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Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe

DIMITRY V. KOCHENOV[1] and PETRA BÁRD[1,2]
[1]Central European University Democracy Institute, Budapest and Central European University Department of Legal Studies, Vienna
[2]Radboud Universiteit, Nijmegen

> (In)dependence is by definition relational: it is the independence from or the dependence on something or somebody. Thus, metaphorically speaking, its assessment cannot be limited to a microscopic study of one slice of a salami, without having regard to the rest of the salami stick…
> Opinion of AG Bobek in *Getin Noble Bank*

Introduction: Salami Context Instead of a Rule of Law Standard

The European Union (EU) is a project of integration through law. President Lenaerts presents this official position well: 'Integration through the rule of law defines what the European Union today stands for' (Lenaerts, 2020, p. 29). As a core value and a fundamental principle the Rule of Law has a special status in EU law, 'advancing a clear idea of constitutionalism taming nationalism by […] diffusing the model of liberal democracy to countries with an authoritarian past' (Bárd, 2022; Pech, 2009). This idea is codified by the Member States in Article 2 TEU[1] and informs the functioning of the whole system of EU law (Klamert and Kochenov, 2019; von Danwitz, 2018). Despite these clear legal obligations, the Rule of Law and other closely intertwined values are severely and systematically violated in several EU Member States (Sadurski, 2019; Sajó, 2021). The World Justice Project's Rule of Law Index (2020) showed that respect for the Rule of Law declined the most in Hungary and Poland in the whole EU/EFTA/North-America region over the last five years. Member States with such rule of law records could not join the EU, were they to submit their applications today (Kochenov, 2004).

Now that illiberal regimes are part of the European club, they endanger the European project from within (Pech and Scheppele, 2017). This is best visible in the field of judicial independence, which is both particularly fragile (Kovács and Scheppele, 2019) and crucially important in the context of the European multi-level legal system (Grabowska-Moroz, 2020). Independent judiciary is of course indispensable as the ultimate arbiter and guarantor of individual rights, but also vital for national judges and the Court of Justice of the European Union (CJEU) to maintain judicial dialogue necessary for the proper application of EU law. Both levels of the judiciary in the EU can only fulfil their multiple functions, if their independence is guaranteed. This can only be done if the continental

The authors are grateful to Barbara Grabowska-Moroz, David Kosař and Laurent Pech.
[1]C-621/18, *Wightman and Others*, para. 63.

standards enshrined in Article 6(1) ECHR are fully respected, as Article 19 TEU requires. Here is where the problems start: while some fake Polish 'courts' have already dismissed such basic standards as in breach of the Constitution (Ploszka, 2022), it flows from CJEU's case-law about itself that it is above such basic requirements (Kochenov and Butler, 2022). Worse still, the inability of the CJEU to make up its mind on the vital issue of what it means to be an independent court established by law in the EU legal context led to a proliferation of numerous wanting 'standards' of judicial independence, which are not only internally and mutually contradictory, but also apply differently to the different levels of European judiciary and fall short of meeting the minimum standards outlined by the European Court of Human Rights (ECtHR). This rotten salami, to borrow from AG Bobek's culinary metaphor of this dangerous approach, boasts at least a handful of slices. The very idea of an independent court established by law – which often requires a 'yes' or 'no' answer is that the parties are entitled to know whether the gowned presence in front of them is an independent judge or not – came to mean 'context', as a matter of EU law: whether someone is a lawful judge depends on the court to which the gowned person belongs, the type of action and other variables. 'Context' amounts to lack of clarity concerning this vital aspect of the rule of law, endangering both the uniform application of EU law throughout the territory of the Union and the strict adherence to the rigorous human rights standards.

