDL-AD(2021)036-e, 'Hungary—Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020, adopted by the Venice Commission at its 128th Plenary Session' (15–16 October 2021) p. 5–11.

[102] Broberg and Fenger (2022), p. 196–197.

a court's independence.[103] Given the issues with other 'classical' courts outlined above in Poland and Hungary, the concerns over the independence of the USK pale in comparison.

A more reasonable approach for the CJEU would be to analyse the independence of referring courts of all types on their merits each time without discrimination between classical and non-classical courts. This approach would make sense for several reasons. The CJEU's change in standards of judicial independence has been spurred on by the ongoing rule of law crisis and the CJEU's strengthening of the principle of judicial independence in its recent jurisprudence on Article 19 TEU and Article 47 of the Charter. Therefore, the aim of this more stringent and considered approach is to remove 'poisoned' courts from the legal system of the Union. The current approach the court has taken seems to be targeting the very worst cases of breaches of judicial integrity, as seen in *L.G.*, but also, the CJEU is now going back on its previous decisions on the status of national bodies that were quasi-judicial quasi-administrative and ousting them from the dialogue of the EU legal system. This has now happened a number of times, as seen in *Banco de Santander* with the Spanish Central Tax Tribunal and *Anesco* regarding the Spanish National Competition Authority. To ensure clarity and uniformity of this new overhaul of the CJEU's judicial independence requirements, the CJEU must apply its new criteria in a non-arbitrary fashion.[104] To be clear, this article is highlighting the inconsistencies in the CJEU's application of a new higher standard for judicial independence in the context of Article 267 TFEU. However, an overall less strict approach to judicial independence criteria for preliminary references is advocated for in general.

On a normative and practical level, this article sides with Advocates General Bobek, Tanchev and Wahl in endorsing a single definition of judicial independence as a concept in EU law but allowing for different standards of evaluation depending on the context i.e. between Article 267 TFEU, Article 19(1) TEU and Article 47 of the Charter. Article 267 TFEU should allow for a functional understanding of judicial independence in the context of the preliminary reference as the objective is to ensure uniform application of EU law. Practically, this would mean that a scenario where a Polish court such as the Supreme Court, would continue to enjoy a dialogue with the CJEU and be in a position to defend its independence if necessary, despite its judicial independence being compromised due to the systemic rule of law issues that exist in that member state.[105] Thus, this ensure that effects that are opposite to what are intended by Article 267 TFEU do now occur.

[103] Venice Commission, 'Judicial Appointments: Report Adopted by the Venice Commission at Its 70th Plenary Session' (2006) Opinion No. 403 / 2006, p.2–5.

[104] Case C-274/14 *Banco de Santander; Case* C-462/19 *Anesco e.a* [2020] ECLI:EU:C:2020:715.

[105] The Polish Supreme Court has already utilised the preliminary reference mechanism in such a way to protect itself from the subordination to the political branches of state in Case C-522/18 which arose in the context of the forced retirement of Supreme Court justices. See Biernat and Kawczyńsk, 'Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all' (23 August 2018, Verfassungsblog) https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/ accessed 22 July 2024.

6.2 A Breach of the Principle of Autonomy of EU Law?

It is imperative that the assessment of the independent status of referring courts be performed by the CJEU itself and not delegated outside the immediate jurisdiction of the CJEU. As noted above, there is a real danger of inconsistency in independence criteria emerging if the CJEU is waiting for another court, outside the immediate CJEU court structure to issue a decision on the status of independence of a member state's court. Such a decision may never come or come too late, which is unacceptable for ensuring the principle of legal certainty. Crucially, outsourcing such an essential element of its duty to ensure the highest standards of judicial independence threatens the fundamental principles of autonomy of EU law, which is central to EU legal infrastructure.[106] President of the CJEU, Koen Lenaerts, argues that normative gaps cannot appear in the fabric of EU law which means that EU law must be complete and self-sufficient with the jurisprudence of the CJEU being grounded in the legal traditions of the Union and member states.[107] In its most comprehensive iteration of the principle of legal autonomy of EU law,[108] the CJEU itself explained that 'autonomy' creates the foundation of the EUs constitutional structure which interlinks with other concepts such as mutual trust, fundamental rights and the goal of European integration.[109] Furthermore, the CJEU has argued that the specific characteristics and autonomy of the Union's legal order has within it the preliminary reference procedure which is tasked with ensuring the "full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law".[110] Therefore, the preliminary reference procedure is essentially intertwined with the principle of legal autonomy:

