Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?

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Admissibility of questions for preliminary ruling – Independence of courts and tribunals in the case law of the Court of Justice of the European Union as *Dorsch Consult* criterion under Article 267 TFEU – Independence of courts and tribunals in the case law of the Court of Justice of the European Union as element of the Rule of Law value under Article 19 TEU – Structural inadmissibility of questions for preliminary ruling as perverse consequence of the attempts to safeguard independence of the EU judiciary

INTRODUCTION

The second half of the past decade has been characterised by a political development in the European Union often described as 'Rule of Law backsliding'. Alongside a set of Rule of Law instruments issued by the Commission[1] and the triggering of Article 7 TEU against Poland[2] and Hungary,[3] the Court of Justice of the European Union has revealed itself as a dedicated ally in the struggle to uphold the Rule of Law in the different member states. More specifically, its strong reaction to the Polish reforms that jeopardise the independence of the

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[1] *See*, for instance, Commission, 'Further strengthening the Rule of Law within the Union State of play and possible next steps' (Communication) COM(2019) 163 final.

[2] Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (Press Release) (Brussels, 20 December 2017) ⟨ec.europa.eu/commission/presscorner/detail/en/IP_17_5367⟩, visited 15 March 2021.

[3] European Parliament, 'Rule of Law in Hungary: Parliament calls on the EU to act' (Press Release) (Brussels, 12 September 2018) ⟨www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-inhungary-parliament-calls-on-the-eu-to-act⟩, visited 15 March 2021.

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national judiciary did not go unnoticed. On 24 June 2019, the Court issued the highly anticipated judgment *Commission* v *Poland (Indépendance de la Cour suprême)*,[4] which relied heavily on the reasoning set out in *Associação Sindical dos Juízes Portugueses*[5] (*ASJP*) the year before. The cornerstone of the Court's legal reasoning was the concept of 'judicial independence', which arose in those cases as a necessary corollary of the principle of effective legal protection laid down in Article 19(1)(2) TEU, itself part and parcel of the Rule of Law. Tied to Article 19(1)(2) TEU, which states that member states are under a duty 'to ensure effective legal protection in the fields covered by Union law', safeguarding the independence of courts that function as EU courts became a primary law obligation that every member state must adhere to.[6]

However, the notion of 'independence' has a long history in the case law of the Court, albeit in a different framework: it is one of the so-called *Dorsch Consult* criteria that the Court uses to establish whether a body that refers a question for a preliminary ruling qualifies as a 'court or tribunal' in the sense of Article 267 TFEU.[7] This was reiterated by the Court in *ASJP,* where the Court stated that:

> 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, in that [. . .] that mechanism may be activated only by a body responsible for applying EU law which satisfies, inter alia, that criterion of independence.[8]

Independence thus seems to play a dual role before the Court: it functions as a formal admissibility requirement under Article 267 TFEU; and as a substantive obligation incumbent upon member states to guarantee the right to effective judicial protection and intrinsically uphold the Rule of Law under Article 19 TEU. This raises an important question: does the context in which 'independence' operates have any bearing on its content or how it is evaluated?

The answer to that question is of great importance to the preliminary ruling mechanism. After all, this mechanism can be triggered only by independent bodies. Could this mean that by declaring that a member state's tribunal or court is no

[4]ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland (Indépendance de la Cour suprême)*, EU:C:2019:531.

[5]ECJ 27 February 2018, Case C-64/16, *ASJP*, EU:C:2018:117.

[6]M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary', 14 *EuConst* (2018) p. 622 at p. 634.

[7]After ECJ 17 September 1997, Case C-54/96 *Dorsch Consult Ingenieursgesellschaft* v *Bundesbaugesellschaft Berlin,* EU:C:1997:413. NB: some authors use the term 'Vaassen criteria'.

[8]*ASJP*, *supra* n. 5, para. 23.

longer independent, the Court of Justice inherently excludes that body from further participation in the *dialogue des juges*? And what if a member state systematically threatens the independence of the entire judiciary: could this lead to structural inadmissibility of questions arising from these 'tainted' courts, turning an entire member state into a blind spot on the radar of the Court of Justice? This would certainly be a perverse conclusion to draw from the Court's attempts to safeguard judicial independence, yet it does not seem entirely unlikely.

The relationship between the two strands of case law on independence creates a lot of questions. This contribution will attempt to phrase an answer to those. First, the notion 'independence' in the case law of the Court will be analysed: this paper will give a concise overview of the approach of the Court towards independence, as it will be coined here, as a *formalistic* admissibility requirement in the context of preliminary reference procedure; it will then discuss the evolution of the notion under *Wilson*;[9] and finally, it will look into independence as a *substantive* element of the Rule of Law. Next, it will explore the relationship between independence under Article 267 TFEU and independence under Article 19 TEU. In its recent ruling *Banco de Santander*, the Court appears to move towards the alignment of these notions.[10] This article will take the stance that such approach could be detrimental to the functioning of the preliminary ruling mechanism. Indeed, with this alignment, the Court could inherently be excluding from participating in the *dialogue des juges* national courts whose independence has been impaired. Lastly, this contribution will explore whether structural inadmissibility is truly inevitable, or whether the difference in context might provide sufficient arguments to warrant a difference in treatment.

What does 'independence' mean to the Court of Justice of the European Union?

Independence under Article 267 TFEU in the early days: a functional approach

As stated in the introduction, the notion of independence has a long history in the case law of the Court in the framework of the preliminary reference procedure. It features amongst the so-called *Dorsch Consult* criteria that the Court uses to establish whether a body that refers a question for a preliminary ruling qualifies as a 'court or tribunal' in the sense of Article 267 TFEU.[11] In order to take part in the judge-to-judge dialogue laid down by that mechanism, the referring body must be established by law; it must be permanent; its jurisdiction must be

[9]ECJ 19 September 2006, Case C-506/04, *Wilson*, EU:C:2006:587.
[10]ECJ 21 January 2020, Case C-274/14, *Banco de Santander SA*, EU:C:2020:17.
[11]*Dorsch Consult*, *supra* n. 7.

compulsory; its procedure must be *inter partes*; it must apply rules of law; and it must be independent.[12]

The importance of the independence criterion was stressed by current President of the Court of Justice Koen Lenaerts in a recent speech:

> In order to have access to the preliminary reference procedure, national courts must be independent because only those courts can be trusted with applying loyally the law of the EU as interpreted by the ECJ.[13]

It is, however, questionable whether this idea of trust truly constituted the foundation of the Court's reasoning when it first adopted this criterion in *Pretore di Salò*[14] and *Corbiau*.[15]

In *Pretore di Salò*, the Court explained that it can only reply to requests for a preliminary ruling 'if that request emanates 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'.[16] In his Opinion in *Corbiau*, Advocate General Darmon clarified that 'the idea of independence is an inherent element of the judicial function'.[17] Independence is thus seen as an inseparable aspect of the judicial function (in contrast to the administrative function), and national courts and tribunals can only make use of the preliminary reference procedure when they are required to resolve a legal dispute before them.[18] The original rationale behind the independence requirement thus seems to be rather straightforward: the proceedings before the national body have to be judicial in nature, and in order for them to be judicial, that body inherently has to be

[12]Referring to 'a number of factors' that are taken into account, these criteria are neither cumulative nor exhaustive: ibid., para. 23.

[13]K Lenaerts, 'The Court of Justice and national courts: a dialogue based on mutual trust and judicial independence' (Speech at the Supreme Administrative Court of the Republic of Poland, Warsaw, 19 March 2018) ⟨www.nsa.gov.pl/download.php?id=753&mod=m/11/pliki_edit.php⟩, visited 15 March 2021, p 4. One might furthermore wonder whether this statement is entirely correct, looking at the decision of the Danish supreme court in *AJOS* or the recent stand-off between the ECJ and the German Federal Constitutional Court in its *PPSP* judgment. For an analysis, *see* S. Klinge, 'Dialogue or disobedience between the European Court of Justice and the Danish Constitutional Court? The Danish Supreme Court challenges the Mangold-principle', *EU Law Analysis*, 13 December 2016, ⟨eulawanalysis.blogspot.com/2016/12/dialogue-or-disobedience-between.html⟩, visited 15 March 2021; P. Eleftheriadis, 'Germany's Failing Court', *Verfassungsblog*, 18 May 2020, ⟨verfassungsblog.de/germanys-failing-court/⟩, visited 15 March 2021.