The task of this contribution is to walk through a handful of available standards of judicial independence and discuss the broad implications of this EU-mandated unprincipled rule of law relativism. In what follows we retrace the explosion of the ill-conceived plurality of standards on judicial independence and proceed standard by standard, to demonstrate how the EU enforces mutually-contradictory rules pertaining to the heart of the rule of law. We start with the ECtHR approach in 'established by law' Article 6(1) ECHR case-law, which makes clear that lawfulness of the court is at the heart of the rule of law and is indispensable in a democratic society to even start speaking about judicial independence; we then proceed to the strong standard applied by CJEU in preliminary references context culminating in *Banco de Santander SA*; and a watered-down *Getin Noble Bank* version of the same, which does not – in the name of 'judicial (sic) dialogue'[2] – even require a lawful judge and shows resolute lack of decisiveness, on the part of the CJEU in maintaining the EU-wide definition of a 'court or tribunal' in the sense of Article 267 TFEU. We proceed to discuss the groundbreaking yet so far ineffective CJEU case-law attempting to shield courts in backsliding member states from the attacks by the executives, only to counterbalance it by the *LM* case-law and its progeny, which values the idea of 'mutual trust' above the protection of fundamental rights and adherence to basic rule of law requirements. Last but not least, we discuss the lowest point in the whole story – the presumption of the CJEU entertained in *Sharpston* cases that even the lowest standards of lawful composition and independence do not apply to it, thus almost putting the supranational Court, through a *contra legem* interpretation of the primary law, outwith the ambit of Article 19 TEU minimal requirements: unlawful arbitrary interference by the sovereign with the Court's composition in direct violation of EU and ECHR law has been greenlighted in numerous cases related to AG Sharpston's unlawful

[2]C-132/20, *Getin Noble Bank*, para. 71.

premature dismissal by both the Court and the General Court (Kochenov and Butler, 2022).

I. The Continental Best Practice: ECHR Standard of a 'tribunal established by law'

The requirement of a tribunal 'established by law' in the sense of Article 6(1) ECHR is at the heart of ECtHR's approach to judicial independence. The establishment of a court by law is a necessary and indispensable requirement of the rule of law, turning the Convention into a 'rule of law instrument'.[3] Significant case-law comes down to several core elements to consider (for details, see Registry of ECtHR, 2022). At issue is not only the legal basis underpinning the establishment of the court as such, but also the rules of staffing it with judges as well as compliance. So, crucially, the failure to comply with the rules of formation of the court is in itself a violation of Article 6 ECHR.[4] Acknowledging the criticism this case-law received, the court painting in quite broad brush strokes (Kosař and Leloup, 2022), it is important that ECtHR connects the rationale behind 'established by law' with the essence of the preservation of democracy: 'to ensure that the judicial organization in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament'.[5]

Three key elements of the 'established by law' test flow from *Ástráðsson*[6]: (1) objectively and genuinely identifiable breach of domestic law; (2) the breaches should be fundamental to the procedure; and (3) availability of suitable judicial review based on Convention standards. This standard has been applied in countless cases against Poland, resulting in the finding of significant violations in the cases of outright unlawfully appointed judges of the Constitutional Tribunal[7] (see Grabowska-Moroz, 2021) and the Supreme Court of Poland, including, especially, the Disciplinary Chamber[8] but also other chambers, as long as they include individuals who were appointed by the 'reformed' National Council of the Judiciary (NCJ), which was established, to have the purpose of undermining the independence of the Polish judiciary[9] and is thus an institution that cannot appoint members to any tribunal 'established by law' (Śledzińska-Simon, 2018).[10]

II. CJEU Standard in Preliminary Reference Cases after *Banco de Santander SA*

For decades before the advent of the Article 19(1) TEU case-law starting with *Portuguese Judges* (Pech and Kochenov, 2021) that gave CJEU broad jurisdiction over the national judiciaries, the main vehicle for the CJEU to deal with the whole array of issues pertaining to judicial independence lawful composition and established by law requirements was Article 267 TFEU.[11] CJEU's determination of the meaning of 'court or tribunal' in the context of the preliminary reference procedure has been a pillar of EU law

[3]ECtHR, *Grzęda v Poland*, para. 339.
[4]ECtHR, *Ástráðsson v. Iceland*, para. 227.
[5]ECtHR, *Richert v. Poland*, para. 42.
[6]*Ástráðsson*, paras. 243–52.
[7]ECtHR, *Xero Flor w Polsce v. Poland*.
[8]ECtHR, *Reczkowicz v. Poland*; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*.
[9]*Grzęda*, para. 348.
[10]For a full list of pending and decided cases on this matter, see the August 2022 tweet from L. Pech https://twitter.com/ProfPech/status/1557028402275799042.
[11]For a meticulous analysis of interplay between different aspects to be taken into account, see Pech (2021a).

since the dawn of integration (Broberg and Fenger, 2021). The core idea was inclusivity and control. The Court invited as many interlocutors as possible to establish vibrant judicial dialogue (Eeckhout, 2015), while at the same time keeping the right to determine what 'court or tribunal' meant.