> *"… the judicial system as thus conceived has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU… thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties…"*[111]

Considering the above emphasis the CJEU itself places on the need for the EU legal system to be self-sufficient and how the Article 267 TFEU procedure helps ensure this is achieved, the recent developments in the Courts jurisprudence seem to be in direct contradiction. The new test the Court has formulated for ascertaining

[106] Kukovec (2023), p. 1407–1409.

[107] Lenaerts (2019), p. 7.

[108] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454.

[109] Ibid, paras 167-171.

[110] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, paras 174-175.

[111] Opinion 2/13 (*Accession of the European Union to the ECHR*) of 18 December 2014, EU:C:2014:2454, para 176.

a referring bodies independence for the preliminary reference mechanism relies heavily on the opinions of courts outside the immediate jurisdiction of the EU legal system. The presumption of independence doctrine formulated in *Getin Noble Bank* allows for the rebuttal of the presumption of independence if there are final judicial rulings indicating a lack of independence from a national or international court.[112] This means the CJEU is permitting the outsourcing of its own duty to evaluate the independence standards of a referring body outside the EU court system which compromises the autonomy of EU law.

6.3 EU Citizens as the Ultimate 'Collateral' of the New Article 267 TFEU Regime?

The shifting landscape of the Article 267 TFEU reference not only has consequences for the legal architecture of the EU but will ultimately impact the rights of EU citizens as the national bodies through which an individual can access the 'natural judge', the CJEU, will be limited.[113] There are several issues to note on these developments that warrant EU scholars to keep a close eye on upcoming CJEU jurisprudence. Article 267 TFEU itself can be considered an instrument of EU law that facilitates effective legal protection. The principle of effective legal protection primarily falls under the auspice of Article 19 (1)(2) TEU and Article 47 of the Charter and by extension Article 6 ECHR.[114] However, the preliminary reference mechanism is imperative in ensuring uniform interpretation and application of EU law across the Union and therefore plays a key role in providing EU citizens access to the CJEU.[115] This function of Article 267 TFEU is a cornerstone of the system of protection for fundamental rights.[116] The importance of the Article 267 TFEU mechanism for the equal protection of fundamental rights of citizens is amplified even further considering the growing importance of Article 267 TFEU as a means of supranational judicial review. Since the judgments of *Van Gend and Loos* and *Costa v ENEL*,[117] the role of the preliminary reference has transcended a simple guarantee of uniform application of EU law and now plays a crucial role in insuring the compatibility of national laws with EU standards.[118]

Furthermore, Article 267 TFEU forms the cornerstone of the decentralised character of the EU legal system, where national courts are guardians of EU law and part of the judicial system of the Union.[119] Restricting the type of national bodies permitted to refer questions to the CJEU under Article 267 TFEU will inevitably

[112] C-132/20 *Getin Noble Bank*, para 72.

[113] Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* para 51.

[114] Broberg and Fenger (2022), p. 196–197.

[115] C-132/20 *Getin Noble Bank* [2022] para 71.

[116] See Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* paras 47–51 where it is argued an overly strict application of independence criteria risks producing opposite effects to what are envisioned by Article 6 of the ECHR and Article 47 of the Charter.

[117] Case 26/62, *Van Gend en Loos* ECLI:EU:C:1963:1; Case 6/64, *Costa v. Enel*, Order of the Court of 3 June 1964, ECLI:EU:C:1964:34.

[118] Passalacqua and Costamagna (2023), p. 323.