[14]ECJ 11 June 1987, Case 14/86, *Pretore di Salò,* EU:C:1987:275.

[15]ECJ 30 March 1993, Case C-24/92, *Corbiau,* EU:C:1993:118.

[16]*Pretore di Salò*, *supra* n. 14, para. 7.

[17]Opinion of AG Darmon in ECJ 30 March 1993, C-24/92 *Corbiau*, EU:C:1993:59, para. 10.

[18]*See* in that sense ECJ 16 December 2008, Case C-210/06, *Cartesio*, EU:C:2008:723.

independent. Consequently, pinning the original rationale underlying the concept of independence on the idea of trust, like President Lenaerts did in his speech, rather than on the requirement that the proceedings before the national body must be judicial in nature, seems to be an anachronism.

In *Corbiau*, the Court then clarified how to assess whether the requirement of independence is fulfilled substantively.[19] In that judgment, independence meant that the body seeking the preliminary ruling should act as a third party in relation to the authority which adopts the decision forming the subject-matter of the proceedings.[20] Following this reasoning, a reference made by the Italian Public Prosecutor's Office was declared inadmissible in *Criminal Proceedings against X*.[21] However, in *Dorsch Consult*, the Court overlooked the requirement that the body be a third party, and emphasised instead that the body should 'carry out its task independently and under its own responsibility'.[22] This line was continued in cases such as *Köllensperger and Atzwanger*[23] and *Gabalfrisa.*[24] These cases were criticised for portraying a very 'lax criterion' of independence, as it sufficed that there were generic provisions intended to ensure the impartiality or the independence of the court or tribunal.[25]

In summary, this early body of case law set out a functional notion that delineates which bodies should be allowed to the judicial dialogue. In contrast to the European Court of Human Rights (henceforth: ECtHR) when it decides on judicial independence under Article 6 of the European Convention of Human Rights (henceforth: ECHR), the focal point of the Court of Justice has *not* been the protection of the fundamental right of an individual to an independent tribunal.[26] Hence, when interpreting independence in a 'lax' way, the Court was not

[19]*Corbiau*, *supra* n. 15.

[20]Ibid., para. 15.

[21]ECJ 12 December 1996, Joined Cases C-74/95 and C-129/95, *Criminal Proceedings against X*, EU:C:1996:491.

[22]*Dorsch Consult*, *supra* n. 7, para. 35; Opinion of AG Ruiz-Jarabo Colomer in ECJ 29 November 2001, Case C-17/00, *de Coster*, EU:C:2001:366, paras. 21-22.

[23]ECJ 4 February 1999, Case C-103/97, *Köllensperger and Atzwanger*, EU:C:1999:52. The Tyrol's Procurement Office was deemed independent even though the national guarantees on the member's tenure and dismissal were rather vague.

[24]ECJ 21 March 2000, Case C-110/98 *Gabalfrisa,* EU:C:2000:145. The Spanish tribunals reviewing decisions of tax authorities were deemed independent even though the Minister of Economic Affairs could directly appoint or dismiss the members of the tribunals. This was justified by relying on the separation of functions between the ministers and the tribunals.

[25]AG Ruiz-Jarabo Colomer especially criticised this approach. In his opinion on *de Coster*, he militated for guarantees of independence by means of 'provisions which establish, clearly and precisely, the reasons for the withdrawal, rejection and dismissal of its members': Opinion of AG Ruiz-Jarabo Colomer in *de Coster*, *supra* n. 22, paras. 24-25. *See also* Bonelli and Claes, *supra* n. 6, p. 638.

[26]Bonelli and Claes, *supra* n. 6, p. 638.

concerned with fundamental rights but merely focused on broadening access to the preliminary reference procedure, allowing more participants to the dialogue.[27]

Wilson: a stepping stone towards a more substantive understanding of independence?

This functional view on independence seemed to change with the Court's ruling in *Wilson*, where it built up the independence requirement.[28] Referring to the case law of the European Court of Human Rights in the context of Article 6(1) ECHR, the Court explained that there are two dimensions to independence: an internal and an external one.[29] Internally, independence should be understood as impartiality: it seeks to ensure a level playing field for the parties to the proceedings and for their competing interests.[30] Externally, independence requires that the body be shielded from external intervention or pressure that could jeopardise the independent judgement of its members as regards proceedings before them.[31] This embodies the separation of powers between the executive and legislative branch and the judicial one.[32]

The Court further emphasised that both dimensions of independence require rules that are able 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] In particular, rules are required concerning the composition and appointment of the body, length of service and the grounds for abstention, rejection, and dismissal of its members.[34]

This move away from a purely functional approach towards a more 'substantive' understanding of independence (which is more in line with the case law of the European Court of Human Rights), does come with an important side note. Unlike in the previously mentioned cases, in *Wilson* the Court was not concerned with allowing a national court to take part in the *dialogue des juges*. The notion of 'independence' in *Wilson* arose in the context of Article 9 of Directive 98/5 on the free movement of lawyers, which requires member states to provide remedies

[27]Ibid.; Opinion of AG Ruiz-Jarabo Colomer in *de Coster*, *supra* n. 22, para. 63.

[28]*Wilson*, *supra* n. 9.

[29]*See* the references made in *Wilson*, *supra* n. 9, paras. 51 and 53.

[30]Ibid., para. 52.

[31]Ibid., para. 51.

[32]Lenaerts, Speech at the Supreme Administrative Court of the Republic of Poland, *supra* n. 13, p. 5.

[33]*Wilson*, *supra* n. 9, para. 53.

[34]Ibid. Also, guarantees against removal from office are required for members of the judiciary: ECJ 22 October 1998, Joined Cases C-9/97 and C-118/97, *Jokela and Pitkäranta*, EU:C:1998:497, para. 20.

before a 'court or tribunal' against negative registration decisions.[35] To interpret this provision, the Court relied on the body of case law developed under Article 267 TFEU.[36] As argued by Bonelli and Claes, the change in case law can thus be explained by the aim of this particular provision, which is to guarantee that individuals have access to an independent body.[37]

Be that as it may, the Court stuck with this interpretation of the independence requirement also in 'pure' admissibility questions under Article 267 TFEU, where it was not concerned with the right to an effective remedy.[38] Furthermore, this definition was transposed to yet another context: when elaborating on judicial independence as part of the principle of effective judicial protection laid down in Article 19 TEU.

Independence in a Rule of Law context: the activation of Article 19 TEU

Following the many examples of 'Rule of Law backsliding' in several member states,[39] and notably the Polish rules that systematically undermine the independence of the national judiciary,[40] a new body of case law has been emerging with the notion of 'judicial independence' as its centre. This time, the case law does not revolve around Article 267 TFEU, but around Article 19(1)(2) TEU, which imposes a duty on member states 'to ensure effective legal protection in the fields covered by Union law'. 'Judicial independence' arises in these cases not as a 'formalistic' admissibility requirement, but as a necessary corollary of the principle of effective legal protection, itself part and parcel of the Rule of Law.

Two cases in particular steal the spotlight: *ASJP*[41] and, of course, *Commission* v *Poland (Indépendance de la Cour suprême)*.[42] Interestingly, the former is not the controversial Rule of Law case one would imagine. The facts were rather

[35] *Wilson*, *supra* n. 9, para. 44.

[36] Ibid., para. 48. AG Wahl writes that 'the Court "borrowed" the principles developed under Article 267 TFEU': Opinion of AG Wahl in ECJ 17 July 2014, Case C-58/13, *Torresi*, EU:C:2014:265, para. 32.

[37] Bonelli and Claes, *supra* n. 6, p. 639.

[38] *See* for instance ECJ 22 December 2010, Case C-517/09, *RTL Belgium*, EU:C:2010:821, para. 37 ff and ECJ 16 February 2017, Case C-503/15, *Margarit Panicello*, EU:C:2017:126, para. 37 ff.

[39] In addition to Poland and Hungary, Romania and Bulgaria also face difficulties upholding the Rule of Law. For an overview *see* Commission, 'Report on progress in Bulgaria under the Cooperation and Verification Mechanism' COM(2018) 850 final; Commission, 'Report on progress in Romania under the Cooperation and Verification Mechanism' COM(2018) 851 final.