As a result, the criterion of 'independence' was such that even bodies not recognized as courts and inserted within the administrative structures of the Member States were eligible and encouraged to make references (Broberg, 2009, p. 221). The basic standard to assess all the bodies qualifying to use the preliminary rulings, although criticised (for example Tridimas, 2003, p. 30), was set out with clarity since the early days of European integration, demanding that the body is established by law, permanent, enjoying compulsory jurisdiction, *inter partes* procedure, applying rules of law and is independent.[12] Pech and Platon (2018, p. 1942) foresaw potential conflicts between the permissive paradigm espoused by this case-law and the more demanding (and rightly so) requirements of Article 19 TEU following *Portuguese Judges*.

Banco de Santander SA,[13] upgraded the meaning of 'court or tribunal' by reinforcing the minimal independence requirement: a body where irremovability of members is not strictly guaranteed cannot meet Article 267 TFEU standard (para. 67). Moreover, a court against the final decision of which an extraordinary appeal is possible is equally not a 'court or tribunal' able to send preliminary references (para. 73).

III. Promoting 'Dialogue': Welcoming Referrals from Bodies Not Established by Law

The high standard was short-lived. Filipek (2022) is right: 'The CJEU now appears to differentiate between a "court" under Article 267 TFEU and a "court" under 19 TEU (Article 47 Charter).' Indeed, the steady reinforcement of the standards of independence required under Article 267 TFEU came to an abrupt end with *Getin Noble Bank*, where the Court accepted to answer a request for a preliminary ruling[14] from Mr. Zaradkiewicz, a known usurper[15] found by ECtHR to manifestly fail the 'established by law' test.[16] Moreover, *Grzęda*, decided by the ECtHR almost immediately after *Getin Noble Bank* clarified that the core idea behind the so-called Polish 'reform' was the deliberate and systemic undermining of the judicial independence and emphasized that any judge appointed by an organ the sole purpose of which is to undermine judicial independence, is not lawfully appointed. In other words, it was not particularly difficult to see the actual motive behind the case: the actual 'dispute' aside, it was clearly fabricated in an attempt to legitimize the PiS attack against judicial independence by killing two birds with one stone: legitimizing the usurper Zaradkiewicz, who is not a lawful judge in the eyes of the ECHR (and thus not a lawful judge for all the authorities in all the EU Member States, including Poland) and to undermine the credentials of some of his colleagues (Wójcik, 2022).

[12]Case 61/65, *Vaassen (née Göbbels)*.
[13]For analysis, see Pech and Kochenov (2021, pp. 122–7).
[14]This move came as a total surprise to leading commentators, who expected a radically different outcome, e.g. Pech, 2021b.
[15]In English law this term of art stands for those 'who have sat on a panel of judges in full knowledge that they lacked authority to do so': Opinion of AG Sharpston in Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Simpson and HG*, para. 100. See Pech (2020).
[16]ECtHR, *Advance Pharma v. Poland*, para 350, also para. 349.

The CJEU accepted the reference ignoring all the above (as well as many an academic warning, for example Pech, 2021b). Instead, the Court established a presumption whereby any national court can be assumed to be established by law,[17] which can only be rebated by a final judicial decision at the national or international level.[18] Unquestionably, ignoring the composition of the referring judge or chamber to focus on the overall court which the judge or a chamber are connected to, is a radical departure from the ECHR standards, where lawful appointment is an inalienable part qualifying as 'established by law'. Speaking of a one-person panel composed of a fake judge, AG Bobek made a distinction between the '*body* itself, and not in relation to the *individuals* who sit in the body which made the request'.[19] The Court found this logic appealing, underlining the importance of 'judicial dialogue' and deploying this term in a direct attack against the core of the rule of law, as explained by ECtHR and analysed above.