[119] Opinion 1/09 of The Court [2011] ECLI:EU:C:2011:123, paras 66, 60-84.

limit the scope of interpretation of EU law and thus the access of individuals to the CJEU. This, in turn, will affect the principles at the core of the EU's legal structure, the principle of subsidiarity and legal autonomy as citizen's access to the CJEU is restricted.[120] As Advocate General Wahl noted in his opinion in *Toressi*, an overly rigid application of independence criteria on referring national courts also threatens the objectives of Article 6 of the ECHR and Article 47 of the Charter as it would limit EU citizens access to justice and the protection of fundamental rights.[121] Therefore, it would be in the interest of fundamental rights protection and the overall access for individuals to the CJEU to apply independence criteria to referring national bodies in a considered and balanced way. Advocate General Wahl argued in favour of a very purposeful analysis of a referring body's independence so that EU citizens' rights to have their case heard by the CJEU would not be unduly restricted:

> *"Whenever it is clear that a national body is formally accorded the status of a judicial body in its own legal system, and that—in compliance with the Court's case-law—there are sufficient rules under national law to guarantee the independence stricto sensu and the impartiality of that body and of its members, I do not believe that the Court's analysis should go any further on that point."*[122]

Of course, this approach of faith in national legislatures to ensure the impartiality and independence of national courts and tribunals must be balanced with the genuine concern in recent years of the practices employed by Polish and Hungarian governments where courts are hollowed out and packed with government allies, a practice widely explored in the literature and commonly referred to as 'stealth authoritarianism', 'rule of law backsliding' and 'illiberal constitutionalism.'[123] This phenomenon is recognised as being of particular concern as the changes in the independence standards of a national court or tribunal under these regimes are particularly subtle, legalistic, and challenging to diagnose.[124] However, as mentioned in the previous section, a divergent treatment of classical and non-classical courts in the wake of the new test of judicial independence under *Getin Noble Bank* leads to some worrisome inconsistencies that are difficult to reconcile, especially if the objectives of the Article 267 TFEU procedure of equal application of EU law and effective legal protection are considered.

A reasonable alternative approach the CJEU might take is an assessment of each referring body's independence standards regardless of its status as a 'classic' or 'non-classic' court. This would ensure a uniform application of judicial independence criteria while simultaneously protecting judicial dialogue. In this regard, it is key to bear in mind that the aim of Article 19 TEU is to catch deliberate and systemic attempts to undermine judicial independence standards. In contrast, the assessment of independence standards of a referring body under Article 267 TFEU is a means

[120] Opinion of Advocate General Wahl in Case C-58/13 and C-59/13 *Torresi,* para 51.

[121] Ibid para 49.

[122] Ibid para 53.

[123] Varol (2015) p. 1681; Pech and Scheppele 2017 p. 9–11, Drinóczi and Bień-Kacała (2019) p. 1149–115.

[124] Ginsburg 2018 p. 355–358.

to ascertain whether the body is sufficiently free to be considered a part of the EU judiciary.[125] The independence standard is a condition that must be met to engage in dialogue with the CJEU and is a secondary feature of Article 267 TFEU.[126] If it is evident that a referring entity is not deliberately abusing the preliminary reference procedure, then it is in the interest of expediency of justice to allow a referring body that interprets and applies EU law to have access to the preliminary reference mechanism. This is especially important considering that many member states rely on administrative bodies with quasi-judicial functions to settle disputes on substantive subject matters.[127]

7 Conclusion

The CJEU's standards of judicial independence are continuing to evolve in the wake of the Union's rule of law crisis. As the battle to save judicial independence spills over into the preliminary reference mechanism, the challenge for the CJEU seems to be striking the correct balance between a strict approach to judicial independence in order to preserve the value of the rule of law in the Union while also protecting the uniform application of EU law and crucially the right of access of EU citizens to the natural judge. This balance is proving more difficult to ascertain than perhaps expected. It is also worth bearing in mind that dialogue between Polish courts and the EU courts is more important than ever in the context of Poland, and the possibility of this member state beginning its transition back to a liberal constitutional democracy after the last general election in 2023 ushered in a new government. Nevertheless, this challenging new line of jurisprudence will require the close attention of EU legal scholars going forward.

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[125] Broberg and Fenger (2022), p. 197–198.

[126] Ibid p. 197.

[127] Broberg and Fenger (2022), p. 197–198.

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