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May 2021

The Substantive Requirements of Judicial Independence in the EU: Lessons from Times of Crisis

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Introduction

In 2018, it was clarified that,

> "every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection."[1]

This statement by the Court of Justice (ECJ) in *Associação Sindical dos Juízes Portugueses* (*ASJP*) represented an important clarification in respect to the possibility of protecting the independence of the EU judiciary under EU law,[2] which falls under the principle of effective judicial protection.[3] This was perhaps the most consequential development in the Court's judicial independence-related case law to date, in which the Court, "establishe[d] a general obligation for Member States to guarantee and respect the independence of their national courts and tribunals"[4] via their interpretation of Article 19(1) of the Treaty on European Union second subparagraph.[5] The year 2018 also witnessed "the first time a Member State was found to have failed to fulfil its Treaty obligations by violating the principle of judicial independence",[6] when the Commission brought proceedings against Poland via Article 258 TFEU alleging an infringement of Article 19(1) TEU second subparagraph.[7] As noted by Pech,

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[1] *Associação Sindical dos Juízes Portugueses* (C-64/16) EU:C:2018:117; [2018] 3 C.M.L.R. 16 *("ASJP")* [37].

[2] 'EU judiciary' here also includes national courts since part of their role in effect is to operate as 'decentralized EU courts' and hence 'Union judges': *e.g.* Jaremba and Mayoral, "The Europeanization of National Judiciaries" (2019) 26 J.E.P.P. 386, p. 386. See lately AG Bobek's Opinion in Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Minsku Mazowieckim/WB and others* (20 May 2021) ("*Prokuratura*") [139]: "…it is vital for the European judicial system categorically to insist on minimal guarantees of judicial independence and impartiality for all its constituent members, irrespective of whether in the individual case before a given court, EU law is in fact being applied".

[3] *ASJP* [40]–[41].

[4] L. Pech and S. Platon, "Judicial Independence Under Threat" (2018) 55 CMLRev. 1827, 1828.

[5] See in particular K. Lenaerts, "On Judicial Independence and the Quest for National, Supranational and Transnational Justice" in G. Selvik et al. (eds), *The Art of Judicial Reasoning* (Cham: Springer International 2019), p. 160.

[6] L. Pech, "The Rule of Law in the EU" (2020) RECONNECT Working Paper 7, p. 9.

[7] *Commission v Poland (Independence of the Supreme Court)* (C-619/18) EU:C:2019:531; [2020] 1 C.M.L.R. 6 *("ISC")*; *Commission v Poland (Judges' Retirement Age)* (C-192/18) EU:C:2019:924; [2020] 2 C.M.L.R. 4 *("JRA")*.

> The Court of Justice has since seen "a proliferation of cases" raising judicial independence issues originating from national courts with at this time of writing, close to twenty cases raising Article 19(1) TEU issues referred by Polish Courts, ten cases originating from Romanian courts, and one case from Hungary and from Malta.[8]

These cases stand out from the large body of Article 267 TFEU "court or tribunal" independence-related law,[9] in which independence is assessed only to verify whether a body can make a reference to the ECJ as an issue of admissibility. By contrast, in the more recent judicial independence cases, the Court has had to assess whether a public authority has taken measures related to the judiciary that infringed a substantive rule of EU law – i.e. the requirement of judicial independence itself contained in most notably Article 19 TEU, but also Article 47 of the EU Charter of Fundamental Rights (CFR). The advantage of Article 19 TEU from the perspective of invoking a requirement of judicial independence is that this provision does not have to meet the Charter's scope hurdle. As noted by the Court, Article 19 TEU "aims to guarantee effective judicial protection in 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) [CFR]".[10] Moreover, and importantly, Article 19 TEU also contains the requirement for members of the CJEU to be independent in Article 19(2) third subparagraph.[11] Hence, Article 19 TEU requires both arms of the EU judiciary to be independent, upholding access to justice across the EU. In his Opinion in the *Prokuratura* case, AG Bobek referred to the 'true nature' of the second paragraph of Article 19(1) TEU:

> "it is simply an extraordinary remedy for extraordinary cases. Therefore, the access threshold in terms of admissibility is and ought to remain low, while the substantive threshold for its breach is relatively high."[12]

He further clarified that in his view, the review to be carried out by the courts with respect to national measures 'allegedly affecting the independence of the national judiciary' "cannot but be limited to *pathological situations*".[13] Reference to the 'gravity' of the situation required to trigger any judicial independence review under EU level has been made elsewhere.[14] Taking the analogy with medicine further, any pathological situation would require a protocol towards a possible cure, the protocol reflecting the degree of gravity of the pathology. Hence the questions paused by this paper around the substance of the 'protocol'. In light of the recently-identified broad scope of Article 19 TEU's judicial independence requirement, it is worth therefore taking a moment to contemplate the substance of the notion of "judicial independence" in the EU. By focusing on the substantive requirements of judicial independence, this piece seeks to complement the rich body of literature that has investigated the scope of application of such rules,[15] with a focus on Article 19 TEU. However, it can be borne in mind that the substantive content of the judicial

[8] Pech, 'The Rule of Law in the EU', p. 29.

[9] To name but a few early and more recent cases, e.g.: *Pretore di Salò* (14/86) EU:C:1987:275 [7]; *Dorsch Consult* (C-54/96) EU:C:1997:413; [1998] 2 C.M.L.R. 237 [23] and more recently *Margarit Panicello* (C-503/15) EU:C:2017:126; [2017] 3 C.M.L.R. 7 [27], [36]–[40]; *MF 7 as v MAFRA as* (C-49/13) EU:C:2013:767 [22]–[23].

[10] *ISC* [50]; *AK and Others* (C-585/18, C-624–625/18) EU:C:2019:982; [2020] 2 C.M.L.R. 10 [82]. This is what was first said in effect in *ASJP* [29].

[11] *ASJP* [42]; *Vindel* (C-49/18) EU:C:2019:106; [2019] 2 C.M.L.R. 22 [65]. An alleged infringement of judicial independence of the EU Civil Service Tribunal was assessed under the Article 47 of the Charter of Fundamental Rights (CFR) requirement in *Simpson and HG* (Cases C-542–543/18 RX-II) EU:C:2020:232; [2020] 3 C.M.L.R. 27, discussed in Section 2.

[12] *Prokuratura* [134].

[13] *Prokuratura* [151].

[14] See recently AG Pikamäe Opinion in Case C-564/19, *Criminal proceedings against IS*, 15 April 2021 [97].

[15] e.g. Pech and Platon, "Judicial Independence Under Threat"; M. Bonelli and M. Claes, "Judicial Serendipity" (2018) 14 Eu.Const. 622; A. Torres Pérez, "From Portugal to Poland" (2020) 27 M.J. 105; B. Bakó, "Judges Sitting on the Warsaw-Budapest Express Train" (2020) 26 European Public Law 587, 595–601.

independence requirement contained in e.g. Articles 47 CFR and Article 267 TFEU is the same.[16] In that regard, the core benchmark used to determine what is required from the perspective of judicial independence as understood in the EU is whether the relevant measure under scrutiny is such as to "dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it."[17] How can one determine whether a given measure is liable to give rise to reasonable doubts in that respect? This piece argues that the substantive requirements of judicial independence can be found in an analysis of the "essential guarantees" and "fundamental rules" of judicial independence articulated throughout the Court's independence case law. In that respect, it will be demonstrated that the Court has found that for a body to be considered independent, certain "essential guarantees" of judicial independence must be provided, and that certain "fundamental rules" integral to the establishment or functioning of the judiciary must be respected.

Thus, Section 1 takes stock of those guarantees that the ECJ has deemed "essential" to safeguarding judicial independence. According to the Court, such essential guarantees include the provision of appropriate disciplinary regimes (1.1) and commensurate remuneration (1.2). An analysis of those guarantees serves to inform the identification of other possible "essential guarantees", which arguably include safeguards against executive discretion that results in undue external intervention or pressure on the judiciary (1.3).

The latter half of this paper then turns to the second category of substantive requirements of judicial independence identified in the research underlying this piece: respect for existing rules identified by the Court as "fundamental rules forming an integral part of the establishment and functioning of [the] judicial system".[18] In *Simpson and HG* (2020), the Court used this formula to determine when a breach of an existing rule related to the supranational EU judiciary also entails a breach of independence, by distinguishing between 'fundamental' and non-fundamental rules related to judicial appointments and term durations (2.1). However, it is further argued here that additional rules related to other types of measures – i.e. judicial remuneration and disciplinary regimes – can also be considered integral to the establishment and functioning of the judiciary (2.2).

In order to understand and demonstrate how these "essential guarantees" and "fundamental rules" of judicial independence operate in practice, several contemporary crisis-related issues are explored throughout these sections, including: the rule of law crises affecting several Member States,[19] the exit of the UK from the EU ("Brexit"),[20] economic crises that have arisen as a result of the global financial crisis

[16] By consistently making cross-references between cases involving different judicial independence provisions, the ECJ has made clear that judicial independence is given the same substantive interpretation: e.g. *AK and Others* [168]–[170]; *Banco de Santander* (C-274/14) EU:C:2020:17; [2020] 2 C.M.L.R. 29 [57]–[58].

[17] See *inter alia*: *Wilson* (C-506/04*)* EU:C:2006:587; [2007] 1 C.M.L.R. 7 [53]; *Pilato* (C-109/07) EU:C:2008:274 [24]; *D and A* (C-175/11) EU:C:2013:45; [2013] 2 C.M.L.R. 31 [97]; *TDC* (C-222/13) EU:C:2014:2265 [32]; *ISC* [74] and [108]; *JRA* [111] and [119]; *AK and Others* [123]; *Banco de Santander* [63]; *CETA* (Opinion 1/17) EU:C:2019:341; [2019] 3 C.M.L.R. 25 [204]; *UX* (C-658/18) EU:C:2020:572 [51]; *Simpson and HG* [71]. This formulation seems to come from Article 6(1) of the European Convention on Human Rights: eg Advocate General Opinion in *ISC* (C-619/18) EU:C:2019:325 [88]. It is this standard against which measures taken in respect to the judiciary have been scrutinised: e.g. in *ISC* [111] and [118]; *JRA* [124] and [127]; *AK and Others* [133], [142], and [153].

[18] *Simpson and HG* [75].

[19] For background information on the rule of law crises: D. Kochenov and P. Bárd, "The Last Soldier Standing?" in E. Hirsch Ballin, G. van der Schyff and M. Stremler (eds), *European Yearbook of Constitutional Law 2019* (The Hague: TMC Asser Press, 2020), p. 243; R.D. Kelemen and L. Pech, "The Uses and Abuses of Constitutional Pluralism" (2019) 21 C.Y.E.L.S 59; L. Pech and K. Scheppele, "Illiberalism Within" (2017) 19 C.Y.E.L.S. 3.