Ultimately, the CJEU apparently refuses to give the 'court or tribunal of a Member State' an EU law meaning any more, with the presumption of lawful establishment by law, which contradicts final decisions of national courts,[20] its own case-law[21] (Pech and Kochenov, 2021) and Article 6(1) ECHR as interpreted by ECtHR,[22] especially in the case of *Advance Pharma*, rendered *before* the *Getin Noble Bank* decision.[23]

In *Getin Noble Bank* the well-known standards thus evaporated: a known non-court, failing ECtHR standard is found to be qualified to refer a case under Article 267 TFEU, thus starting a short-lived 'judicial (sic!) dialogue' between an impostor and CJEU. Short-lived, since no court in the European legal space would consider the national decision resulting from such dialogue as a lawful exercise of judicial power: unlike the CJEU, with its Baratarian Salami standard, all the other courts on the continent know that an unlawfully appointed judge is not a judge. All in all, the *Getin Noble Bank* standard emerged as a denial of what Article 6 ECHR and Article 19 TEU requires. The gravity of the situation was further exacerbated, once again, by the fact that all the national courts of other Member States, when dealing with the decisions of the fake judges in Poland, are of course bound by the ECtHR standard. Implications, especially in the context of European Arrest Warrants, as will be seen below, are truly far-reaching.

IV. Helping Judges under Attack: CJEU Standard in the Cases on Rule of Law Backsliding

This reality-disconnected unprincipled approach by the CJEU is all the more surprising, when viewed in the context of the remarkable 'anti-backsliding' case-law the Court has developed since 2018. In a glorious défilé of cases analysed by Pech and Kochenov (2021) in detail and primarily concerned with PiS authorities' sustained and systemic attacks against the judiciary in Poland (Pech and Scheppele, 2017), Article 19(1) TEU has now acquired direct effect.[24] The CJEU not only fine-tuned its *Portuguese Judges* jurisdiction

[17] *Getin Noble Bank*, para. 69.
[18] *Getin Noble Bank*, para. 72.
[19] Opinion of AG Bobek in *Noble Bank*, para. 47.
[20] Point 1 of the Polish Supreme Court Resolution of 23.01.2020 implementing the *AK* judgment of the CJEU.
[21] CJEU, joined cases C-542/18 RX-II and C-543/18 RX-II, *Simpson and HG*.
[22] The Court lied in para. 73.
[23] See the brilliant analysis by P. Filipek (2022).
[24] Case C-824/18, *A.B.* et al. *(Appointment of judges to the Supreme Court*), 2 March 2021, ECLI:EU:C:2021:153.

to intervene with the judiciaries at the national level to ensure safeguard of the rule of law, but also distilled a set of key principles, such as non-regression (Leloup et al., 2021), to be taken into account when determining, which courts are established and function in compliance with EU rule of law requirements, the latter being well-known and rather clear by now (Koncewicz, 2020; Pech, 2022).

The case law took the form of both direct actions by the Commission – as in *Commission v. Poland (The Independence of Supreme Court)* (for an analysis see Bárd and Śledzińska-Simon, 2020), or *Commission v. Poland (Independence of Ordinary Judges)* highlighting the 'cardinal' importance of the principle of irremovability – and via preliminary references route – as in *AK* (see Leloup, 2020) where the Court instructed the Polish referring court to apply its judicial independence test to the body in dispute. While the Polish Supreme Court has done exactly that, also holding that the Disciplinary Chamber's past and future decisions 'deserve no protection',[25] Supreme Court decisions were ignored, leaving *AK* without application. CJEU enriched its law with interim relief (Wennerås, 2019), possible sanctions and *status quo ante* restorations. The Court further clarified in *AB and others* that all the principles of the rule of law are to be safeguarded when the whole system of judicial appointments is changed, including proper judicial review of the crucial reformed irremovability requirements.[26]