[40] Commission Recommendation (EU) 2018/103 of 20 December 2017 regarding the Rule of Law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520 [2018] OJ L17/50.

[41] *ASJP*, *supra* n. 5.

[42] *Commission* v *Poland*, *supra* n. 4.

straightforward: in short, a union of Portuguese judges tried to defend their salaries from austerity measures by arguing that those measures breached the principle of judicial independence. As singled out by Bonelli and Claes, this case could have been resolved easily: the Court has generally declined jurisdiction when questioned about the conformity of austerity measures with fundamental rights, as it found that the referring courts did not adequately explain why the legislation at issue was 'implementing EU law' in the sense of Article 51 of the Charter.[43] Likewise, the Court could easily have declared the question of the Portuguese judges inadmissible. Alternatively, the Court could have relied on the principle of non-discrimination, as it did in *Commission* v *Hungary*,[44] and more recently in *UX* v *Governo della Repubblica italiana*.[45] Surprisingly, the Court chose to answer the referred question from a Rule of Law perspective instead. It seized this case as an opportunity to set out its views on judicial independence, activating Article 19 TEU as a standard for review of national measures that would hamper the principle of judicial independence.[46] The judicial creativity that this 'detour'[47] required can only be explained by the desire of the Court to find a foothold in the Polish discussion. In fact, the independence of the Polish judiciary was – and is – being seriously undermined by a set of reforms, inter alia, by lowering the retirement age of sitting judges of the Polish Supreme Court.[48] It came as no surprise that when the Commission brought an infringement action against Poland for jeopardising the independence of its Supreme Court, the Court seamlessly

[43]*See* for instance: ECJ 7 March 2013, Case C-128/12, *Sindicato dos Bancários do Norte and Others* v *BPN – Banco Português de Negócios SA*, EU:C:2013:149 and ECJ 26 June 2014, Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins* v *Fidelidade Mundial – Companhia de Seguros SA*, EU:C:2014:2036; Bonelli and Claes, *supra* n. 6, p. 622, 624-625.

[44]ECJ 6 November 2012, Case C-286/12, *Commission* v *Hungary*, EU:C:2012:687. In this case, Hungary had lowered the retirement age of judges. Rather than addressing the lowering of the retirement age as a threat to the independence of the Hungarian judges, the Court took the view that the measures constituted a breach of the EU age discrimination provisions.

[45]ECJ 16 July 2020, Case C-658/18, *UX* v *Governo della Repubblica italiana*, EU:C:2020:572. In this case, a *giudice di pace* (magistrate) challenged an Italian law which provided that the payments received by magistrates are linked to the work carried out. Consequently, during her annual leave, the magistrate did not receive any payment, whereas ordinary judges are entitled to 30 days' paid leave. The Court found that the Italian legislation infringed the principle of non-discrimination.

[46]Bonelli and Claes, *supra* n. 6, p. 628.

[47]The actual analysis of the national measures at stake was straightforward and uncontroversial: the specific outcome of the case was clearly of less interest to the Court than setting out the lines for the concept of judicial independence and the European judiciary: ibid., p. 635.

[48]For an overview *see* L. Pech and K. Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3; W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', 18/01 *Legal Studies Research Paper* (2018) ⟨papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491⟩, visited 15 March 2021.

followed its reasoning set out in *ASJP*, striking down the Polish measures for infringing Article 19(1)(2) TEU.

While this judgment deals with a multitude of interesting issues,[49] this article will focus on how both *ASJP* and *Commission* v *Poland* have elevated the concept of independence. First, the Court stressed that judicial independence is a general principle of EU law, referring to the common traditions of the member states and to fundamental rights provisions (Articles 6 and 13 ECHR and Article 47 of the Charter of Fundamental Rights of the European Union – henceforth: the Charter) which codify the right to effective judicial protection.[50]

Second, it embedded judicial independence as a necessary corollary of the Rule of Law value in Article 2 TEU. A Union that is based on the Rule of Law entails that individual parties can challenge the legality of EU acts that affect them before the courts.[51] In that sense, 'Article 19 TEU [. . .] gives concrete expression to the value of the Rule of Law affirmed in Article 2 TEU', since it requires member states to establish a system of legal remedies and procedures that is able to ensure effective judicial review and effective judicial protection, within the meaning of Article 47 Charter in particular, in the fields covered by EU law.[52] This means in particular that national bodies qualifying as 'courts or tribunals' within the meaning of EU law and which form part of the member state's judicial system in the fields covered by EU law, must meet the requirements of effective judicial protection.[53] This entails that the body be 'independent', which is intertwined with the right to an effective remedy as confirmed by the second paragraph of Article 47 Charter.[54] Indeed:

> that requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and

[49]For an extensive commentary of the judgment, *see* P. Bogdanowicz and M. 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', 16 *EuConst* (2020) p. 306.

[50]*Commission* v *Poland*, *supra* n. 4, para. 49.

[51]Ibid., para. 46.

[52]Ibid., paras. 47, 54. *See*, to that effect: ECJ 3 October 2013, C-583/11 P, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, paras. 100-101; ECJ 28 April 2015, C-456/13 P, *T & L Sugars and Sidul Açúcares* v *Commission*, EU:C:2015:284, para. 50; ECJ 14 June 2017, C-685/15, *Online Games and Others*, EU:C:2017:452, para. 54; *ASJP*, *supra* n. 5, para. 34; ECJ 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality* v *LM*, EU:C:2018:586, para. 50.

[53]*Commission* v *Poland*, *supra* n. 4, para. 55.

[54]Ibid., para. 56.

> that the values common to the member states set out in Article 2 TEU, in particular the value of the Rule of Law, will be safeguarded.[55]

In other words: without independent courts, there cannot be effective judicial protection; and without effective judicial protection, there cannot be a Rule of Law.

Last and perhaps most importantly, maintaining judicial independence became an enforceable primary law obligation that binds member states 'in the fields covered by Union law' under Article 19 TEU. The Court followed its stance set out in *ASJP*, explaining that Article 19(1)(2) TEU applies irrespective of whether member states are implementing Union law, as would be required for the applicability of Article 47 Charter under Article 51(1) Charter.[56] Advocate General Tanchev stresses that 'Article 19(1) TEU constitutes an autonomous standard for ensuring that national measures meet the requirements of effective judicial protection, including judicial independence, which complements Article 47 of the Charter'.[57] The obligations arising from Article 19(1)(2) TEU already apply from the moment a national body *could* rule as a 'court or tribunal' on questions concerning the application or interpretation of EU law.[58] In that regard, Article 19(1)(2) TEU also sets out a functional notion of the 'European judiciary' as the

[55]Ibid., para. 58.

[56]*ASJP*, *supra* n. 5, para. 29; *Commission* v *Poland*, *supra* n. 4, para. 50.

[57]Opinion of AG Tanchev in ECJ 24 June 2019, Case C-619/18, *Commission* v *Poland*, EU:C:2019:325, para. 58. In *AK (Indépendance de la chambre disciplinaire de la Cour suprême)*, AG Tanchev refers to a '*constitutional passarelle*' between both provisions: Opinion of AG Tanchev in ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18 *AK (Indépendance de la chambre disciplinaire de la Cour suprême),* EU:C:2019:551, para. 85. The relationship between both provisions and their respective field of application, specifically in light of Art. 51(1) of the Charter, has been subject to debate. AG Bobek poetically describes the discussion as follows: 'A detailed discussion about the exact scope of Article 51(1) Charter when contrasted with Article 19(1) TEU looks a bit like a debate on what colour to choose for the tea cosy and the dining set to be selected for one's house, coupled with a passionate exchange about whether that tone exactly matches the colour of curtains already selected for the dining room, while disregarding the fact that the roof leaks, the doors and windows of the house are being removed, and cracks are appearing in the walls. However, the fact that there is rain coming into the house and the walls are crumbling will always be structurally relevant to any discussion about the state of the judicial house, irrespective of whether the issue of the colour of the tea cosy will eventually be declared to be within or outside the scope of EU law under whatever provision of EU law': Opinion of AG Bobek in ECJ 29 July 2019, Case C-556/17, *Alekszij Torubarov*, EU:C:2019:339, para. 55. *See*, for a more detailed overview of this discussion, P. Van Elsuwege and F. Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice', 16 *EuConst* (2020) p. 8 at p. 25-28.