[20] The focus herein will be on the removal of Advocate General Sharpston. For a detailed overview, see: D. Kochenov and G. Butler, "The Independence and Lawful Composition of the Court of Justice of the European Union" (2020) Jean Monnet Working Paper 2/20, pp. 14–30.

and euro-area sovereign debt crises,[21] and now the COVID-19 pandemic, which has exacerbated the aforementioned rule of law and economic issues.[22] Though crises of different natures will inevitably come and go, this does not mean that the EU judiciary's judicial infrastructure cannot be made more resilient. Indeed, as will be seen, insight as to the substance of the judicial independence provisions can be drawn from these situations in a way that can be used to bolster the independence of the EU judiciary.

In light of the findings and arguments presented herein, the authors' approach is first that where a case concerns the introduction or application of a measure affecting the judiciary, under Article 19 TEU, the question should be whether the given measure fails to provide the "essential guarantees" of judicial independence required in that context. Second, where the case concerns a breach of a rule related to the judiciary (and this rule does not in itself fail to provide an essential guarantee of judicial independence), it can be asked whether that breach concerned a "fundamental rule" integral to the judiciary's establishment or functioning.[23] If the answer is "yes" to either question, the independence of the relevant judge or court required by Article 19 TEU has been infringed, and vice versa.

1. "Essential Guarantees" of Judicial Independence

Authorities may introduce or apply measures that do not comply with EU judicial independence rules. Based on an analysis of the Court's case law, the Court's concept of "essential guarantees" of judicial independence appears able to substantively determine whether a given measure affecting the judiciary infringes Article 19 TEU. To substantiate this argument, these subsections identify several "essential guarantees" of judicial independence articulated by the Court, including those related to disciplinary regimes (1.1), remuneration (1.2), and external intervention or pressure (1.3). Moreover, throughout these subsections, it is seen that the substance of the "essential guarantees" of judicial independence has been further fleshed out by the Court when faced with different types of contemporary crises that have arisen in the EU. Hence crises may assist in identifying the substance of judicial independence in the EU and can ultimately inform the overall strengthening of the independence of the EU judiciary.

1.1. Essential Guarantees: Disciplinary Regimes

One of the broader "essential guarantees" of judicial independence identified in the research underlying this piece relates to the appropriate structuring of the disciplinary regime, including removals from office. Specifically, measures relating to judicial discipline must "prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions".[24] To ensure this essential guarantee is upheld, several relevant safeguards must be provided, including rules that, firstly, define "conduct amounting to disciplinary offences and the penalties actually applicable" and, secondly, that "provide for the involvement of an independent body in accordance with a procedure that fully safeguards the rights

[21] As demonstrated by the cases arising in *ASJP* and *Vindel*, as well as the other examples mentioned in Section 1.2.1 below. For background on the euro area crisis context that gave rise to these cases, see e.g. B. de Witte, C. Kilpatrick and T. Beukers (eds), *Constitutional Change Through Euro-Crisis Law* (Cambridge: CUP, 2017), pp. 1–12; A. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford: OUP, 2015), pp. 11–14.

[22] e.g. as raised in *XX v OO* (C-220/20) EU:C: 2020:1022, which was however deemed inadmissible. See further: "COVID-19: MEPs Fear Impact on Justice System and Threat to Rule of Law" (7 May 2020), *European Parliament, https://www.europarl.europa.eu/news/en/press-room/20200507IPR78610/covid-19-meps-fear-impact-on-justice-system-and-threat-to-rule-of-law* [Accessed 29 January 2021]; I. Keilitz, "Illiberalism Enabled by the Coronavirus Pandemic" (2020) 11 I.J.C.A. 1, 8–10; Peršak, "Covid-19 and the Social Responses Thereto" (2020) 28 Eur.J.Crime.Crim.Law.Crim.Justice 205, 211–212; Hedgecoe, "Spain's Judiciary in the Dock" (26 October 2020). *POLITICO*, *https://www.politico.eu/article/spains-judiciary-in-the-dock/* [Accessed 29 October 2020]; e.g. Paseková, "Špičky justice se bouří proti návrhu Maláčové na snižování platů" (21 August 2020), *Česká justice*, *https://www.ceska-justice.cz/2020/08/spicky-justice-se-bouri-proti-navrhu-malacove-na-snizovani-platu-je-v-rozporu-s-rozhodnutim-ustavniho-soudu/* [Accessed 29 October 2020]. Galič, "Slovenian Civil Procedure in the Age of Covid-19" (2020) 5 Septentrio Reports 45, 49–50.

[23] *Simpson and HG* [75] (emphasis added).

[24] *ISC* [77]; *JRA* [114]; *LM* (C-216/18 PPU) EU:C:2018:586; [2019] 1 C.M.L.R. 18 [67].

enshrined in Articles 47 and 48 of the Charter".[25] Together, these requirements were deemed by the ECJ to "constitute a set of guarantees that are essential for safeguarding the independence of the judiciary."[26] This essential guarantee of an appropriate judicial disciplinary regime encompasses the essential guarantee of irremovability (1.1.1).

1.1.1. Essential Guarantee of Irremovability: The Polish Rule of Law Crisis

The most consequential types of measures that could fall under this essential guarantees' category are those related to removal. Indeed, questions concerning judicial independence as related to removal have consistently arisen before the Court in various contexts, e.g. in respect to the principle of effective judicial protection,[27] the EAW Framework Decision,[28] the CFR,[29] and now Article 19 TEU.[30] In the 2018 Polish rule of law crisis cases,[31] the ECJ began referring to this notion as the "principle of the irremovability"[32] – again as "essential" to judicial independence.[33] This essential guarantee against removability requires that "dismissals of members of that body should be determined by express legislative provisions",[34] which must "go beyond those provided for by the general rules of administrative law and employment law which apply in the event of an unlawful dismissal".[35] It also requires that judges may remain in post provided that they have not reached the obligatory retirement age or until the expiry of their mandate, where that mandate is for a fixed term.[36] However, it is clear that not all removals of members of the EU judiciary constitute an infringement of the essential guarantee against irremovability. The Court gave as examples of acceptable exceptions the removal of judges due to unfitness caused by incapacity or a serious breach of their obligations (provided the appropriate procedures are followed).[37] As an illustration, for the EU Courts the grounds for removals and the relevant procedure are provided in Article 6 of the CJEU Statute.[38]

For examples on how the essential guarantees against removability apply in practice, one can look to the Polish rule of law crisis cases *Independence of the Supreme Court* and *Judges' Retirement Age*, which concerned measures lowering judges' retirement ages. To establish whether the removal of a member of the EU judiciary is compatible with Article 19 TEU, according to the ECJ it must be asked whether a judge's removal is "warranted by legitimate and compelling grounds, subject to the principle of proportionality".[39] Curiously, however, the Court seemingly added a third criterion by requiring that the measure is also "not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it".[40] Interestingly, this third criterion corresponds to the formula consistently used by the ECJ to describe the core of "judicial independence" as such, as highlighted in the introduction. Thus, what the Court was seemingly implying is that exceptions to irremovability are actually only permissible if they do not infringe

[25] *ISC* [77]; *JRA* [114]; *LM* [67]. Also reiterated by Advocate General Tanchev in *AK and Others* (C-585/18, C-624/18 and C-625/18) EU:C:2019:551 [117]–[118]. The Commission also referred to these requirements as "a set of *guarantees* identified by the [ECJ] as *essential* for safeguarding the independence of the judiciary" in e.g. Commission, "2020 EU Justice Scoreboard" COM(2020) 306 final, p. 50. (emphasis added).
[26] *LM* [67]; *ISC* [77]; *JRA* [114].
[27] *Wilson* [46]–[48] and [51].
[28] *LM* [64].
[29] *CETA* [202] and [225].
[30] *ASJP* [45]; *Vindel* [66]; *ISC* [75]; *JRA* [112].
[31] i.e. *ISC* and *JRA*.
[32] *ISC* [76] and [96]; *JRA* [118]–[119].
[33] *ISC* [96].
[34] *Pilato* [24]; *D and A* [97]; *TDC* [32]; *LM* [66]; *Banco de Santander* [60].
[35] *Banco de Santander* [60]; *TDC* [35]–[36].
[36] *ISC* [76]; *JRA* [113].
[37] *ISC* [76]; *JRA* [113].
[38] Article 6(1) CJEU Statute TFEU Protocol (No 3) on the Statute of the Court of Justice of the European Union ("CJEU Statute")). This provision also applies to Advocate Generals in accordance with Article 8 CJEU Statute.
[39] *ISC* [76]; JRA 113
[40] *ISC* [79]; JRA 115

the requirements of judicial independence. The reasoning here is not flawless, since the Court's case law has established irremovability as a constitutive element of judicial independence,[41] rather than a self-standing principle. Moreover, it is difficult to imagine a situation in which the dismissal of a judge is done in pursuit of an illegitimate objective or disproportionately in a way that would not simultaneously give rise to reasonable doubts as to the body's imperviousness or neutrality (and vice versa). In any event, the application of either the first and second criteria or the third on its own would lead to the same result.