The flood of principles drawing on Article 19(1) TEU and 47 CFR notwithstanding, as well as their applicability to the reforms of the judiciaries, the effectiveness of this case-law on the ground both at the national and supranational level leaves much to be desired. The Commission has not learnt its lesson of winning with a meaning, as desire to win a case outshines strategic goals of restoring the rule of law (Scheppele et al., 2020). Worse still, it has been consistently closing its eyes at the CJEU's position, seemingly eager to reward backsliders for their lacking performance as we have argued (Bárd and Kochenov, 2022). More importantly, the CJEU has resolutely ignored *all* of its judicial independence and security of tenure case-law when asked to assess an attack by the Member States against own independence in the *Sharpston* cases, as will be discussed below. Once one looks at the national level, the situation seems only to deteriorate: growing case-law did not bring actual rule of law victories (Kochenov, 2021). The biggest victory emerging seems the development of EU law itself as a value-based constitutional system in its eyes and also in its law (Kochenov, 2017). The victory has thus been confined to EUR-Lex, rather than provincial courthouses, what has been characterized as 'the failure of pan-European template' (Kosař et al., 2019, p. 461; see also Pech et al., 2021).

V. 'Trust' Trumps the Rule of Law and Fundamental Rights: CJEU Standard in European Arrest Warrant Cases

European Arrest Warrant (EAW) is an altogether different terrain, where the CJEU insisted that mutual trust as such cannot be suspended, however serious and systemic judicial independence problems. The results are as incomprehensible in principle as dialoguing with an unlawful body masquerading as a court or individuals masquerading as judges, like in *Getin Noble Bank*. Suspending the FD EAW is a task of the European

[25]Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, Case BSA I-4110-1/20, para. 55.
[26]CJEU thus ruled fully in line with *Reczkowicz v. Poland*.

Council exclusively, says CJEU on the basis of a non-binding recital it unnecessarily inflated in *LM*, paras 71 and 72 (Pech and Kochenov, 2021, pp. 157–71). Executing domestic courts are only allowed to check the issuing court's independence on an exceptional, case-by-case basis. The applicable judicial test has first been laid down in *Aranyosi and Căldăraru* (para. 81), which concerned prison conditions. The same test has been relied on by the CJEU in the *LM* (para. 70) case in relation to doubts concerning the independence of the requesting court, as if it was self-evident that prisons and courts would raise the same problématique.

The CJEU could have developed a different test for systemic Rule of Law deficiencies, but instead it followed the same logic applied to potential human rights deficiencies in *Aranyosi*, given that the issue of judicial independence also boils down to a human rights problem of the requested person, namely their right to a fair trial.

As the first step of the *Aranyosi* test the executing court must assess whether the operation of the justice system in the issuing state suffers from general deficiencies in terms of judicial independence. If it does not, the individual must be surrendered.[27] If it does, the second, individual prong of the test kicks in, where the judge must determine, specifically and precisely, whether there are substantial grounds to believe that the requested person will be exposed to a real risk of a violation of their fair trial rights, also with regard to a potential lack of independence of the courts,[28] if surrendered (Bárd and van Ballegooij, 2018; van Ballegooij and Bárd, 2016). To agree with AG Sharpston, this prong of the test is 'unduly stringent',[29] if not unworkable. What is more, the CJEU obliges requested and requesting courts to engage in a discussion about compliance with established by law and judicial independence requirements, which essentially means that, absurdly, the fake courts and impostors posing as judges, who issued the EAWs, are invited to assess their own compliance themselves. But the problem is even broader than that: properly appointed and independent individual judges cannot save a flawed system (Bárd and Morijn, 2020).

The CJEU nevertheless insisted on the *LM* test in *L and P*, no matter how severe the systemic problem is, pretending that judges can still retain their independence in the middle of state and judicial capture.[30] The Court in effect sacrificed the fundamental right to an independent tribunal established by law to the altar of 'mutual trust': 'An interpretation to the contrary would amount to extending the limitations that may be placed on the principles of mutual trust and mutual recognition beyond 'exceptional circumstances',[31] insisting on this further, also in *WO and JL*, which post-dates the ruling of the compromised Polish Constitutional Court in K-3/21 (2021) that Article 19(1) TEU as such is not in line with Polish Constitution. This is not the first instance when CJEU sacrifices substantive principles in the name of procedural ones, but a telling one nevertheless (Kochenov, 2015).