[58]*Commission* v *Poland*, *supra* n. 4, para. 51.

subject of this 'new' primary law obligation: this judiciary encompasses any national body fulfilling the *Dorsch Consult* criteria that may potentially decide on the interpretation or application of Union law.[59] In other words, when a national body qualifies as a member of the European judiciary, meaning that it fulfils – amongst other criteria – the criterion of independence, the member states are under the obligation to safeguard that body's independence.

The case law on independence, a (dis)continuum?

While the nature of the concept of independence seems to have evolved, the Court filled out the *content* of judicial independence in the same way as it has done since *Wilson*, reiterating that independence has an internal and external aspect.[60] The Court thus relied on the case law it developed in the context of Article 267 TFEU.[61] There are arguments to be made in favour of this choice: first, given the relevance of the preliminary ruling system for the EU legal order, the independence requirement under Article 267 TFEU could seem like a good starting point for the creation of a general obligation to protect judicial independence.[62] Second, it is practical: the case law under Article 267 TFEU has been developed for years by the Court and is therefore an easy stepping stone.[63] Last, it ensures consistency: given the close connection between Articles 19 TEU and 267 TFEU, a distinction between both notions of independence might feel artificial and create confusion.[64]

However, it is important to denote the differences between the body of case law concerning the preliminary ruling procedure and the new 'Rule of Law' cases, respectively. In the context of Article 267 TFEU, the requirement of independence serves as one of the factors that will determine whether *one specific* national body is capable of referring a question for preliminary ruling to the Court. It is not used as a general requirement imposed on *all* bodies that potentially form part of the European judiciary. Furthermore, one might argue that there is a 'temporal' element to take into account: in the context of the preliminary ruling procedure,

[59]Bonelli and Claes, *supra* n. 6, p. 631.

[60]*Commission* v *Poland*, *supra* n. 4, paras. 71-74.

[61]As mentioned above, the specifics of the case in *Wilson* are slightly different, yet the Court stuck with its definition also in the context of pure admissibility questions under Art. 267 TFEU.

[62]T. Skočir, 'European Rule of Law, EU Principles and the ECJ: Judicial Response to the Rule of Law Crisis in Poland', Master's Thesis, KU Leuven (2019) p. 15.

[63]Ibid.

[64]The preliminary ruling procedure is a vital element of the right to effective judicial protection, *see* C. Lacchi, 'Multilevel judicial protection in the EU and preliminary references', 53 *Common Market Law Review* (2016) p. 679.

the Court will generally assess whether a body that refers for the *first* time forms part of the European judiciary. In contrast, under Article 19(1)(2) TEU, the Court is likely to already *know* that the body forms part of the European judiciary. The Polish Supreme Court, for instance, has been admitted to refer questions for preliminary ruling and continues to do so routinely. The Court did not question whether the Polish Supreme Court forms part of the European judiciary – it investigated how the Polish Supreme Court's properties were altered and whether that threatened its independence. Last, as explained above, the Court's attitude towards independence has been rather 'lax' and fragmented in the context of Article 267 TFEU with a (legitimate) view on broadening access to the preliminary reference procedure, allowing more participants to the dialogue.[65] This raises at least some doubt as to whether that body of case law constitutes a suitable standard for assessing whether a member state has breached its obligations under Article 19(1)(2) TEU.[66]

It is clear that both the alignment *and* the nonalignment of the concept of independence under Article 267 TFEU and under Article 19 TEU create some challenges. Looking at the Court's reasoning in *Commission* v *Poland* and *ASJP*, it appears as if 'independence' could become an autonomous notion of EU law that has the same content regardless of the context in which it operates.[67] But what are the effects of this 'Article 19 type of independence' on the possibility for individual judges to refer questions for preliminary ruling to the Court, when member states fail to fulfil their obligations under Article 19(1)(2) TEU or even blatantly undermine the independence of their judges? Are they paradoxically excluded from participating in the *dialogue des juges*? This would mean they are punished twice: not only is their independence threatened, but they see their access to the Court of Justice disappear as well.

It is not ground-breaking that questions are declared inadmissible when they arise from bodies that are not independent.[68] What is controversial, however, is whether systemic deficiencies in a member state that affect the independence of the judiciary could lead to structural inadmissibility of the questions referred by the judiciary of that member state.[69]

[65]Bonelli and Claes, *supra* n. 6, p. 638; Opinion of AG Ruiz-Jarabo Colomer in *de Coster*, *supra* n. 22, para. 63.

[66]Bonelli and Claes, *supra* n. 6, p. 638.

[67]Whether this implies that the type of review carried out by the Court will be the same regardless of the context in which the independence requirement operates will form the subject of the final section of this article.

[68]*See* for example *Corbiau*, *supra* n. 15; *Criminal Proceedings against X*, *supra* n. 21; ECJ 14 May 2008, Order C-109/07, *Pilato,* EU:C:2008:274; ECJ 9 October 2014, Case C-222/13, *TDC,* EU:C:2014:2265.

[69]Bonelli and Claes already hint at a 'paradoxical conclusion': Bonelli and Claes, *supra* n. 6, p. 637.

The practical implication of 'independence' under Article 19 TEU: a threat to the functioning of the preliminary ruling system?

Banco de Santander: tying a dangerous knot

Until the Court's judgment in *Banco de Santander*,[70] it was unclear whether the case law on 'independence' developed under Article 19 TEU would in its turn be incorporated when assessing the admissibility of a preliminary reference. In *Banco de Santander*, the Spanish Central Tax Tribunal (*Tribunal-Económico Administrativo Central*) had made a reference concerning an issue of state aid. The Court, however, did not examine the actual content of the references, since it found that the Tax Tribunal was not a 'court or tribunal' in the sense of Article 267 TFEU and declared the references inadmissible.

The bone of contention was whether the Tax Tribunal fulfilled the criterion of independence. When assessing compliance with this condition, the Court overruled its earlier findings in *Gabalfrisa*, where it had established that the Spanish legislation concerning administrative tax tribunals ensured an acceptable degree of independence by safeguarding a separation of functions between, on the one hand, the departments responsible for management, clearance and recovery of tax and, on the other hand, the tax tribunals which rule on complaints lodged against the decisions of those departments.[71] As mentioned earlier, this ruling was criticised for establishing a 'lax criterion of independence'.[72] In *Banco de Santander*, the Court explicitly noted that its considerations in *Gabalfrisa* 'must be re-examined notably in the light of the most recent case-law of the Court [i.e. *ASJP* in particular] concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU'.[73] Furthermore, it reiterated its case law from *ASJP*, stating that the requirement of independence is essential to the proper functioning of the preliminary ruling mechanism, since only independent bodies can activate this mechanism.[74] With this 'new' lens, the Court carried out an in-depth analysis of the internal and external aspects of independence, concluding that the Tax Tribunal does not comply with the internal aspect of it and therefore no longer qualified as a 'court or tribunal'.[75]

While it is possible to view this as 'a final tribute to Advocates General Saggio and Ruiz-Jarabo Colomer', who firmly disagreed with the Court's earlier stance

[70] *Banco de Santander*, *supra* n. 10.
[71] Ibid., para. 54 ; *Gabalfrisa*, *supra* n. 24, paras. 39-40.
[72] *Supra*, n. 25.
[73] *Banco de Santander*, *supra* n. 10, para. 55.
[74] Ibid., para. 56.
[75] Ibid., paras. 64-80.

that administrative tax tribunals qualify as 'courts or tribunals', the implications of this ruling and the reasoning displayed in it are more far-reaching than they might appear at first sight.[76] Indeed, it seems – at least from this case – that the notion of 'independence' has the same content when examining whether a national body qualifies as 'court or tribunal' as a precondition for Article 267 TFEU proceedings as when judging on Rule of Law infringements.[77] This also seems to be echoed by President Koen Lenaerts in his speech before the Supreme Administrative Court of Poland, which he concluded by stating first that 'in the EU legal order, a "court" is always to be understood as meaning an "independent court"', followed by the statement that 'judicial independence is, in any event, a prerequisite for any "court" that wishes to engage in a dialogue with the ECJ and with sister courts in other Member States'.[78]

The consequence: structural inadmissibility?