In terms of the Polish rule of law crisis cases, whereas the two examples of acceptable derogations to irremovability articulated by the ECJ were measures applicable to individual judges (unfitness and incapacity), the factual scenario encountered by the Court in *Independence of the Supreme Court* and *Judges' Retirement Age* concerned generally applicable measures. The relevant Polish measures applied to the entirety of the Supreme Court and national courts designated as "ordinary" courts. Thus, it was to be expected that when the ECJ applied the three-step "exception" test identified above it found that the measures did not pursue a legitimate objective. Rather, in *Independence of the Supreme Court* it was found that the measures were "such as to raise serious doubts as to whether the reform of the retirement age of serving judges of the Sąd Najwyższy (Supreme Court) was made in pursuance of such objectives, and not with the aim of side-lining a certain group of judges of that court."[42] A similar statement was made in *Judges' Retirement Age*.[43] Thus, such measures did not pursue legitimate objectives and were breaches of the "essential guarantee" against irremovability.[44]

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In sum, through these cases occurring in the context of the Polish rule of law crisis, the ECJ has clearly established that the substance of judicial independence as enshrined in *inter alia* Article 19 TEU requires the provision of certain "essential guarantees" against the removal of judges and to provide appropriate disciplinary regimes more generally for members of the EU judiciary. In his Opinion in *Prokurata* on whether EU law precludes the Polish practice of secondment of judges to higher courts and their termination at the discretion of the Minister of Justice who is at the same time the General Prosecutor, AG Bobek indicated that the concept of judicial independence has an 'external' and an 'internal' dimension: "The *external* aspect (or independent *stricto sensu*) requires the court to be protected from external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them… . The *internal* aspect is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests as regards the subject matter of those proceedings."[45]

1.2. Essential Guarantee of Commensurate Remuneration

In addition to essential guarantees related to disciplinary regimes, the Court has also stated that "the receipt by those members [of the judiciary] of a level of remuneration commensurate with the importance of the functions they carry out constitutes a *guarantee essential* to judicial independence".[46] The Court considers this necessary in order to ensure the judiciary is "protected against external interventions or

[41] Indeed, the ECJ claimed in *ISC* [96] and JRA [125] that irremovability "is inherent in judicial independence".
[42] *ISC* [82].
[43] *JRA* [127].
[44] *ISC* [96]; *JRA* [130].
[45] Cases C-748/19 to C-754/19 *Prokurata* [173]-[174].
[46] Emphasis added. *ASJP* [45]; *LM* [64]; *Vindel* [64]; Case C-274/14 *Banco de Santander* AG Hogan Opinion [2019] EU:C:2019:802 [6]. *CETA* 202; *RH* (C-8/19 PPU) EU:C:2019:110 [47]. This requirement is reiterated in Principle III(1)(b) Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers (1994), Council of Europe Consultative Council of European Judges (CCJE) (2001) OP N°1 [61], Council of Europe, European Charter on the Statute for Judges (DAJ/DOC (98) 23) [6].

pressure liable to impair the independent judgment of its members and to influence their decisions".[47] Similar reasoning has been articulated by several bodies of the Council of Europe, e.g. in stating that commensurate remuneration of judges as an aspect of judicial independence is necessary in order "to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence".[48] The "commensurate remuneration" rule does not necessarily prohibit the reduction of the remuneration of a judge or the judiciary more generally. This was illustrated when the issues of economic crisis and judicial remuneration intersected before the Court of Justice in *ASJP* and *Vindel*. Interestingly, however, the ECJ took markedly different analytical approaches in these two cases, as will be seen in Section 1.2.1, which proposes a framework reconciling these approaches. Section 1.2.2 then applies these considerations to a case pending before the ECJ that has emerged in the notably different context of the Hungarian rule of law crisis.

1.2.1 Reductions of judicial remuneration as a response to an economic crisis: *ASJP* and *Vindel*

In *ASJP*, the ECJ assessed the application to the plaintiffs (a particular Portuguese Tribunal) of a measure reducing the salary of civil servants. Without saying as much, the Court in effect applied a justification analysis in their substantive assessment of the national measure to determine it was not precluded by Article 19(1) TEU's judicial independence requirement. First, the ECJ emphasised several features of the measures before finding that they could not "be perceived as being specifically adopted in respect of the members of the Tribunal" but "on the contrary" were of a general in nature and part of an austerity effort.[49]. These features included: 1) the measures' link to efforts aimed at reducing Portugal's excessive budget deficit,[50] 2) that the reduction accorded to the level of remuneration (rather than sector of employment),[51] and 3) that the measures were applied to civil servants more generally.[52] This can be seen as the Court's demonstration that the measure sought to achieve a legitimate objective. Second, the Court went on to highlight that the salary-reduction measure was "temporary in nature"[53] thus suggesting that it was also proportionate.

This stands in contrast to the approach taken by the ECJ in the subsequent judicial remuneration case *Vindel*, which concerned a preliminary reference on the legality of the application of very similar measures to a particular individual. First, the ECJ again nodded to the apparently legitimate objective and proportionality of the generally applicable austerity measures.[54] Second, and significantly, the Court said it had to be determined "whether [Mr. Vindel] receives, following the salary reduction at issue in the main proceedings, a level of remuneration commensurate with the importance of the duties *he* performs".[55] After giving guidance as to the factors that may be relevant in answering that question, the Court left the matter to be decided by the national court.[56] This is all the more appropriate when dealing with such a contextually-dependent socio-economic issue; a national court is better suited to rule on whether the judge's remuneration "is commensurate with the importance of the duties he performs and, accordingly, guarantees his independent judgment"[57] in a national economic crisis.

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[47] *Vindel* [64]; *ASJP* [44]; see similarly: *RH* [47]; *LM* [64].
[48] Council of Europe, European Charter on the Statute for Judges [6.1]. See similarly CCJE, Magna Carta of Judges (CCJE (2010)3 Final) [4]; Council of Europe Committee of Ministers CM/Rec(2010)12 [54]; Council of Europe Committee of Ministers CM(2016)36 final Action 2.3. See also P. Russel "Toward a General Theory of Judicial Independence" in P. Russell and D. O'Brien, *Judicial Independence in the Age of Democracy* (Charlottesville: University of Virginia Press, 2001) 18.
[49] *ASJP* [49].
[50] *ASJP* [46].
[51] *ASJP* [47].
[52] *ASJP* [48].
[53] *ASJP* [50].
[54] *ASJP* [67].
[55] *Vindel* [68] (emphasis added).
[56] *Vindel* [68]–[72].
[57] *Vindel* [72].

Why the ECJ did not tell the referring national court in *ASJP* to wrestle with the same sensitive but important question can only be subject to speculation. However, compared to *Vindel*, in *ASJP* the Court arguably did not completely answer the question at hand: i.e. was the remuneration of the relevant judges of the Portuguese Tribunal commensurate to the importance of *their* tasks after the application to them of the otherwise generally justifiable measure? This is not to say that the general justifiability question should not be asked at all. It is still practical to first ask whether the measure is justifiable more generally from the perspective of judicial independence, as, if it is not, then there is no need to ask the more difficult question of whether the essential guarantee of commensurate remuneration is safeguarded. This was seen e.g. in Slovenia, where the Constitutional Court found that the degree of the reduction of judicial remuneration did not correspond to the reduction in the salaries of other members of the civil service.[58] However, it appears from *Vindel* that even where measures that seek to achieve a legitimate objective and are generally proportionate in respect to their application of the judiciary as such, it can still be asked (and should be asked if there are doubts in this respect) whether a judge's remuneration is commensurate to the importance of their task. This two-step test can be considered an analytical framework for substantively assessing whether a given reduction of judicial remuneration is compatible with the essential guarantee of commensurate remuneration required by Article 19 TEU.

These observations are particularly relevant given that the adoption of general measures lowering the remuneration of civil servants in the face of financial crises has become a widespread austerity tool in response to economic crises more generally. As seen in Portugal and Spain, the underlying reasons for the reductions of judicial salaries are generally based on arguments of a need for national solidarity in times of economic difficulty. The idea is that where the rest of the country takes the hit, including the civil service, so too should the judiciary. This has occurred in *inter alia* Latvia,[59] Czech Republic,[60] Cyprus,[61] Greece,[62] Slovenia,[63] Slovakia,[64] as well as Spain, Lithuania, Romania, and Ireland.[65] In light of the unprecedented economic shock that has arisen from the COVID-19 crisis, one can expect similar measures (and corresponding challenges) to arise in the years to come across a range of Member States. Such a debate has indeed resurfaced in the Czech Republic, where the Minister of Interior has proposed a permanent reduction to judges salaries (rather than a suspension or temporary reduction) alleged to be justified by the current crisis.[66] Accordingly, to prevent the application to them of such measures, the members of EU judiciaries affected thereby have and may continue to invoke norms of judicial independence, and it is argued here that such claims must be scrutinised against the substantive judicial independence requirement of the essential guarantee of commensurate remuneration established by the ECJ. These claims can be examined within the substantive analytical framework identified herein.

1.2.2. The Hungarian Remuneration of Judges: Incommensurate?

[58] K. Zajc, "Independence of Judiciary in Slovenia" (2014) 22 Acta Histriae 741, 754.
[59] Constitutional Court Case Nos. 2009-11-01, 2009-111-01, 2011-10-01, and 2016-31-01.
[60] Czech Republic Constitutional Court, *Judges' Salaries* (2005/07/14) PL. ÚS 34/04.
[61] Supreme Court of Cyprus, Joined Cases No. 397/2012 and 480/2012, *Fylactou and others v. Republic of Cyprus* (2013) 3 CLR 565 (in Greek) with respect to the remuneration and other conditions of services of judges in Cyprus under Article 158(3) of the Cyprus Constitution safeguarding the independence of the judiciary against measures restricting their compensation (deductions in salaries and contributions) found unconstitutional.
[62] E. Kousta, "Greece: Supreme Court rules that salary cuts for judges are unconstitutional" (16 October 2014), *Eurofound, https://www.eurofound.europa.eu/publications/article/2014/greece-supreme-court-rules-that-salary-cuts-for-judges-are-unconstitutional* [Accessed 30 January 2021].
[63] Constitutional Court decision No. U-I-60/06; Zajc, "Independence of Judiciary in Slovenia", 754–756.
[64] A. Di Gregorio, "Constitutional Courts and the Rule of Law in the New EU Member States" (2019) 44 Review of Central and East European Law 202, s. 4.
[65] F. van Dijk and H. Dumbrava, "Judiciary in Times of Scarcity" (2013) 5 International Journal for Court Administration 15.
[66] Paseková, "Špičky justice".

In contrast to the measures adopted in the context of economic crises in Spain and Portugal that did not infringe EU judicial independence requirements, Hungarian measures to be potentially scrutinised in the *IS* referral currently pending before the ECJ are more likely to infringe the essential guarantee of commensurate remuneration.[67] The referring Hungarian judge asked the ECJ whether Article 19(1) TEU or Article 47 CFR must "be interpreted as precluding a situation in which, since 1 September 2018 ― unlike the practice followed in previous decades — Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform".[68] As highlighted by Szabó, Hungarian judges' wages have not been increased for fifteen years and are thus now relatively low: "While in 2004 the basic pay for judges was 2.09 times higher than the average pay, in 2019 the ratio is only 1.23".[69]

An application of the justification framework deployed in *ASJP* to the facts and questions referred in *IS* arguably casts doubt on their compliance with the essential guarantee of commensurate remuneration. First, unlike the measures scrutinised in *ASJP* and *Vindel* – which were adopted in the context of economic crises – the measures referred for scrutiny in the *IS* referral have been adopted in the context of what is widely seen as rule of law crisis (as were those adopted in the Polish *Independence of the Supreme Court* and *Judges' Retirement Age* cases).[70] Thus, unlike the pursuit of addressing an economic crisis with national austerity measures, in *IS* it is more likely that these measures have the wider illegitimate objective of dismantling the independence of the judiciary.[71] The idea that the remuneration is proportionate is also cast in doubt, e.g. by the fact that the Council of Europe's Consultative Council of European Judges (CCJE) considers that to guarantee commensurate remuneration it was generally important "to ensure at least de facto provision for salary increases in line with the cost of living".[72] Proportionality is further cast into by the fact that, according to the referring court, since September 2018, prosecutors in Hungary of the same rank and length of service[73] receive greater salaries than judges. This too conflicts with the position of the Venice Commission's Report on Judicial Independence that judicial remuneration "should be determined

[67] *IS* (C-564/19) (in progress). AG Pikamäe's Opinion in Case C-564/19 *IS* issued on 15 April 2021 found the questions relating to the direct appointment by the President of the National Office of Justice of Hungary of temporary senior judges and to judges' pay 'irrelevant to the outcome of the criminal proceedings at issue' and therefore inadmissible. The AG however gave his interpretation of the fourth and fifth questions as "[i]t is thus conceivable that the supplementary request for a preliminary ruling could be regarded as an indivisible whole, in which the fourth and fifth questions are closely linked, if not indissociable' [98]. The fourth question related to "whether Article 267 TFEU must be interpreted as precluding the adoption by the highest national court, hearing an appeal in the interests of the law, of a judgment declaring the order for reference unlawful – without, however, affecting its legal effects as regards the stay of the main proceedings and the continuation of the preliminary ruling procedure – on the grounds that the questions referred are not necessary to the determination of the case and seek a declaration that national law is incompatible with EU law" [31]. The fifth question related to "whether Article 19(1) TEU, Article 47 of the Charter and Article 267 TFEU must be interpreted as precluding national law which allows disciplinary proceedings to be brought against a judge on the ground that he or she submitted a request for a preliminary ruling to the Court" [93].