Similarly to a body, which is not established by law, but is still welcome to enter some kind of 'dialogue' with CJEU post *Getin Noble Bank*, a judge in a flawed system suffering

[27]Opinion of AG de la Tour, CJEU, case C-158/21, *Ministerio Fiscal*, *Abogacía del Estado, Partido político VOX v. Gordi*, *Puidgemont et al*., 14 July 2022, ECLI:EU:C:2022:573.
[28]*LM*, para. 61.
[29]Opinion of AG Sharpston, CJEU case C-396/11, *Radu*, 18 October 2012, ECLI:EU:C:2012:648, para 83.
[30]CJEU, case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire émission) L and P*, 17 December 2020, ECLI:EU:C:2020:1033.
[31]*L and P*, para. 43.

from serious rule of law deficiencies unquestionably qualifies as issuing judicial authority for a EAW, thanks to the CJEUs insistence on *LM* at the expense of human rights and the rule of law. The test is designed to justify even the most gruesome national-level rule of law deficiencies no matter what. However independent the individual judge, surrendering anyone to Poland today is particularly questionable from the point of view of fundamental rights, since it is well established by the CJEU and ECtHR that *all* the highest courts in the Country are irregularly composed, including the criminal chamber of the Polish Supreme Court. Appeals are thus unquestionably and surely bound to result in Article 6 ECHR rights violations of anyone surrendered, as CJEU knows very well.

VI. CJEU Illegality Standard Applied to itself in the *Sharpston* Cases

The CJEU acquired a rare chance to test the judicial independence and irremovability standards as applied to its *own members* as a result of Brexit. The departure of the UK on 1 February 2020 resulted in the shrinking of the membership of the Court, as all the CJEU judges appointed by the UK stopped being members of the Court on the day of Brexit. The same did not apply to AG Sharpston: since the Treaties did not require AGs to resign upon the departure of the Member State of their nationality from the Union, she continued serving on the Court past the Brexit date. This situation displeased some Member States,[32] and a political decision was taken to interpret AG Sharpston's office as affected by Brexit (Council of the European Union, 2020) in direct violation of the express wording of the Treaties, which did not make such a connection.

The *Herren der Verträge* thus decided to amend the Treaties by a political agreement *inter se* and appoint a Greek gentleman as an 'AG' although no vacancy existed and the cardinal principle of irremovability in CJEU and ECtHR case-law should have been applied to AG Sharpston. Marking a radical difference with the situation in Poland, the President of the Court seemingly assisted the Member States in breaking the law and removing a sitting member whose mandate has not expired, in breach of the Treaties and underlying principles of judicial independence (see Kochenov and Butler, 2022). AG Sharpston brought a number of actions in front of the General Court and the action of the Member States initiating the unlawful appointment was briefly suspended: Judge Collins hearing the case reasoned that 'the negative consequences of replacing a lawfully appointed office holder by someone who may ultimately be deemed to have been appointed unlawfully, are self-evident. Such a scenario is not in the interests of the applicant nor in those of her possible successor.'[33] He gave the Member States and the Council several days to present their arguments. The Member States and the Court, in a farcical move of aberration of justice, orchestrated an *ex parte* urgent appeal against a non-final interim measure, allowing the Vice President of the Court of Justice to *de facto* hijack the case and dismiss it as 'prima facie' having 'no prospects of success'.[34] The Greek usurper was installed *even before* AG Sharpston (2021) learnt about the appeal against Judge Collins' order and she was never given a chance to present her case formally again.

[32]This is especially true in the case of France, judging by the unverifiable materials received by one of the authors from a whistleblower at the Court (on file with Prof. Kochenov).
[33]Case T-550/20 R, *Sharpston* (Order of the Judge Hearing Applications for Interim Measures), para. 13
[34]Case C-423/20 P(R), *Council v Sharpston* (Order of the Vice-President), para. 29; Case C-424/20 P(R), *Council and Representatives of the Governments of the Member States v Sharpston*, (Order of the Vice-President), para. 29.