The Court's ruling in *Banco de Santander* seems – at least in theory – to open Pandora's box: courts or tribunals whose independence has been impaired by far-reaching structural changes carried out by the government would no longer qualify as a 'court or tribunal' under Article 267 TFEU and would thus be denied access to the preliminary ruling procedure. When the structural change impairs the independence of the *entire* national judiciary, this would mean that the member state in question becomes a blind spot on the radar of the Court of Justice.[79] This hypothesis is far from theoretical when looking at Poland: the new disciplinary regime for judges, which 'allows ordinary court judges to be subjected to disciplinary investigations, procedures and sanctions on the basis of the content of their judicial decisions, including the exercise of their right under Article 267 of

[76]R. García Antón, 'Can the Spanish Central Tax Tribunal make a preliminary reference under Article 267 TFEU? A "final" tribute to Advocates General Saggio and Ruiz-Jarabo Colomer', *EU Law Live*, 22 January 2020, ⟨eulawlive.com/op-ed-can-the-spanish-central-tax-tribunal-make-a-preliminary-reference-under-article-267-tfeu-a-final-tribute-to-advocate-general-saggio-and-ruiz-jarabo-colomer/⟩, visited 15 March 2021.

[77]The Court also seems to imply this in ECJ 26 March 2020, Case C-558/18, *Miasto Łowicz*, EU:C:2020:234, para. 59: 'For those judges, not being exposed to disciplinary proceedings or measures for having exercised such a discretion to bring a matter before the Court, which is exclusively within their jurisdiction, also constitutes a guarantee that is essential to judicial independence [. . .], which independence is, in particular, essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU [. . .].'

[78]Lenaerts, Speech at the Supreme Administrative Court of the Republic of Poland, *supra* n. 13, p. 16.

[79]Commission, 'Rule of Law: European Commission refers Poland to the Court of Justice to protect judges from political control' (Press Release) (Brussels, 10 October 2019) ⟨ec.europa.eu/commission/presscorner/detail/en/IP_19_6033⟩, visited 15 March 2021.

the Treaty on the Functioning of the European Union (TFEU) to request preliminary rulings from the Court of Justice of the EU' should be viewed as a structural change that impairs the independence of the *entire* judiciary. In that sense, none of the bodies belonging to the judiciary would still fulfil the independence requirement and, inevitably, none of those bodies would still have access to the preliminary ruling procedure.[80] As apocalyptic as it may sound, that member state would – from the point of view of EU law – no longer have 'courts or tribunals'.

While this seems an undesirable and perverse conclusion to draw from the Court's attempts to safeguard judicial independence, it does not seem unlikely in view of the logic deployed by the Court in *Banco de Santander*. As stated above, the Court naturally declares questions arising from non-independent bodies inadmissible. Furthermore, structural independence issues have had similarly intrusive consequences: in the context of a European Arrest Warrant, the Court stated that the executing authority could refuse to surrender a person when it has material, such as that set out in a reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial under Article 47 Charter on account of systemic or generalised deficiencies affecting the independence of the issuing member state's judiciary.[81] In that case, the executing authority has to examine whether there are substantial grounds for believing that the individual whose surrender is requested, will run such a risk.[82] The European Arrest Warrant, a mutual trust mechanism *par excellence*, can thus be crippled by structural independence issues.[83]

[80]Lenaerts draws the same conclusion. Furthermore, he argues that those courts cannot provide judicial protection, since they might not be able to make use of the remedies (such as setting aside national measures) that are provided under EU law. Lastly, undermining judicial independence is detrimental to mutual recognition of judicial decisions: K. Lenaerts, 'New Horizons for the Rule of Law Within the EU', 21 *German Law Journal* (2020) p. 29 at p. 31-32.

[81]*Minister for Justice and Equality* v *LM*, *supra* n. 52, para. 79.

[82]For the full test to be carried out by the executing authority: *see* ibid., paras. 73-78.

[83]*See*, to that effect, also the recent references made by the District Court of Amsterdam in (now) joined and pending cases C-354/20 and C-412/20, where it asked the Court in essence whether the worsening of the systemic or generalised deficiencies in the system of independence of the Polish courts would entitle it to refuse automatically all European Arrest Warrants at issue: Application Rechtbank Amsterdam, 31 July 2020, Case C-354/20, available at ⟨curia.europa.eu/⟩; Application Rechtbank Amsterdam, 3 September 2020, Case C-412/20, available at ⟨curia.europa.eu/⟩. AG Campos Sánchez-Bordona advised the Court to confirm the case law set out in *Minister for Justice and Equality* v *LM*: Opinion of AG Campos Sánchez-Bordona of 12 November 2020, Joined Cases C-354/20 and C-412/20, *L and P*, EU:C:2020:925, para. 5.

The reasons for such far-reaching consequences are concisely summarised by Lenaerts in the earlier quoted speech:

> Since the enforcement of EU law is decentralised, the entire EU system of judicial protection is thus predicated on the premise that the Member States enjoy and cherish an independent judiciary that is capable of providing effective judicial protection of EU rights. However, where that premise no longer holds true, i.e., where judicial independence is lacking, the preliminary reference procedure becomes devoid of purpose, and the principle of mutual trust no more than an empty promise.[84]

It is thus clear that systemic deficiencies affecting the independence of the judiciary can have far-reaching consequences for the EU legal order. Becoming a blind spot for the Court of Justice might very well be one of them. However, the Court has not – to date – declared inadmissible questions referred for preliminary ruling by the Polish courts on the ground that they are affected by laws undermining their independence.[85] Moreover, in *Commission* v *Poland*, the Court interestingly has omitted the 'controversial' paragraph from *ASJP* on the essential nature of the characteristic of independence for the proper functioning of the preliminary ruling procedure. The reason for that can only be guessed. One explanation could be the nature of the proceedings: in an infringement action, an *obiter dictum* on the relevance of the independence requirement for the preliminary ruling system was perhaps not considered useful.[86] Yet another – perhaps more likely – explanation could be that the Court did not want to prematurely close the doors on the Polish courts. Remaining silent might have left the Court the leeway it needs to assess the admissibility of individual questions arising from Polish courts. As described above, the alternative would force the Court to systematically decline jurisdiction concerning these questions. Or would it?

[84]Lenaerts, Speech at the Supreme Administrative Court of the Republic of Poland, *supra* n. 13, p.17.

[85]It should be noted that after *Commission* v *Poland (Indépendance de la cour suprême)* Poland repealed the law forming the subject of that case. Nonetheless, the Polish judiciary is affected by multiple legislative changes other than the ones disputed in that case. While not all references made in *AK* were considered admissible, none of them were inadmissible because the referring body was deemed to be no longer a court or tribunal for lacking independence in the sense of Art. 267 TFEU: ECJ 19 November 2019, Joined Cases C-585/18, C-624/18 and C-625/18, *AK*, EU: C:2019:982.

[86]Contrastingly, in the preliminary ruling *Miasto Łowicz,* the Court did strongly condemn the possible exposure of Polish judges to disciplinary proceedings, as this threatens their independence, which is in turn essential to the proper working of the preliminary ruling mechanism: *Miasto Łowicz*, *supra* n. 77, paras. 57-59.

Structural inadmissibility, truly inevitable?

With *Banco de Santander*,[87] the Court seemed to have set course towards the alignment of 'independence' under Article 267 TFEU and Article 19 TEU. The consequences of that approach have been set out above: a structural demise of judicial independence could equal structural decline of jurisdiction for the Court when confronted with preliminary questions arising from the 'tainted' Polish courts. This hypothesis has been explored by several authors.[88] To date,[89] the Court has however steered clear of declaring questions from the Polish courts inadmissible.[90] That leaves some room for the following debate: is structural inadmissibility really inevitable, or are there arguments to support a more flexible interpretation of the independence requirement under Article 267 TFEU?

Advocate General Wahl in Torresi: also for 'independence', context is everything

An interesting view on the relevance of the context in which 'independence' operates, is offered by Advocate General Wahl in *Torresi*.[91] In that case, the Court had to assess whether the Italian National Bar Council met the requirement of independence and thus qualified as a 'court or tribunal'.[92] In the past, the Court had already accepted a reference from that same National Bar Council in *Gebhard*.[93] However, in the meantime, the Court had issued the *Wilson* judgment, in which it had set out an 'internal and external aspect of independence'.[94] This raised the following question: did *Wilson* overrule *Gebhard* in such a fashion that a body that was once deemed to fulfil the requirement of independence, now no longer did because *Wilson* had made the requirement of independence more demanding?