[68] Question 3(a) of the Request (available at [2020] OJ C 95/6)

[69] D. Szabó, "A Hungarian Judge Seeks Protection from the CJEU – Part I" (28 July 2019), *Verfassungsblog*, https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/ [Accessed 30 January 2021].

[70] *ISC* and *JRA*.

[71] As noted, in *ISC* the objective was seemingly "side-lining" the judiciary. The objective of the measure in *JRA* appeared to be "to enable the Minister for Justice, acting in his discretion, to remove…certain groups of judges serving in the ordinary Polish courts" [127]. On dismantling of the rule of law and hence also the independence of the judiciary in Hungary as part of the rule of law crisis, see e.g. B. Bakó, "Judges Sitting on the Warsaw-Budapest Express Train", 591–595; European Parliament, *Resolution on the situation of fundamental rights: Standards and practices in Hungary*, 2012/2130(INI), AV–BC and [27]–[38]; K. Kovács and K.L. Scheppele, "The Fragility of an Independent Judiciary" (2018) 51 Communist and Post-Communist Studies 189, 191–194.

[72] CCJE (2001) OP N°1 [62].

[73] *IS* Question 3.A.

in the light of the social conditions in the country and *compared to the level of remuneration of higher civil servants*."[74]

Thus, the remuneration measures applicable to the judiciary in the context of the *IS* case seems to constitute a real reduction in wages that neither pursued a legitimate objective nor were proportionate in nature. Moreover, while an application of the individually-focused assessment used by the ECJ in *Vindel* would require determining whether the remuneration of a *particular* judge or court is commensurate to the nature of *their* tasks, this evidently would not be the case where the measure in its general application is itself an infringement of the essential guarantee of commensurate remuneration. As pointed out by Bárd, however, whether in *IS* the ECJ will suggest that such a judicial independence infringement has occurred seems unlikely.[75] Amongst other issues, the questions referred do not seem strictly related to the case before the national court and yet the defendant in the national case will have to be personally affected by the measures for the question to be relevant to the case at hand,[76] as seen in *Miasto Lowicz*.[77] This seems to be confirmed to some extent by AG Pikamäe in his Opinion in the *IS* case. For this question to be effectively dealt with, affected Hungarian judges could themselves initiate national legal proceedings and then have the dispute referred to the ECJ, (though this may be unlikely if the case comes before a national court affected by Hungary's other general rule of law backsliding measures)[78] or it may be time for the initiation of infringement proceedings under Article 258 TFEU or Article 259 TFEU.[79] Regardless, this case stemming from the Hungarian rule of law crisis case provides further insight as to the application of the essential guarantee of commensurate remuneration required as part of the protection of judicial independence by Article 19 TEU.

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In sum, these cases that have emerged in the context of economic and rule of law crises have demonstrated that the Court's notion of "essential guarantees" of judicial independence also requires an essential guarantee of commensurate remuneration. This substantive requirement can be used to assess general measures affecting the remuneration of a branch of the EU judiciary and/or the application of those measures to a particular judge or court.

1.3. Essential Guarantee of Protection from External Intervention or Pressure

In regards to the final "essential guarantee" of judicial independence identified in the research underlying this piece, throughout its case law, the Court has reiterated that judicial independence requires protection from "external intervention or pressure liable to jeopardise the independent judgment of its members".[80] More specifically, it requires substantive rules "particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members".[81] Like the guarantees required in terms of disciplinary regimes and remuneration, the Court has referred to that

[74] Venice Commission, "Report on the Independence of the Judicial System Part I" (2010) CDL-AD(2010)004 [46]. (emphasis added).

[75] P. Bárd, ""Am I Independent?"" (27 September 2019), *RECONNECT*, *https://reconnect-europe.eu/blog/politics-newep-krum-2* [Accessed 30 January 2021].

[76] P. Bárd, ""Am I Independent?"". Indeed, the actual case concerns a Swedish national charged with criminal offences.

[77] *Miasto Łowicz* [52].

[78] e.g. as pointed out in points 7–10 of the request in *IS*, the head of the National Council of the Judiciary (a Parliament appointee) withdrew calls for applications to fill judicial posts and filled them via nomination.

[79] Under these provisions (and unlike under Article 267 TFEU), "the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts": *Miasto Lowicz* [47].

[80] *D and A* [96].

[81] Originating in *Wilson* [51] and [53]. See also: *D and A* [97]; *LM* [66]; *ISC* [74]; *JRA* [111]; *Simpson and HG* [71]; *CETA* [204]; *AK and Others* [134].

"freedom" from external intervention or pressure as "essential".[82] For the sake of consistency, this essential "freedom" will be referred to here as an "essential guarantee" of judicial independence. Hence, this essential guarantee requiring freedom from external intervention and pressure is also a substantive requirement of judicial independence as required inter alia by Article 19 TEU.

1.3.1 External Intervention: Appointments, Term Duration, Remuneration

The Court's rule of law crisis cases dealt with infringements of this essential guarantee in the context of several measures related to term extensions and appointments. First, the Court's decisions in *Independence of the Supreme Court* and *Judges' Retirement Age* both found the new Polish measures governing the extension of term durations for the Supreme Court and ordinary courts problematic in light of the fact that the executive branch was granted discretion to provide for an "extension of the period of judicial activity beyond the normal retirement age".[83] Second, the same issue of discretion was then seen with respect to new measures governing the appointments of judges to the Disciplinary Chamber of the Supreme Court in *AK and Others*.[84] In terms of measures considered "discretionary", where an executive's extension decision is not governed by any objective and verifiable criteria (or criteria that are "too vague and unverifiable"[85]), does not have to provide reasons, and/or is not amenable to judicial review,[86] such power is discretionary.[87] Hence, measures that grant the executive "discretion" – without the presence of any additional independent body able to make such decisions more objectively[88] – to make such extensions and appointments would be such as to exert an external influence of an "indirect"[89] type liable to have an effect on the decisions of the judges concerned.[90] Thus, it can be observed from these cases that measures conferring discretion in matters related to term durations and appointments are particularly likely to conflict with the obligation to provide essential guarantees from external intervention or pressure.

These considerations are also relevant to other matters concerning the operation of the judiciary, such as remuneration. Measures referred to in the Hungarian *IS* preliminary reference can be used as an illustration.[91] In their referral, the national court questioned whether judicial independence precludes a "practice of discretionary bonuses applied by holders of high level posts",[92] i.e. the President of the

[82] *LM* [64]; *Wilson* [51].
[83] *ISC* [110]; *JRA* [118].
[84] In *AK and Others*, the Court highlighted that the discretion of the President in appointing judges to the Disciplinary Chamber could be objectively circumscribed by the involvement of the National Council of the Judiciary [137], but the national court had to determine whether that body itself was independent (the ECJ firmly suggested this was not the case in [141]–[152]).
[85] *ISC* [122]. Notably, the situation appeared to be different in the Maltese referral *Repubblika* – where Advocate General Hogan opined that Art. 19(1) TEU and Art 47 CFR did not necessarily preclude Constitutional Court appointments by the Prime Minister [93], in the sense that objective criteria were apparently laid down in the Constitution [91]: *Repubblika* (C-896/19) EU:C:2020:1055.
[86] A pertinent issue in *AB and Others* (C-824/18) EU:C:2020:1053 in which the Advocate General opined that the referring court could disregard the national law designed to remove judicial review of the relevant appointment decisions and declare itself competent to rule on the appeals to that effect: [135]–[136].
[87] *ISC* [114]. It is arguably likely that the presence of just one or two of those factors (which happened to be present in this case) would be liable to give rise to reasonable doubts as to judicial independence.
[88] This was acknowledged as a possibility by the Court (*ISC* [115]; *AK and Others* [137]), but in *ISC* the relevant advisory body was deemed not sufficiently independent to circumscribe the President's discretion ([115]–[117]) and this was strongly suggested to be the case in *AK and Others* (141–145]). The presence of such an independent advisory body was one of the notable differences in *Repubblika* [91].
[89] *AK and Others* [125]; *ISC* [112].
[90] *ISC* para 112; *JRA* para 120. On judicial independence and term extensions, see: J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles* (London: BIICL 2015) [71] et seq; Opeskin, "Models of Judicial Tenure" (2015) 35 O.J.L.S. 627.
[91] *IS* (C-564/19) (in progress). Request available at [2020] OJ C95/6.
[92] *IS* Question 3.A.

National Judicial office (who is fully dependent on the legislative branch)[93] and court presidents selected by her.[94] Such discretionary bonuses are liable to conflict with the discussed essential guarantee against external intervention since they may influence the decision making of judges, as supported by the Venice Commission's opinion that "[b]onuses which include an element of discretion should be excluded."[95] Thus, along with measures conferring discretion in judicial term durations and appointments, measures conferring discretion related to judicial remuneration are also liable to conflict with the essential guarantee against external intervention and pressure required by inter alia Article 19 TEU's requirement of judicial independence.

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In essence, therefore, another substantive requirement of judicial independence in the EU is the essential guarantee from external intervention in respect to e.g. appointments, term duration, remuneration.