The Vice President of the Court of Justice was clear that the action of the Member States was a 'common accord' under Article 253 TFEU and was unreviewable no matter what,[35] siding with the abuse of the Court's independence and dismissing outright the basic idea that Article 19 TEU contains the same principles and applies equally to the national and supranational courts alike. The Vice President 'purported to decide the entire case on an ex parte application against an ex parte freezing order' (Rozenberg, 2020) (which was not final) to the end that, in a nutshell, the CJEU does not enjoy independence from the Member States. The outcome of the case was such that the Member States were allowed by the Court absolute room for manœuvre in mingling with the Court's composition including the instances where their intervention was not only *ultra vires*, but also directly *contra legem* and making the concerns of Judge Collins of the General Court more acute: what is the power of the Court's decisions if its composition as such is tainted by manifest illegality? While the Court of Justice preferred not to say, dismissing all the cases and denying independence to the General Court too, which was de facto pre-empted by the Vice President of the Court of Justice in the *Sharpston* cases,[36] the answer based on its own standards of judicial independence, as well as the key case-law on the matter from the ECtHR is quite clear and alarming: a Court open to absolute interference by the sovereign in direct contradiction with the letter and the spirit of the law in a context where such interventions are not reviewable, is not a 'tribunal established by law' in the sense of *Xero Flor*. Even more, *Grzęda* indicates that an unlawfully appointed individual taints compliance with Article 6(1) ECHR, as an impostor cannot adjudicate and the panel is thus improperly composed. It appears, thus, that the CJEU applies a radically different standard of judicial independence to itself – the one that directly contradicts its own case-law related to the PiS attacks on Polish courts and which is in prima facie violation of the ECtHR standard.

The new 'standard' of judicial independence established by the Court of Justice in the *Sharpston* cases is thus the most deficient among all the standards present in the European legal space. It does not only directly contradict the CJEU's own case-law on irremovability of judges and security of tenure, but also the ECtHR standard, which is more demanding. Speaking openly, the 'standard' comes down to allowing for a *carte blanche* to unlimited interference by the political powers with the Court's composition in the absence of any references to the law or basic legality. The *Sharpston* cases are thus a no legality standard. If applied to the Polish Rule of Law situation, the *Sharpston* standard would have cleared PiS attacks on the independence of the Polish courts as fully legitimate. The most important court in the framework of a project of integration through law thus emerged as falling short of meeting the basic European standards of what is a 'tribunal established by law' – an immensely dangerous deficiency. What is particularly puzzling is that it came in the context where the Court's unlawful servility vis-à-vis the Member States was also absolutely unnecessary, given that AG Sharpston had only one year left to serve.

[35]Ibid (identical wording in both cases).
[36]AG Sharpston's further actions and appeals were thus dismissed on the grounds, which contradict the very idea of judicial independence: the General Court and later the Court of Justice found the issue outwith the ambit of judicial review no matter what, and also ruled that the countless procedural irregularities depriving AG Sharpston of her rights were not the matter of her appeals (Kochenov and Butler, 2022).

Conclusion: Saving *Bosphorus* and EU Values

For the past one and a half decades the ECtHR has presumed that ECHR obligations are respected when states implement EU law, given that the protection of fundamental rights afforded by the EU was in principle equivalent to that of the Convention system.[37] But the ECtHR also made clear that this *Bosphorus* presumption is rebuttable, even if the threshold was high.[38] The equivalence in human rights protection can only be rebutted if a manifest deficiency is established.

For a long time the presumption proved to be well founded. The multiplication of judicial independence standards in the EU, which now includes several standards in direct contravention of the basic requirements of Article 6(1) ECHR could mark an unfortunate beginning of a new era. Indeed, when CJEU insists on accepting preliminary references from the bodies not established by law and where the CJEU itself, allows for unchecked unlawful interference by the Member States into its own composition, the question arises whether the principles cherished by the two systems are really the same. Granted, the EU in not a member of the ECHR, yet, the basic adherence to the key principles of Article 6(1) ECHR as well as own law is still to be expected of the CJEU – and this is what is missing from the diverse and incoherent judicial independence picture painted by CJEU in the interests of 'judicial dialogue', 'mutual trust' and other procedural approaches to EU law. Worse still, there is a set of laws in the area of freedom, security and justice, which were adopted along the principle of mutual trust, and where member states are specifically called upon to lower their scrutiny and almost automatically recognize eachothers' decisions. As the CJEU held in Opinion 2/13 essentially vetoing EU accession to the ECHR, when implementing EU law, Member States may be required to presume that fundamental rights have been observed by all other Member States, meaning that 'save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU'.[39] The FD EAW is a schoolbook example. Once the presumption of the lawful composition of national courts established in *Getin Noble Bank* is taken into account, the picture is more alarming. In fact, EU law directly threatens to obstruct the proper functioning of the Convention in its territory as a result of the CJEU's astonishingly short-sighted approach chronically valuing procedural EU law above the essence of substantive human rights. Procedural automatism with hardly any human rights scrutiny fits poorly with the ECHR and endangers fundamental rights of countless Europeans.