[87] *Banco de Santander*, *supra* n. 10.

[88] D. Sarmiento, 'The Polish Dilemma', *Despite our Differences*, 17 July 2017 ⟨despiteourdifferencesblog.wordpress.com/page/5/⟩, visited 15 March 2021; Lenaerts, *supra* n. 80, p. 31, 32; Bonelli and Claes, *supra* n. 6, p. 637. *See also*, N. Wahl and L. Prete, 'The Gatekeepers of Article 267 TFEU : on Jurisdiction and Admissibility of References for Preliminary Rulings', 55 *Common Market Law Review* (2018) p. 511 at p. 527.

[89] This research was concluded on 16 December 2020.

[90] *See also supra* n. 85. The Court seems to proceed with caution. This can also be seen in *AK*, where the Court left the final determination whether the Polish National Council of Judiciary and the Disciplinary Chamber of the Polish Supreme Court are independent to the referring court. For an analysis *see* S. Platon, 'Writing between the lines. The preliminary ruling of the CJEU on the independence of the Disciplinary Chamber of the Polish Supreme Court', *EU Law Analysis*, 26 November 2019 ⟨eulawanalysis.blogspot.com/2019/11/writing-between-lines-preliminary.html⟩, accessed 15 March 2021.

[91] Opinion of AG Wahl in *Torresi*, *supra* n. 36.

[92] ECJ 17 July 2014, Joined Cases C-58/13 and C-59/13, *Torresi*, EU:C:2014:2088.

[93] ECJ 30 November 1997, Case C-55/94, *Gebhard*, EU:C:1995:411.

[94] *Supra*.

According to Advocate General Wahl, the answer to that question *is* and *should* be negative. While he defends a degree of flexibility for the Court when assessing the relevant criteria under Article 267 TFEU, this should not lead to a more rigorous application of the independence requirement.[95]

First, to demonstrate that *Wilson* did *not* overrule *Gebhard*, Advocate General Wahl starts by stressing the different contexts of both cases. As noted above, the Court did not rule on the admissibility of a preliminary question in *Wilson* but ruled on the compatibility of a Luxembourgish law with Directive 98/5. In that specific context and with the purpose of that provision in mind, the Court merely '*borrowed*' the principles developed under Article 267 TFEU.[96] Advocate General Wahl then continues by examining the relevant legal background in *Wilson*. He stresses that where in *Wilson* there were no guarantees protecting the impartiality and independence of the Bar Association concerned, those guarantees are in fact present in the relevant Italian laws when it comes to the National Bar Council.[97] This difference in factual and legal context leads Advocate General Wahl to conclude that *Wilson* and *Gebhard* must be distinguished from one another, and that therefore *Wilson* cannot have been intended to overrule *Gebhard*.[98]

He then moves on to argue that *Wilson should* not in any event overrule *Gebhard* 'by applying ipso facto the reasoning developed in *Wilson* to another legal context'.[99] To substantiate this claim, he highlights that Article 9(2) of Directive 98/5 aims to provide a legal remedy which is fully consistent with Article 6 ECHR and Article 47 Charter.[100] According to Advocate General Wahl, it is far from obvious that Article 267 TFEU would impose such a high threshold for a national court to be able to seize the Court of Justice under the preliminary ruling procedure.[101] On the contrary: the same arguments that plead in favour of a strict application of Article 6 ECHR and Article 47 Charter, ironically urge a less rigid interpretation of the notion 'court or tribunal' for the purposes of Article 267 TFEU.[102]

Article 6 ECHR and Article 47 Charter are applied strictly in order to strengthen the protection of individuals and ensure a high standard of protection of fundamental rights.[103] According to Advocate General Wahl, those goals could be hampered by an overly strict application of the admissibility criteria for

[95]Opinion of AG Wahl in *Torresi*, *supra* n. 36, paras. 26-29.
[96]Ibid., para. 32.
[97]Ibid., paras. 38-43.
[98]Ibid., para. 44.
[99]Ibid., para. 45.
[100]Ibid., para. 47.
[101]Ibid.
[102]Ibid., para. 48.
[103]Ibid., para. 49.

preliminary references under Article 267 TFEU: individuals would no longer be able to have the 'natural judge' (the Court of Justice) hear their EU law based claims and this would, as a consequence, weaken the effectiveness of EU law throughout the EU.[104]

With his Opinion, Advocate General Wahl does not seek to minimise the role played by the criterion of independence. He stresses that impartiality and independence have an important function to fulfil, as they are inherent in the notion of 'court or tribunal' in contemporary legal and political thinking.[105] He does, however, advocate against interpreting *Wilson* as an 'innovation' on to existing case law, which would impose on the Court the duty to carry out 'an in-depth analysis of all the possible grounds which might give rise to some suspicion about the impartiality (or the independence stricto sensu) of the referring body'.[106] Rather, when the referring body forms part of the judicial structure of a member state, and when there are sufficient rules under national law which guarantee the impartiality and independence of that body, Advocate General Wahl argues that the Court's analysis should not go any further when assessing compliance with the requirement of independence.[107] To do so would have far-reaching consequences: 'A not insignificant number of national judicial bodies would risk falling outside the notion of "court or tribunal" for the purposes of Article 267 TFEU, with the result that the system of protection for individuals would be weakened, hindering the effectiveness of EU law'.[108] With this statement, Advocate General Wahl makes it clear that when assessing independence, context is indeed everything.

This line of reasoning also seems to have been followed by Advocate General Bobek in *Pula Parking* concerning a more general discussion on the interpretation of the notion of 'court or tribunal' in the context of Regulation 1215/2012.[109] Advocate General Bobek argued that for this definition there are good normative and pragmatic reasons to not reinvent the wheel and rely on the Article 267 TFEU test.[110] However, 'the difference in purpose [of the preliminary ruling mechanism and Regulation 1215/2012 respectively] must be reflected in a

[104]Ibid.

[105]Ibid., paras. 50-51.

[106]Ibid., para. 52.

[107]Ibid., para. 53. On the 'institutional approach' to determine whether a body qualifies as 'court or tribunal', *see also* the Opinion of AG Bobek in ECJ 9 March 2017, Case C-551/15, *Pula Parking*, EU:C:2016:825, paras. 85-86. AG Bobek argues that generally, when it comes to bodies that are part of the judicial branch of a member state, the Court does not even discuss whether that body is a 'court or tribunal'. He uses the English High Court of Justice, the Arondissementsrechtsbank, or the Tribunal de Grande Instance as examples of bodies that *of course* qualify as 'courts or tribunals'.

[108]Opinion of AG Wahl in *Torresi*, *supra* n. 36, para. 60.

[109]Opinion of AG Bobek in *Pula Parking*, *supra* n. 107.

[110]Ibid., para. 100.

different approach in terms of how to apply the same criteria'.[111] Likewise, the difference in purpose of the preliminary ruling mechanism and of Article 19 TEU must be reflected in a different approach in terms of how to apply the criterion of independence.

For the sake of completeness, it should be noted that the Court seems to have followed the reasoning of Advocate General Wahl in *Torresi*. Rather than conducting an 'in-depth analysis', the Court focused on the existence of a legal framework that laid down safeguards protecting the independence and impartiality of the National Bar Council.[112] This is in line with the Court's case law in *Köllensperger and Atzwanger*: after having established that the law laid down sufficient safeguards to protect the independence of the body concerned, the Court explicitly refused – for the purposes of Article 267 TFEU[113] – to infer that a provision meant to protect a national court's independence was applied in a manner contrary to the domestic constitution or the principles of a state governed by the Rule of Law.[114] It seems unlikely that the Court would limit itself to such examination under Article 19(1)(2) TEU or Article 47 Charter.