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To conclude, this Section 1 has argued that certain "essential guarantees" form part of the substance of the judicial independence requirement laid down in *inter alia* Article 19 TEU, as transpires from an analysis of ECJ case law. In particular, the Court has required essential guarantees: 1) related to the provision of appropriate judicial disciplinary regimes (in particular against removability), 2) of commensurate remuneration, and 3) against external intervention or pressure (as developed recently in *Repubblika*). This doctrine of "essential guarantees" and the substantive requirements flowing therefrom have been identified by analysing cases and measures taken in the context of rule of law and economic crises.

In that respect, in section 1.1, events connected to the Polish rule of law crisis highlighted the substance of the essential guarantees that must apply in terms of disciplinary regimes, including the removal of judges. Second, section 1.2 illustrated how economic crises in Spain and Portugal have given rise to difficult questions concerning the appropriate level of remuneration for judges in times of austerity and led to the identification of an analytical framework that can be applied in that regard. This framework – involving a general justification analysis followed by a verification of whether a judge's essential guarantee to commensurate remuneration is provided in the particular socio-economic context – can be used to assess future changes to judicial remuneration, such as those that may arise in light of economic hardship brought by the Covid-19 pandemic. Finally, on the topic of external intervention, the essential guarantees that may apply in that respect were explored in relation to the use of financial bonuses in Hungary's rule of law crisis. The analysis of these pertinent questions leading to the identification of the substantive requirements of judicial independence demonstrates that in times of crisis, valuable lessons can be learned that can assist in strengthening the independence of the EU judiciary.

The following Section 2 will now turn to discussing the assessment of the second category of substantive requirements of judicial independence: respect for "fundamental rules" integral to the establishment and functioning of the judiciary.

2. "Fundamental Rules" of Judicial Independence

In addition to essential guarantees, judicial independence as enshrined in inter alia Article 19 TEU also substantively requires compliance with certain existing rules considered "fundamental" to the EU judiciary. In that respect, to identify the types of rules related to the judiciary which, if breached, necessarily

[93] V. Vadász, "A Hungarian Judge Seeks Protection from the CJEU – Part II" (7 August 2019) *Verfassungsblog, https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/* [Accessed 28 January 2021].
[94] P. Bárd ""Am I Independent?""; D. Szabó, "A Hungarian Judge".
[95] Venice Commission, "Report on the Independence of the Judicial System Part I" [46]. They similarly state in [51] that "Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out."

also entail infringements of judicial independence, the Court clarified the existence of certain "fundamental rules forming an integral part of the establishment and functioning of that judicial system."[96] While the latter formula was only first introduced in *Simpson and HG* (2020) to discuss measures related to appointments and term duration of judges at the supranational level, it is argued here that the fundamental- and non-fundamental rule dichotomy can serve as a useful tool to determine when a breach of an existing rule related to the judiciary (otherwise compliant with the essential guarantees discussed above) also entails a breach of the EU judicial independence requirement contained in e.g. Article 19 TEU. Thus, after first asking whether a public authority has failed to uphold an "essential guarantee" of judicial independence, if this is answered in the negative, it can then be asked whether the relevant action under scrutiny nevertheless led to the breach of an existing "fundamental rule" integral to the establishment and/or functioning of the judiciary.

Elaborating on this "fundamental rules" doctrine, the subsections below seek to identify those substantive rules relating to the judiciary that may be "fundamental" in nature. Section 2.1 therefore begins by elaborating upon rules identified as fundamental by the ECJ in *Simpson and HG*, related in particular to judicial appointments and term durations. Section 2.2 then goes on to propose that there may also be fundamental rules governing the remuneration of judges and their disciplinary regimes (in particular removal). In the final subsection 2.3, the legality of Advocate General Sharpston's replacement in the wake of the Brexit crisis is explored from the perspective of fundamental rules, again demonstrating that useful insight as regards the substance of judicial independence may be gained through analyses of the difficult questions that may arise in times of crisis. This insight may be leveraged to strengthen the independence of the EU judiciary.

2.1. "Fundamental Rules" Integral to the Establishment and Functioning of the Judiciary: Judicial Appointments and Term Durations

The notion of "fundamental rules" related to judicial independence originates from the recent ECJ case of *Simpson and HG*, involving appointments to the former EU Civil Service Tribunal (CST). In that case, *three* judges were appointed on the basis of a list of candidates that was itself drawn up on the basis of a public call for applications to fill *two* posts on the CST, and so the Council had "disregarded the legal framework which it had itself laid down".[97] When this third appointment was challenged from the perspective of judicial independence, the Court stated that:

> an irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of [Article 47(2) CFR], particularly when that irregularity is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned, *which is the case when what is at issue are fundamental rules forming an integral part of the establishment and functioning of that judicial system.*[98]

This case demonstrates that the Court considers that breaches of some, but not all existing rules related to the judiciary – i.e. fundamental rules – will result in an infringement of judicial independence requirements.

In terms of the types of judiciary-related rules that are considered to fulfil this definition of "fundamental rules", in *Simpson and HG* the Court acknowledged several rules applicable to the CST that it deemed fundamental relating to judicial appointments (2.1.1) and term duration (2.1.2). A further exploration of the substance of the rules related to both these types of measures will now be undergone in the respective subsections below.

2.1.1. Fundamental Rules: Appointments

[96] *Simpson and HG* [75].
[97] *Simpson and HG* [61].
[98] *Simpson and HG* [75] (emphasis added).

First, since the factual scenario at hand in *Simpson and HG* concerned CST appointments, the ECJ sought to identify the rules integral specifically in respect to appointments to that Tribunal.[99] It found that these included 1) Article 257(4) TFEU and 2) (ex) Article 3 Annex I of the ECJ statute,[100] both provisions of EU primary law. Article 257(4) TFEU lays down the substantive conditions that must be met by appointees to specialised courts: they must be independent and "possess the ability required for appointment to judicial office".[101] Article 3 Annex I of the Statute provided: that judges would be appointed by the Council after consulting the Article 255 TFEU panel and that the Council would ensure a "balanced composition" on "as broad a geographical basis as possible"; 2) that any EU citizens fulfilling the Article 257(4) TFEU criteria may apply and that the Council must determine the rules governing the submission and processing of these applications; 3) for the establishment of a seven-person committee (whose operating rules would be determined by the Council); and 4) for the consultative role of this committee in drafting a list of candidates.[102]

As there was nothing to suggest in *Simpson and HG* that the Council's measure under scrutiny infringed these fundamental rules, the Council's "disregard for the public call for applications"[103] in the judicial appointment did not create a real risk of reasonable doubts arising as to the appointed judge's (or Chamber's) independence.[104] This can be seen as logical when one bears in mind that the legality of such an action was being assessed from the perspective of *judicial independence*,[105] without commenting on the availability of other legal avenues for those who may have missed out on the opportunity to apply to the relevant court or tribunal. The public call – unlike the provisions of primary law identified by the Court as fundamental – was not "integral" to the establishment or functioning of the judiciary.

Now that this case has been dissected, the following sections will turn to identifying those rules related to the establishment and functioning of the CJEU and national courts that are also arguably 'fundamental'.

2.1.1.1. Fundamental Rules: CJEU Appointments

While the CST is now defunct, the Court's reasoning can be applied by analogy to other courts in the EU judiciary to understand which rules related to their (re)appointments can be considered "fundamental rules", integral to the establishment or functioning of the judiciary that, if breached, would undermine independence. In terms of provisions for the appointment of CJEU members equivalent to those identified as fundamental for CST appointments, these can arguably be found in Articles 252–255 TFEU.

Articles 253 and 254 TFEU are the provisions for the ECJ and GC (respectively) that are equivalent to the one identified by the Court in *Simpson and HG* in respect to the CST – Article 257(4) TFEU. Article 254 TFEU is identical in terms of the substantive requirements that must be met by the Court appointees (requiring their independence and that they "possess the qualifications required for appointment to the highest judicial offices in their respective countries").[106] Article 253 TFEU adds that "jurisconsults of recognised competence" are also eligible for ECJ appointment. As for the procedural requirements, whereas Article 257(4) TFEU provides for unanimous appointment by the Council, Articles 253 and 254 TFEU both provides for unanimous appointment by the "governments of the Member States".[107] As for the equivalent provisions to ex Article 3 Annex I CJEU Statute (which, as mentioned, the Court also identified as "fundamental" in respect to the CST), these are contained in Articles 253 and TFEU 254,[108] as well as

[99] *Simpson and HG* 78.
[100] *Simpson and HG* 78.
[101] Article 257(4) TFEU first sentence.
[102] ex Article 3 Annex I CJEU Statute paras. 1–4 (respectively).
[103] *Simpson and HG* [77] and [81].
[104] *Simpson and HG* [79].
[105] And also, in this case, the "established by law" requirement. Advocate General Sharpston also agreed there was no infringement of independence in their Opinion: *Simpson and HG* (C-542–543/18 RX-II) [40].
[106] Article 253 first sentence and Article 254 second sentence TFEU.
[107] Article 253 first sentence and Article 254 second sentence TFEU.
[108] Article 3(1) first simply reiterated the substantive conditions in Article 257(4) TFEU.

Article 255 TFEU.[109] There is no equivalent to the Article 3(1) requirement that the candidate be a "citizen of the Union".[110] Moreover, as the appointment of CJEU members is tied to individual Member States,[111] there is no need for an equivalent to the ex-Article 3(1) provision of a "balanced composition... on as broad a geographical basis as possible". Similarly, since nominations to the CJEU are organised at the national level, there is no need for the Council to determine arrangements for the submission of applications.[112]

While the main actors involved in CST appointments were limited to the Council and the advisory selection committee,[113] the actors now involved in the CJEU (re)appointment procedures include a "Government of a Member State" (in their initial nominations),[114] the Article 255 TFEU Panel (in their review of the nominations), and the "governments of the Member States" (in the formal appointment).[115] What types of irregularities in CJEU appointments may these actors commit that constitute measures infringing fundamental rules?

First, regarding the nominating role of an individual Government of a Member State in the (re)appointment process, many Member States now have advisory committees established by law that are tasked with proposing candidates to the executive branch.[116] What happens if a Member State executive branch disregards or influences the selection committee process and hand picks their CJEU candidate? On the one hand, for its part the 255 Panel "attaches the greatest importance to compliance by Member States with national rules, where they have been put in place",[117] suggesting compliance with such rules is fundamental indeed. As a result, while minor irregularities in the national procedure related to CJEU appointments might not give rise to a finding by the Article 255 Panel that a proposed candidate is not independent, grave infringements of this procedure that indicate that the "fundamental rules" for CJEU appointees may not have been met would presumably result in a negative opinion from the committee, or at least further investigations to this effect.[118]

Second, as for the Article 255 Panel, if the appointing Governments of the Member States fail to seek the Panel's "opinion on candidates' suitability" this would undermine independence by infringing Article 253–255 TFEU, which were argued above to constitute a "fundamental rule". This is supported by the ECJ's reasoning in *Independence of the Supreme Court*, where the independent nature of ECJ appointments procedure was supported by the fact that such appointments require "the common accord of the Governments of the Member States, after consultation of the panel provided for in Article 255 TFEU."[119] What might happen if the governments of the Member States select a candidate who receives a negative opinion from the committee? None of the aforementioned TFEU provisions suggest that this is prohibited, so long as the selection committee is "consulted",[120] implying such a measure would be in compliance with these "fundamental rules" governing CJEU appointment.