The ECtHR tried to avoid an open conflict with EU law for a long time, and the *Bosphorus*-presumption allowed it to show deference. But already in 2016 in *Avotiņš v Latvia*,[40] it warned that mutual trust must have its limits under the Convention.[41] In other cases it specifically stated that in the context of the execution of EAWs, the mutual

[37]ECtHR, *Bosphorus v. Ireland*; ECtHR, *Michaud v. France*.
[38]Also, certain conditions need to be satisfied for the *Bosphorus*-presumption to kick in. First, it applies, if the Member State had no discretionary power when applying EU law. Secondly, the full potential of the EU's supervisory mechanism must have been exhausted, so that the CJEU was given an opportunity to have a say on the human rights element of an EU law related controversy, before the case reaches the Strasbourg court.
[39]CJEU, Opinion 2/13, para. 49.
[40]ECtHR *Avotiņš v. Latvia*.
[41]*Avotiņš*, para. 114.

recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights.[42]

Finally, in *Bivolaru and Moldovan v France*[43] the ECtHR held – for the first time in history – that the *Bosphorus*-presumption was rebutted. *Bivolaru and Moldovan* arose from another EAW case and France was condemned for not paying due regard to its ECHR obligations and violated Article 3 ECHR when surrendering Mr. Moldovan to Romania, where there was a real risk of inadequate detention conditions (see Krommendijk and de Vries, 2021).

With regard to fair trial rights, the ECtHR has thus far been still satisfied with executing states checking only whether a flagrant denial of a fair trial in the requesting country may occur, which, as we have argued above, is a rather high test.[44] If these ECtHR cases were taken in isolation, the *LM* test would seem higher when it allows the suspension of surrender in case of a real risk of a breach of the fundamental right to a fair trial. But as we have shown above, the test is unworkable in practice. And if one considers ECtHR cases on judicial independence, the Strasbourg approach seems to be much more sensitive to the core aspects of the rule of law – and since judicial independence and human rights are two sides of the same coin – also human rights.

Should the CJEU however push further for an understanding that does not sufficiently take into account violations of judicial independence and thus fair trials rights or ignores outright that the body in question is not lawfully established (that is, *LM*, *Sharpston* and *Getin Noble Bank* case-law), the gap between the Convention system and EU law may widen, and more Strasbourg condemnations can be expected. This will be detrimental for the European human rights protection system, but also for EU law.

Since Member States are not in the position to amend EU laws unilaterally, they will be placed between a rock and a hard place, where they will be forced to choose between their EU law and ECHR obligations. Either way, serious damage will be done to EU law and the multi-layered European system of fundamental rights protection.

The diverging and at times self-contradictory CJEU case-law on judicial independence and fair trial did not have to develop this way: a number of European courts demonstrate how the vital rule of law issues can be solved without endangering the system of values underpinning the integration project. From President Baudenbacher's (2020, 2019, pp. 318–21) principled position to save the EFTA Court's legitimacy to the ECHR case-law on Icelandic and Polish courts, numerous examples point to the fact that being unprincipled about the core features of a 'lawful judge', or caring little about the human rights component of the EAW – the path chosen by the CJEU – is absolutely unnecessary in the world of the rule of law. Replacing clear standards with a murky self-contradictory context for the reasons oblivious of the rule of law and fundamental rights protection while failing to apply any standard to itself is not the way to go.

[42]ECtHR, *Romeo Castaño v. Belgium*, para. 24; ECtHR, *Pirozzi v. Belgium*, para. 71.
[43]ECtHR, *Bivolaru and Moldovan v. France*.
[44]See the inadmissibility decision in ECtHR, *Stapleton v Ireland*, paras 25–27; *Pirozzi v. Belgium*, para. 71.

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