Independence under Article 267 TFEU and Article 19 TEU: A 'qualitatively different exercise'?[115]

The reasoning of Advocate General Wahl in *Torresi* set out above fuels the argument that structural inadmissibility is not an inevitable consequence arising from the Court's recent rulings on judicial independence.[116]

While the Opinion of Advocate General Wahl does not feature in a Rule of Law context, the Opinion of Advocate General Tanchev in *AK (Indépendance de la chambre disciplinaire de la Cour suprême)* does.[117] In that case, Poland had argued that the Disciplinary Chamber complied with the independence requirement under Article 267 TFEU, and that that standard should not be interpreted differently from those under Article 19 TEU and Article 47

[111]Ibid., para. 104.

[112]*Torresi*, *supra* n. 92, paras. 21-25.

[113]It should be noted that in *AK*, *supra* n. 85, the Court did in fact look at 'the cocktail effect' that several seemingly harmless measures may have when combined. However, the Court carried out this assessment under Art. 19 TEU. Platon, *supra* n. 90.

[114]*Köllensperger and Atzwanger*, *supra* n. 23, para. 24.

[115]Opinion of AG Tanchev in *Commission* v *Poland*, *supra* n. 57, para. 111.

[116]Relying on this case, Prete and Wahl call the idea that the Court would have to re-consider whether Polish courts generally fulfil the requirement of independence for the purposes of Art. 267 TFEU – and thus still qualify as 'courts or tribunals' – 'certainly original' but with 'little support in the Court's case law': Wahl and Prete, *supra* n. 88, p. 527.

[117]Opinion of AG Tanchev in *AK*, *supra* n. 57.

Charter.[118] In response, Advocate General Tanchev argued that the Court had in no way suggested that the case law developed under Article 267 TFEU was the exclusive source governing independence.[119] Furthermore, he called the assessment of the independence criterion for determining whether a body qualifies as a 'court or tribunal' under Article 267 TFEU a 'qualitatively different exercise' than the assessment of whether the requirements of judicial independence have been complied with under Article 47 Charter and Article 19(1) TEU.[120]

Like Advocate General Wahl in *Torresi*, he emphasises the difference in context: under the preliminary ruling mechanism, the Court answers a question referred by a body which is entitled to do so, and which is linked to the underlying objective of the mechanism: establishing a judge-to-judge dialogue and ensuring the uniform interpretation of EU law.[121] On the other hand, under Article 47 Charter and Article 19 TEU, the Court engages in a substantive assessment to establish whether the national measure in question undermines judicial independence according to the requirements imposed by those provisions.[122] Concluding on this point, however, Advocate General Tanchev adds that:

> Most importantly, [...] due to Article 52(3) of the Charter, EU law guarantees judicial independence, at minimum, to the standard set by Article 6(1) ECHR [...]. That being so, if the case-law elaborated by the Court with respect to the criterion of independence under Article 267 TFEU (in the context of determining whether a particular body can make a reference for a preliminary ruling to the Court) were to fall short of the 'minimum threshold of protection' guaranteed by Article 6(1) ECHR, it would in any event have to brought up to that standard.[123]

While there are arguments to be made in favour of this statement, it should be noted that this concerns the debate on the *content* of the independence requirement and not the debate on the *assessment* of the independence requirement. The type of review carried out by the Court in the context of Article 267 TFEU should be – as Advocate General Tanchev writes in the preceding paragraphs – *qualitatively different*.[124] It should moreover be noted that, as described above, the Court already moved closer towards the case law of the European Court of Human

[118]Ibid., para. 66.
[119]Ibid., para. 110.
[120]Ibid., para. 111.
[121]Ibid., para. 112.
[122]Ibid., para. 113.
[123]Ibid., paras. 114, 119-123. Concretely, the standards of Art. 6(1) ECHR entail an objective assessment of, inter alia, the appointment procedure, the existence of guarantees against outside pressures and of whether the body presents an appearance of independence.
[124]Ibid., para. 111.

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Rights on Article 6(1) ECHR when developing the internal and external aspect of independence in *Wilson*. This evolution did not, however, prompt the Court to change the type of assessment it carries out when reviewing independence in the context of admissibility procedures.[125] Analogous to the Opinion of Advocate General Bobek quoted above, the difference in purpose of the preliminary ruling mechanism and Article 19 TEU respectively must be reflected in a different approach in terms of how to *apply* the same criteria.[126] Drawing a parallel between the opinions of Advocate General Wahl and Advocate General Tanchev seems justified. As in *Wilson*, the Court did not, in the Rule of Law cases, assess whether the body at issue fulfilled the criteria for qualifying as 'court or tribunal' under Article 267 TFEU. Analogous to *Wilson,* the Court 'borrowed' the principles developed under Article 267 TFEU, in particular on independence, but with a different purpose in mind. At issue in both *ASJP* and *Commission* v *Poland* was a threat to the independence of the judiciary, be it by austerity measures or by far-reaching structural changes such as the lowering of the retirement age. This can explain – and justify – the firmer stance of the Court on independence. Indeed, as President Lenaerts stated in his speech before the Supreme Administrative Court of Poland, 'where a national court [...] acts as a European court [...], Article 19(1) TEU protects its independence'.[127] Article 267 TFEU, in contrast, does not have as its purpose the protection of national judges.

Interestingly, Advocate General Tanchev mainly focuses on the finding that the case law developed under Article 267 TFEU does not constitute the exclusive source of the principle of judicial independence under Article 19 TEU and Article 47 Charter. He does not in turn mention whether the case law developed under Article 19 TEU and Article 47 Charter could or should be treated as an 'innovation' on to the pre-existing body of case law under Article 267 TFEU (with the possible effect of structural inadmissibility of questions arising from the 'tainted' Polish courts).

Nevertheless, the words of Advocate General Tanchev seem to have resonated with the Court in another case: *Land Hessen*.[128] In that case, the Verwaltungsgericht Wiesbaden (Administrative Court of Wiesbaden) had expressed doubts regarding its own independence and consequently its ability to refer questions for a preliminary ruling. When assessing the admissibility of the question referred, and thus, inherently, the independence of the referring

[125]The ruling in *Torresi*, which is discussed above, is a good example of that: *Torresi*, *supra* n. 92.

[126]Opinion of AG Bobek in *Pula Parking*, *supra* n. 107, para. 104.

[127]Lenaerts, Speech at the Supreme Administrative Court of the Republic of Poland, *supra* n. 13, p. 8.

[128]ECJ 9 July 2020, Case C-272/19, *Land Hessen*, EU:C:2020:535. Note that this is not a Grand Chamber case.

court, the Court emphasised the fundamental importance of the independence requirement for the EU legal order and identified three roles for the independence requirement: first, it forms part of the rule of law value laid down in Article 2 TEU and concretised by Article 19 TEU.[129] Second, it is a necessary condition for guaranteeing individuals their fundamental right to an independent and impartial tribunal laid down in Article 47 Charter, which is of cardinal importance in guaranteeing the protection of all the rights that individuals derive from EU law.[130] Third, it is essential to the proper working of the preliminary ruling mechanism, in that the mechanism may only be triggered by a 'court or tribunal' in the sense of Article 267 TFEU, which satisfies, inter alia, the requirement of independence.[131]

With these different frameworks in mind, the Court concludes that:

> [. . .] in order to determine the admissibility of a request for a preliminary ruling, the criterion relating to independence which the referring body must satisfy before it can be considered to be a 'court or tribunal', within the meaning of Article 267 TFEU, may be assessed *solely in the light of that provision*.[132]

This line of reasoning fits seamlessly with the arguments made by Advocate General Wahl, Advocate General Bobek and Advocate General Tanchev. Indeed, independence plays a variety of roles within the EU legal order. In these roles, independence has the same content: it has an internal and external aspect. However, when assessing whether a member state court is independent, the Court must assess its independence only in the light of the specific role played by independence in that context.

This approach can be contrasted with the Court's ruling in *Banco de Santander*.[133] The statement that the ruling in *Gabalfrisa* 'must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorised as a 'court or tribunal' for the purposes of Article 267 TFEU' seems to imply that *ASJP* overruled *Gabalfrisa* in such fashion that a body that was once deemed to fulfil the requirement of independence now no longer does, because *ASJP* has made the requirement of independence more demanding. This not only fails, in my opinion, to attribute the adequate amount of importance to the difference in context, but furthermore seems to ignore the very fact that there are two different strands of case law, delimiting the type of review that

[129]Ibid., para. 45.
[130]Ibid.
[131]Ibid.
[132]Ibid., para. 46 (emphasis added).
[133]*Supra*.