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[109] Equivalent of ex Article 3(3) Annex I CJEU Statute for the consultative committee.
[110] ex Article 3(2) Annex I CJEU Statute.
[111] Note that the continued maintenance of the position is different from initial appointment, to be discussed in Section 2.3.
[112] ex Article 3(2) Annex I CJEU Statute second sentence.
[113] Article 1(1) Annex I CJEU Statute first sentence.
[114] Expression used in point 6 Annex I Council Decision 2010/124 relating to the operating rules of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union [2010] OJ L50/18.
[115] Article 253 TFEU.
[116] See eg the Annex in S. Laulhé Shaelou and J. Veraldi, "Report in the Form of a Discussion Paper: Appointment of Advocate Generals at the CJEU" (2020), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3560619*.
[117] 255 Comité, "Sixth Activity Report of the Panel Provided for by Article 255 of the Treaty on the Functioning of the European Union" (2019), *https://comite255.europa.eu/documents/5642886/5678369/6eme+Rapport+d%27activit%C3%A9+du+D255+-+EN.pdf*> [Accessed 13 January 2021], 11.
[118] For more detailed recommendations on national selection procedures to ensure that they meet the Treaty requirements, see: Laulhé Shaelou and Veraldi, "Report in the Form of a Discussion Paper".
[119] *ISC* [121]. This is reiterated in *JRA* [33].
[120] Articles 253 and 254 TFEU. This is moreover why the recommendation by the Panel takes the form of an "opinion": Article 255 TFEU.

Finally, as the Governments of the Member States in CJEU appointments no longer have to lay down arrangements governing the submission and processing of applications,[121] nor ensure a geographically "balanced composition",[122] there is less scope than was the case with the CST to commit an irregularity in the appointment process that breaches a fundamental rule. By contrast, the Governments would arguably infringe fundamental rules connected to judicial independence if they made an appointment that was not done by common accord (by infringing Article 253 or 254 TFEU), or if the Council's decision establishing the Article 255 Panel breached the compositional requirements of that provision (in terms of the substantive criteria to be met by the Panel's members or the procedure appointments to that body must follow).[123]

2.1.1.2. Fundamental Rules: National Court Appointments

As can see from the above, the Court has only had the opportunity to identify "fundamental rules" integral to the establishment and functioning of the EU judiciary in respect to courts at the supranational level (discussed in the preceding subsections). When it comes to national courts forming part of the EU judiciary, they have only ruled on breaches or discussed the existence of "essential guarantees" of judicial independence (as discussed in Section 1). Nevertheless, it is argued here that fundamental rules integral to the establishment and functioning of the national branches of the EU judiciary can also be identified that national authorities are required to observe.

Similar rules laying down the criteria and procedures for appointment to national courts forming part of the EU judiciary should be considered "fundamental rules" integral to the establishment and functioning of the judiciary (with the prerequisite that those rules meet the "essential guarantees" identified in Section 1). For instance, in Austria, Cyprus or France, the appointment procedure for judges of all or most ranks is contained or framed in the Constitution,[124] whereas in Latvia only the procedure for appointing Constitutional Court judges is constitutionalised.[125] In Spain, the Constitution specifies that the establishment and operation of the judiciary is to be determined by "Organic Law".[126] From this, the place of "fundamental rules" in the national hierarchy of legal instruments seems largely irrelevant, since the organisation of state institutions is by and large the competence of the Member States themselves.

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Therefore, "fundamental rules" governing judicial appointments can be identified at both the EU and national levels that can inform whether a given appointment measure is in breach of judicial independence required by *inter alia* Article 19 TEU.

2.1.2 Fundamental Rules: Term Duration

In *Simpson and HG*, in reconciling the differences in the ECJ's and EFTA Court's conclusions as to whether certain judiciary-related rules also constituted infringements of judicial independence, the ECJ had the opportunity to give an example of rules it considered "fundamental" concerning judicial term duration. In *Pascal Nobile*, an EFTA Court judge had been appointed for a three-year term instead of the six-year period expressly provided for in Article 30(1) of the EFTA Surveillance and Courts Agreement

[121] ex Article 3(2) Annex I CJEU Statute.
[122] Article 3(1) CJEU Statute.
[123] Article 255(2) TFEU.
[124] Article 86 Austrian Constitution; Articles 153(2) and 157(2) Constitution of the Republic of Cyprus; Article 56 and 65 French Constitution.
[125] Article 85 Constitution of Latvia.
[126] Article 122 Constitution of Spain. See Ley Orgánica 6/1985, de 1 de Julio, del Poder Judicial (as amended). Organic Laws are "those relating to the development of fundamental rights and public liberties" (Article 81(1) Constitution). Further on the models of judicial appointments in Europe, see: Mary L. Volcansek, "Appointing Judges the European Way" (2007) 34 Fordham.Urb.L.J. 363.

(SCA).[127] In *Simpson and HG*, the ECJ identified that provision on term duration as a fundamental rule integral to the functioning and establishment of the EFTA Court.[128] It thus followed that the EFTA Court's finding that the breach of Article 30 SCA also constituted an infringement of judicial independence could be reconciled with the ECJ's finding that this was not the case in *Simpson and HG*, since the latter did not concern a fundamental rule.[129] In light of this statement by the Court, it can be reasoned that if Article 30 SCA is a "fundamental rule", the same must be true related to the rules on term duration contained in Article 253 and 254 TFEU, which likewise establish six-year terms for CJEU Judges and Advocates General. Therefore, if these provisions are not complied with, this would constitute a breach of a "fundamental rule" and thereby give rise to an infringement of the EU judicial independence requirement.

The same can be said of rules related to term duration applicable to national judges that form part of the EU judiciary, again irrespective of the place in the national hierarchy, so long as the duration provided ensures protection of the discussed "essential guarantees" of judicial independence. Thus, the Czech rules providing a term limit of ten years for Supreme Court and Supreme Administrative Court Chief Justices, and seven years for all other Czech court presidents, should similarly be considered fundamental rules.[130] For the same reasons, the Austrian rule that Constitutional Court judges are to serve for life, or the Constitutional Court rule in Belgium with mandatory retirement at 70, should equally be considered a fundamental rule.[131]

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It has now been demonstrated in this Section 2.1. that the substance of judicial independence in the EU requires compliance with certain fundamental rules integral to the establishment and functioning of the judiciary related to appointments and term durations. The following Section 2.2 will go on to argue that fundamental rules related to judicial remuneration and disciplinary regimes can also be identified and that must arguably be complied with as part of the requirement of judicial independence under *inter alia* Article 19 TEU.

2.2. Other Fundamental Rules?: Remuneration and Disciplinary Regimes

In the analysisof the Court's judicial independence case law through the lens of the newly identified "fundamental rules" doctrine, rules related to other aspects of the judiciary – particularly the rules governing remuneration and disciplinary regimes – can also be identified that are equally integral to the establishment and functioning of the EU judiciary, thus constituting "fundamental rules" related to independence. These will now be discussed in turn in subsections 2.2.1. and 2.2.2.

2.2.1. "Fundamental Rules": Remuneration

Rules related to the remuneration of judges can also be identified as an "integral part of the establishment and functioning of that judicial system", therefore constituting "fundamental rules" which, if breached, consequentially results in an infringement of e.g. Article 19 TEU. If a judge is compensated with an amount that does not accord to what is laid down in law, or if changes are made to their remuneration in breach of the procedure established for such changes, this arguably would give rise to reasonable doubts as to the independence of the relevant judge and/or court. Thus, it is forwarded here that fundamental rules related to remuneration include at least the provisions of the relevant legal regime stipulating the level of a judge's remuneration and containing the procedures according to which the said remuneration may be adjusted. The instrument containing such "fundamental rule(s)" at the EU level would be the Council

[127] *Pascal Nobile* (E-21/16) October 27, 2017 [80]. Article 30 Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L344/3 is the EFTA Court equivalent to Articles 253(1) and 254(2) TFEU.
[128] *Simpson and HG* [80].
[129] *Simpson and HG* [80]–[81].
[130] Z. Kuhn, "Judicial Independence in Central-Eastern Europe" (2011) 1 Lawyer Quarterly 31, 35.
[131] On term limits for various levels of the judiciary across the world see: The World Factbook, "Judicial Branch" (2021). *CIA*, *https://www.cia.gov/the-world-factbook/field/judicial-branch* [Accessed 29 January 2021].

Regulation 2016/300.[132] Parallel instruments can be found at the national level,[133] many of which lay down judicial salaries in legislation and peg judicial remuneration to the average monthly salary of civil servants.[134]

2.2.1.1. Economic Crisis and Fundamental Rules

The preceding considerations arguably continue to apply even in times of economic crisis: If another branch of the state wishes to adjust the level of remuneration of the judiciary in an economic crisis, this must still be done in accordance with the relevant fundamental rules. If it is realised that the law governing changes to the salary of the judiciary is not sufficient for times of crisis, the consequence should not be disregard for the law, but rather an amendment thereof. This is supported by the approach taken in Ireland, where the salaries of the civil service were reduced but where the Constitution explicitly prohibited the reduction of judicial salaries.[135] The Irish response was to hold a referendum, in accordance with their Constitution, in order to amend it. It now reads:

> Where, before or after the enactment of this section, reductions have been or are made by law to the remuneration of persons belonging to classes of persons whose remuneration is paid out of public money and such law states that those reductions are in the public interest, provision may also be made by law to make proportionate reductions to the remuneration of judges.[136]

The amendment can now be considered part of the "fundamental rules" integral to the functioning of the judiciary, and so reductions to judicial salaries can now be made in a way that respects the fundamental rules governing judicial remuneration and therefore does not infringe judicial independence.

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In sum, the substance of judicial independence contained e.g. in Article 19 TEU requires compliance (even during times of crisis) with rules governing the level of judicial remuneration and the procedure according to which changes to that remuneration can be made, since they are arguably "fundamental rules" in the sense articulated by the Court in *Simpson and HG*.

2.2.2. Fundamental Rules: Disciplinary Regimes

It is further proposed here that those existing rules in a given judicial system governing the discipline of Court members (that otherwise provide the necessary essential guarantees established in 1.1) must also be considered "fundamental rules" equally integral to the establishment and functioning of that system which, if breached, entail an infringement of judicial independence under Article 19(1) TEU.