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needs to be carried out. The Court is thus well advised to steer clear from treating the case law developed under Article 19 TEU as an essential source for the assessment of independence under Article 267 TFEU.

The Rule of Law cases cannot and should not overrule the Court's case law on independence in the context of Article 267 TFEU

In spite of *Banco de Santander*, and in line with the above, two conclusions should be drawn. First, the independence criterion is featured in roughly two different contexts: the context of the preliminary ruling mechanism and the context of the Rule of Law value. Those contexts differ significantly: in the context of the Rule of Law value, the requirement of independence aims at the protection of fundamental rights of individuals and the protection of national judges. In the context of the preliminary ruling procedure, it serves as a functional notion that delineates which bodies should be allowed to the judicial dialogue in the context of the preliminary ruling procedure.[134] Second, 'independence' should be assessed differently depending on the context in which it operates. For this reason, the Rule of Law cases *cannot* overrule the Court's case law on independence in the context of Article 267 TFEU.

There are, however, also normative arguments to be made as to why the Court *should not* overrule its earlier case law under Article 267 TFEU. On a general level, this would not only impose on the Court a responsibility to go far beyond a formal verification of compliance with the requirement of independence under Article 267 TFEU, but also have the result that a not insignificant number of national judicial bodies (possibly all Polish courts) risk falling outside the notion of 'court or tribunal'. Parallel to the argument made by Advocate General Wahl in *Torresi*, the same arguments pleading in favour of a strict application of the criterion of independence under Article 19 TEU – the protection of the rights of individuals under EU law – plead in favour of a less rigid application of that same criterion under Article 267 TFEU.

Looking at the concrete situation in Poland, there are furthermore multiple (meta-legal) arguments advocating for the *qualitatively different assessment* that is put forward in this article. First, as long as Poland remains a member state of the EU, it is bound to apply EU law and EU law grants its citizens certain rights. It is of fundamental importance for the autonomy of the EU legal order that those rights are enforced in a uniform way, which is achieved through the preliminary ruling mechanism.[135] Put differently, not granting the Polish courts access to the preliminary ruling procedure will not stop them from applying EU

[134] *Supra*.
[135] *Commission* v *Poland*, *supra* n. 4, para. 45.

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law. It might only stop them from applying EU law correctly. This inevitably weakens both the effectiveness of EU law and the protection of individuals. As Advocate General Ruiz-Jarabo Colomer wrote in his opinion on *de Coster*: 'the Court of Justice still needs to ensure that situations governed by [Union] law do not remain outside its jurisdiction and, consequently, without a uniform interpretation of the rules which regulate them'.[136]

Next, Polish courts have used the preliminary ruling procedure as one way to bring attention to the reforms carried out by the government.[137] Cutting this lifeline could be detrimental, especially since the political instruments adopted by the Commission, such as the Rule of Law Framework[138] and the Article 7 TEU procedures that have been initiated, have proved to be of little or no avail.

Last, the danger that the preliminary ruling procedure would be instrumentalised by parties with anti-European or anti-Rule of Law interests should, in my opinion, be relativised. Next to the fact that parties cannot oblige a national court to make a reference, it seems rather far-fetched that the end-result of a preliminary ruling, which clarifies the *correct* interpretation and application of EU law, could constitute ammunition to further undermine the Rule of Law. Of course, the risk exists that the judgment of the Court would be implemented in an incorrect or unsatisfactory way. However, one does not need a Rule of Law crisis to run that risk.[139]

Conclusion

This article has sought to address the tensions created by the Court's new body of case law on judicial independence for the functioning of the preliminary ruling mechanism. The notion of 'independence' has a different origin and function under Article 267 TFEU and Article 19 TEU respectively. With *Banco de Santander*, the line between these notions appears dangerously vague. It is true that the Court has (for good reasons) borrowed the case law developed under Article 267 TFEU to develop the notion of independence under Article 19 TEU. However, this does not mean that the body of case law constitutes the exclusive source for judicial independence. On the contrary, the Court is well advised to respect the differences in context of the two provisions and carry out its assessment of independence under Article 267 TFEU in a qualitatively different manner. The alternative

[136]Opinion of AG Ruiz-Jarabo Colomer in *de Coster*, *supra* n. 22, para. 87.

[137]*AK*, *supra* n. 85, and *Miasto Łowicz*, *supra* n. 77, are examples of that.

[138]Commission, *supra* n. 1.

[139]*See* for instance, the implementation of the Danish Supreme Court in the *AJOS* case. For an analysis, *see* Klinge, *supra* n. 13. Another example is the recent stand-off between the Court and the German Federal Constitutional Court in its *PPSP* judgment: Eleftheriadis, *supra* n. 13.

could have a paradoxical and perverse effect: the Court's attempts to safeguard the independence of members of the Polish judiciary could lead to structural inadmissibility of the questions referred for preliminary ruling by that judiciary.

This advice is, of course, open to criticism. To some extent, the Court is forced to choose between the devil and the deep blue sea: either it allows non-independent courts to the dialogue, or it turns Poland into a blind spot on its radar. It will be interesting to see in subsequent cases which one is considered to be the lesser of two evils. Shortly before the submission of the final version of this paper, the Court issued a ruling in *L and P*, in which it answered the question whether the Polish courts could still be viewed as 'issuing judicial authorities' in the framework of the European arrest warrant mechanism.[140] In answering the question, the Court stated that 'the existence of [structural] deficiencies does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case'.[141] Relying on the thesis that limitations on the principles of mutual trust and mutual recognition must be limited to 'exceptional circumstances', it concluded, as an obiter dictum, that an interpretation to the contrary 'would mean that no court of that Member State could any longer be regarded as a "court or tribunal" for the purposes of the application of other provisions of EU law, in particular Article 267 TFEU'.[142] This statement, while brief, should be welcomed as a step in the right direction.

Lastly, this contribution is not advocating for a completely deferential approach towards independence under Article 267 TFEU. What it is advocating for, however, is that the creation of blind spots the size of an entire member state should be avoided. This does not mean that questions arising from a Polish court whose independence is impaired beyond doubt can *never* be declared inadmissible by the Court for not fulfilling the requirements under Article 267 TFEU. However, in my opinion, the Court should refrain from *structurally* declining jurisdiction when confronted with questions arising from the Polish courts. A possibly transposable test could be the two-step test set out by the Court in *LM* v *Minister for Justice and Equality* in the context of the European Arrest Warrant framework.[143] In that case, the Court stated that it is only if the European Council adopts a decision under Article 7(2) TEU, which determines that there is a serious and persistent breach of the values laid down in Article 2 TEU – such as a systemic threat to the independence of the judiciary – that the executing judicial authority is *required* to refuse *automatically* the execution of any

[140]ECJ 17 December 2020, Joined Cases C-354/20 and C-412/20, *L. and P*, EU:C:2020:103.
[141]Ibid., para. 42.
[142]Ibid., paras. 43-44.
[143]*Minister for Justice and Equality* v *LM*, *supra* n. 52. *See also* Opinion of AG Campos Sánchez-Bordona in *L. and P*, *supra* n. 83.

European Arrest Warrant issued by that member state.[144] Where such decision is not adopted by the European Council, the executing judicial authority may only refuse to surrender an individual on a case-by-case basis: first, it must establish whether there is a real risk of breach of a fundamental right on account of systemic or generalised deficiencies.[145] Second, it must assess to what extent those deficiencies pose an *individual* threat for the person concerned.[146] Likewise, the Court of Justice should not *structurally* decline questions arising from the Polish courts under Article 267 TFEU, unless an Article 7(2) TEU decision has been adopted by the European Council.[147] In the absence of such decision, the Court could investigate whether the systemic deficiencies create a concrete problem for the referring court. If, after that examination, it appears that the referring court's independence is impaired, the question could be deemed inadmissible.

In conclusion, the Court's attempts to safeguard 'judicial independence' *can* become a blade that cuts both ways, but with the right amount of importance attributed to the context in which the question of 'independence' arises, it should not have to be.

[144]*Minister for Justice and Equality* v *LM*, *supra* n. 52, para. 72.
[145]Ibid., para. 61.
[146]Ibid., paras. 74-77.
[147]While it is true that Hungary and Poland are currently blocking this mechanism for each other, this idea seems viable at least in theory and respects the balance of powers in the EU.