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[132] Council Regulation (EU) 2016/300 Determining the Emoluments of EU High-Level Public Office Holders [2016] OJ L58/1.

[133] e.g. in France, for magistrates, Article 42 of Ordonnance 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature specifies that salaries are to be laid down in a Decree by the Counsil of Ministers. For details, see: Union syndicale des magistrats, "Rémunérations" (2019), *https://www.union-syndicale-magistrats.org/web2/themes/fr/userfiles/fichier/publication/vos_droits_2019/Chap4_Remuneration_Vos%20droits%202019_USM.pdf*, [Accessed 29 January 2021]. In Germany, the Ministry of Justice of each Lander is responsible for the remuneration of first instance courts, who prepare it along with the presidents of those courts and their respective courts of appeal. The remuneration of Lander appeal courts is allocated by parliaments through their finance ministries, with varying roles for the presidents of these courts: "Questionnaire for the preparation of the CCJE Opinion No. 19 (2016): Answers – GERMANY". *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805aa9ff* [Accessed 29 January 2021], 10–11.

[134] eg L. Jurcena, ""Separation of Powers and Independence of the Constitutional Court of the Republic of Latvia" (2011), *Venice Commission, https://www.venice.coe.int/WCCJ/Rio/Papers/LAT_Jurcena_E.pdf* [Accessed 29 January 2021], 13.

[135] ex Article 35.5 read: "The remuneration of a judge shall not be reduced during his continuance in office".

[136] Article 35.5.3 Irish Constitution. See further: P. O'Brien, "Judicial Independence and the Irish Referendum on Judicial Pay" (16 September 2011), *UK Constitutional Law Association*, *https://ukconstitutionallaw.org/2011/09/16/patrick-obrien-judicial-independence-and-the-irish-referendum-on-judicial-pay/* [Accessed 30 January 2020].

Indeed, if judges are disciplined in a way that contravenes or does not fall within the scope of the applicable disciplinary rules, this arguably constitutes an infringement of "fundamental rules" integral to the court's establishment/functioning since it may influence judicial decision-making. Hence, like in *Simpson & HG*, breaches of rules governing judicial disciplinary regimes would also be "of such a kind and of such gravity as to create a real risk that the [authority] made unjustified use of its powers" and hence be liable, raise doubts as to the independence of the court concerned.[137] Thus, if such "fundamental rules" are not respected in a particular instance of a judge's discipline, this should likewise be considered an infringement of judicial independence.

As seen in Section 1.1, judicial disciplinary regimes encompass the salient issue of judicial removals, which is itself linked to term duration. When the duration of a judge's term is shortened (i.e. terminated before the date provided in the law), they are being removed. Thus, since the Court found that rules laying down the duration of judges' terms are fundamental rules,[138] it seems that so too must be the specific conditions and procedures for removal. According to the Court, such removals are allowed only exceptionally on the substantive grounds of unfitness caused by incapacity or a serious breach of their obligations,[139] and provided 'the appropriate procedures are followed'.[140] At the EU level, these are found in Article 6 CJEU Statute, according to which a Judge or Advocate General:

> may be deprived of his office… only if, in the unanimous opinion of the Judges and Advocates General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office.[141]

At the national level, these are incorporated at different levels of the national hierarchy of norms, e.g. Constitutions[142] or Acts of Parliament.[143]

Thus, as with rules related to appointments, term duration, and remuneration, rules can be identified related to judicial disciplinary regimes – in particular removability – that can also arguably be considered "fundamental rules" integral to the establishment and functioning of the judiciary. It is therefore forwarded that compliance with these fundamental rules related to disciplinary regimes is a substantive requirement of judicial independence in the EU, including Article 19 TEU.

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The considerations presented in the preceding sections 2.1–2.2 are particularly relevant at the time of writing in light of the cutting short of Eleanor Sharpston's term as Advocate General in response to the Brexit crisis. To further demonstrate how these substantive requirements related to fundamental rules apply in practice, the following section 2.3 will explore the compatibility of this removal with "fundamental rules" identified herein, which must be respected as part of the Article 19(1) TEU judicial independence requirement.

2.3. The Removal of Advocate General Sharpston

The issues of term duration and hence removability relate to an especially pertinent question regarding the legality of the removal of Advocate General Sharpston from her CJEU post in response to Brexit. On 31 January 2020, the Council released a Declaration by the "Representatives of the Governments of the Member States" alleging the early termination of Advocate Sharpston's post, as well as the "automatic end" of EU posts "nominated, appointed or elected in relation to the United Kingdom's

[137] *Simpson and HG* [79]
[138] Established in s. 2.1.2.
[139] *ISC* [76]; *JRA* [113].
[140] *ISC* [76]; *JRA* [113].
[141] Article 3 CJEU Statute.
[142] e.g. Article 35 Irish Constitution.
[143] e.g. Germany: The German Judiciary Act (1972, as amended).

membership of the Union".[144] The termination was presented as a direct consequence of Article 50(3) TEU, according to which the Treaties cease to apply to the withdrawing Member State from the date of entry into force of the withdrawal agreement.[145] Subsequently, on 2 September 2020 'the Representatives' issued a Decision appointing a nominee of another Member State as the replacing Advocate General from 7 September 2020 'owing to the withdrawal of the United Kingdom from the Union'.[146] Notably, neither the Declaration nor the Decision were presented as legal bases in themselves for the Advocate General's removal – both refer to the UK's withdrawal from the EU as itself constituting the legal basis.

Sharpston applied for an annulment of the Decision insofar as it appointed the replacing Advocate General and for interim measures suspending the decision to the same extent.[147] The three pleas in law included: 1) Article 50(3) TEU does not produce/require the automatic termination of her mandate; 2) her removal constituted an infringement of judicial independence; 3) a lack of proportionality and an absence of "legitimate and compelling grounds" for her removal, in particular since neither the Treaties nor the Advocate General's functions "involve any continuing connection with any Member State" after appointment.[148]

Whereas General Court Judge Collins granted the requested interim measures,[149] the Council and the Representatives appealed that Order to the ECJ (reportedly without Sharpston being informed).[150] The ECJ Vice-President then found that the main actions against both the Council and the Representatives were "manifestly inadmissible" and set the interim measures Order aside.[151] This was apparently because on the one hand, the Decision appointing the replacing Advocate General was not taken by the *Council*, and on the other hand, decisions of the Representatives of the *Governments of the Member States* could not be subject to judicial review under via Article 263 TFEU.[152] In the subsequent hearing of the main action by the General Court's Second Chamber in October 2020, in reference to the aforementioned ECJ Vice-President Order, the Court found the case to be manifestly inadmissible for identical reasons, without addressing the arguments put forward by Sharpston asserting the General Court's jurisdiction.[153] On 16 June 2021, the Court of Justice issued two Orders rejecting the appeal by Sharpston seeking to have set aside the Order of the General Court of the EU of 6 October 2020.[154]

There were arguably several glaring issues in the aforementioned reasoning of the ECJ Vice President's Order. Firstly, the narrow literal interpretation by the Vice President ignores the other main methods of interpretation used by the Court to verify whether a given measure is compatible with the Treaties, i.e. the teleological and systemic interpretations.[155] One may, for instance, question whether the collective action by the Member States complies with the principle of loyalty laid down in Article 4(3)

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[144] Council, "Declaration by the Conference of the Representatives of the Governments of the Member States on the Consequences of the Withdrawal of the United Kingdom from the European Union for the Advocates-General of the Court of Justice of the European Union" (January 29, 2020) XT 21018/20.
[145] XT 21018/20.
[146] Decision (EU) 2020/1251 of the Representatives of the Governments of the Member States appointing three Judges and an Advocate-General to the Court of Justice [2020] OJ L292/1.
[147] *Sharpston v Council and Representatives of the Governments of the Member States* (T-550/20 R) EU:T:2020:416 [1]. Application available in [2020] OJ C348/26.
[148] *Sharpston* Application [2020] OJ C348/26 [1]–[3].
[149] *Sharpston* (T-550/20 R).
[150] D. Kochenov and G. Butler, "The Independence and Lawful Composition of the Court", 8.
[151] *Council v Sharpston* (C-423/20 P(R)) EU:C:2020:700; and *Representatives of the Governments of the Member States v Sharpston* (C-424/20 P(R)) EU:C:2020:705 [35] and [36].
[152] C-423/20 P(R) and C-424/20 P(R) [23]–[28].
[153] *Sharpston v Council and Representatives of the Governments of the Member States* (T-550/20) EU:T:2020:475 [26]–[30].
[154] Case C-684/20 P and C-685/20 P, *Sharpston v Council and Conference of the Representatives of the Governments of the Member States*, 16 June 2021 (*Sharpston v Council and Governments*).
[155] e.g. M.P. Maduro "Interpreting European Law" (2007) 1 E.J.L.S. 137, 139–140.

TEU.[156] Kochenov and Butler have also highlighted several contradictions in the Court's reasoning. For instance, while acts by "the Representatives" could apparently not be subject to judicial review, the authors point out the Representatives somehow had "legal standing to lodge an appeal and thus could sue, whilst simultaneously having no capacity to be sued".[157] The authors also highlight that the issue of the judicial review of actions by the Representatives where those actions produce effects in the EU legal order is not as clear-cut as the Vice-President made it out to be. Indeed, the caselaw the Vice-President referred to occurred in the context of external relations, whereas in this case the Member States were operating within the scope of the powers conferred by the Treaties.[158] This seems to be confirmed by the Court of Justice's Orders of June 2021 which refer to the exclusion of its own jurisdiction under Article 263 TFEU, with respect to actions brought against acts of the governments of the Member States, acting not within the Council but 'as representatives of their government' and 'collectively exercising the powers of the Member States', thereby excluding judicial review by the EU Courts of such acts due to their author and 'irrespective of their binding legal effects'.[159] The implications of these judgments/orders are that there is genuine concern and potentially a real risk that the CJEU is not fully independent, since the Member States could have free reign to pack the court or dismiss members as they see fit.[160]

As will be further explored below, such a situation is in contradiction with the fundamental rules related to term duration and removal, including Article 253 TFEU and Article 6 CJEU Statute, and therefore of judicial independence, also as enshrined in the ECHR.

2.3.1. A Breach of "Fundamental Rules" and Therefore Judicial Independence

There is no room for doubt that Advocates General must be independent: this is laid down in their criteria for selection and the very definition of their functions.[161] As noted in Sections 2.1.2 and 2.2.2, EU law already specifies the duration of an Advocate General's term and provides a legal basis for their removal from office.[162] Those primary law provisions constitute "fundamental rules" which, if breached, would constitute an infringement of judicial independence. In that connection, it is clear that Advocate General Sharpston's replacement would not comply with these rules since the term duration provided in Article 253 TFEU was cut short and since a body that did so (the Representatives) was one other than that provided for in Article 6 CJEU Statute (i.e. the Court itself). It is forwarded here that only the existence of an equally fundamental rule providing an exception to the applicability of those criteria could therefore provide a legal basis for the replacement of Advocate General Sharpston.

Thus, the Declaration used to justify the Decision replacing Sharpston[163] gives rise to the question of whether there is indeed a legal basis for the assertion that UK-appointed positions do automatically end on the date of the UK's withdrawal, in particular whether the positions of Advocates General are bound to the membership of specific Member States (2.2.1.1). If this question is answered in the negative, there

[156] The principle of loyalty in EU law places an "obligation of Member States (1) to actively ensure compliance with the EU Treaty, (2) to facilitate the achievement of Union tasks, and (3) to abstain from any contravening measures": Klamert, *The Principle of Loyalty in EU Law* (OUP 2014) 1.

[157] Kochenov and Butler, "The Independence and Lawful Composition of the Court" 23–24.

[158] Kochenov and Butler, "The Independence and Lawful Composition of the Court" 24–25.

[159] *Sharpston v Council and Governments* [39-40].

[160] Kochenov and Butler, "The Independence and Lawful Composition of the Court" 26. See also CJEU's Independence and Lawful Composition in Question (Part V) 19 June 2021 https://verfassungsblog.de/cjeus-independence-and-lawful-composition-in-question-part-v/.

[161] Selection criteria: Article 253 TFEU and Article 19(2) TEU third sentence. Definition of their functions: Article 252 TFEU and Article 49 CJEU Statute mandate that AGs act "with complete impartiality and independence". See also: D. Halberstam, "Could there be a Rule of Law Problem at the EU Court of Justice?" (23 February 2020), *Verfassungsblog, https://verfassungsblog.de/could-there-be-a-rule-of-law-problem-at-the-eu-court-of-justice/* [Accessed 15 May 2020]; N. Burrows and R. Greaves, *The Advocate General and EC Law* (Oxford: OUP 2007), pp. 6–7.

[162] Article 253 TFEU and Article 6 jo. Article 8 CJEU Statute.

[163] Decision (EU) 2020/1251.

would be no legal basis supporting the removal of Advocate General Sharpston,[164] and the direct consequence of such a conclusion would be that an infringement of judicial independence has occurred.

2.3.1.1 A Link Between the Continued Position of an Advocate General and a Particular Member State?

First, it cannot go without pointing out that a legal basis providing for an exception to the applicability of Article 6 CJEU Statute does seem to exist in respect to CJEU *Judges* and EU civil servants that can be applied specifically in the context of a Member State's departure from the Union and hence the Brexit crisis. Indeed, according to the Treaties, the ECJ "shall consist of one judge from each Member State',[165] and the General Court two Judges'.[166] As succinctly put by Halberstam, "No Member State, no judge.'[167] A provision of EU law thus links the (continued) position of an ECJ or General Court judge to a particular Member State – i.e. the Member State of nomination – thereby rendering the legality of the removal of UK-appointed CJEU *judges* a rather clear-cut issue. In the case of UK citizens working as EU civil servants, Article 28(a) of the Staff Regulations specifies that *appointees* must be a "national of one of the Member States of the Union, unless an exception is authorized by the appointing authority, and enjoys his full rights as a citizen'.[168] Article 49 of these Regulations moreover provides that an "official *may* be required to resign only where he ceases to fulfil the conditions laid down in Article 28(a)'.[169] Thus, while the removal of UK CJEU Judges was an automatic consequence of Brexit, this was not the case for UK citizen EU civil servants, contrary to what was stated in the Declaration.[170] In fact, the Commission has decided not to employ Article 49.[171]

Second, there are several reasons for concluding that the position of an Advocate General is not bound to the membership of a particular Member State after their initial appointment, contrary to what was stated in the Declaration. Indeed, a Member State-Advocate General link is established in neither the Treaties nor their Protocols. Moreover, while there is a "practice'[172] according to which the six largest Member States have "permanent" Advocate Generals and five of the remaining Member States nominate

[164] As passionately argued by other commentators: e.g. L. Pech, "The Schrödinger's Advocate General" (24 June 2020), *RECONNECT, https://reconnect-europe.eu/blog/the-schrodingers-advocate-general/* [Accessed 30 January 2021]; S. Hummelbrunner et al., "In Support of the EU Rule of Law and Advocate General Eleanor Sharpston" (18 March 2020), *European Law Blog, https://europeanlawblog.eu/2020/03/18/in-support-of-the-eu-rule-of-law-and-advocate-general-eleanor-sharpston-an-open-letter/* [Accessed 30 January 2021]; Halberstam, "Could There Be a Rule of Law Problem"; Kochenov and Butler, "The Independence and Lawful Composition of the Court". There are some who disagree, such as an ECJ référendaire who stated that "in my view, this situation has to be seen as a mere direct consequence of the United Kingdom's withdrawal from the EU" – without providing any supporting underlying legal basis for this view: F. Clausen, "In the Name of the European Union, the Member States, and/or the European Citizens?" in H. Ruiz Fabri et al., *International Judicial Legitimacy* (Baden-Baden: Nomos, 2020), 249, note 27.

[165] Article 19(2) TEU.

[166] Article 48(c) CJEU Statute.

[167] Halberstam, "Could there be a Rule of Law Problem". See also, A. Reid, "The Rule of Law, the UK's Advocate-General and Brexit" (21 September 2020), *DCU Brexit Institute, http://dcubrexitinstitute.eu/2020/09/the-rule-of-law-the-uks-advocate-general-and-brexit/*, [Accessed 30 January 2021].

[168] Article 28 Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants [1962] OJ P45/1385 (as amended).

[169] Staff Regulations of Officials of the EU (emphasis added).

[170] Declaration on the consequences of the withdrawal of the United Kingdom from the European Union for the Advocates-General of the Court of Justice of the European Union.

[171] Décisions administratives et budgétaires prises par la Commission lors de SA 2249ème reunion du mercredi 28 mars 2018, *https://myintracomm.ec.europa.eu/hr_admin/commission-uk-staff/Documents/2249%20-%20%20QABD%20-%20Extract.pdf.* For more information, see: M. Bevington, "British Officials in the EU's Institutions" (5 May 2020), *UK in a Changing Europe, https://ukandeu.ac.uk/british-officials-in-the-eus-institutions/* [Accessed 30 January 2021].

[172] e.g. J. Frankenreiter, "Are Advocates General Political?" (2018) 14 Review of Law & Economics, 8. Halberstam, "Could there be a Rule of Law Problem".

Advocate Generals under an alphabetical "rotation" system,[173] this system was simply brought about by "haggling'[174] and has never gone further than a "political agreement'[175] later incorporated in non-legally binding Treaty Declarations.[176] This is still the case today, though it has been criticised e.g. by (now) Advocate General Bobek for being an "outdated and highly questionable" method "for which any convincing structural explanation (with the exception of blunt power politics) in [a] European Union composed of 27 Member States is lacking".[177] The fact that the tradition for nominating Advocates General never made it into the Treaties nor the CJEU Statute despite multiple rounds of amendments casts further doubt on any link binding Advocate General positions to Member State Union membership. Ultimately, under EU primary law it is the "common accord of the governments of the Member States' that officially appoint CJEU members. Individual Member States only *nominate* candidates, who can be and have been rejected.[178]

Finally, it should be underlined that the first CJEU Statute as a Protocol to the ECSC Treaty provided that the Council was the body with the competence to terminate the mandate of an Advocate General.[179] Importantly, however, this has not been the case since it was ended in 1957 at which point Advocates General became governed by the same rules on removability as Judges, according to which the Court dismisses its own members.[180] This termination of the Council's competence to remove Advocates General arguably further casts doubt on the legality of the announced replacement of Advocate General Sharpston by that same institution.

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Overall, the aforementioned considerations point to the conclusion that there is no provision legally binding the continued position of an Advocate General to a specific Member State that can constitute a ground for removal equivalent to the fundamental rules in Article 253 TFEU and Article 6 CJEU Statute on term durations and removal. Consequently, it can therefore be seriously questioned whether the replacement of Advocate General Sharpston was in accordance with the substantive EU requirement related to the independence of Advocates Generals required by *inter alia* Article 19(2) TEU,[181] since it appears to breach "fundamental rules" related to term duration and removability. The role of the duty of loyalty in this instance of 'EU institutional (internal) affairs' seems to be of essence.

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[173] Indeed, the assignment of the first two appointments for Advocate General positions to France and Germany was handled as a political rather than legal issue and from there the practice continued: L. Clément-Wilz, "The Advocate General" (2011–2012) 14 C.Y.E.L.S. 587. 610–611.
[174] M. Bobek, "A Fourth in the Court" (2012) 14 C.Y.E.L.S. 529, note 26.
[175] R. Greaves, "Reforming Some Aspects of the Role of Advocates General" in A. Arnull et al. (eds), *A Constitutional Order of States?* (London: Hart, 2011) 161, 171; R. Barents, *Remedies and Procedures Before the EU Courts* (Alphen aan den Rijn: Kluwer, 2020) [1.53].
[176] First in Joint Declaration n. 2 on Article 157(4) of the Act of Accession [1994] OJ C241/381. See also e.g. Joint Declaration on Council Decision 95/1/EC [1995] OJ L1221; Declaration n. 38 on Article 252 TFEU [2016] OJ C202/350. On the non-binding status of declarations, see A.G. Toth, "The Legal Status of the Declarations Annexed to the Single European Act" (1986) C.M.L.R. 803, 811–812.
[177] Bobek, "A Fourth in the Court", note 25.
[178] 255 Comité, "Sixth Activity Report"; T. Dumbrovsky, B. Petkova and M. Van der Sluis, "Judicial Appointments" 2014) 51 C.M.L.R. 455, 459.
[179] Article 13 of the Protocol on the CJEU Statute of the Treaty Establishing the European Coal and Steel Community 1951.
[180] Article 6 jo. Article 8 CJEU Statute.
[181] But also Articles 252–253 TFEU and Article 49 CJEU Statute.

To conclude, the latter half of this piece has invoked the "fundamental rules" doctrine articulated by the ECJ in *Simpson and HG* to further identify the substance of the judicial independence requirement in EU law. Subsection 2.1 first discussed and built upon those fundamental rules applicable to judicial appointments (2.1.1) and term durations (2.1.2) recognised by the ECJ as "fundamental rules'. Subsection 2.2 then forwarded that there may also be "fundamental rules" related to the remuneration of judges (2.2.1) and their disciplinary regimes (2.2.2). In respect to remuneration, the lowering judges' pay via a constitutional amendment in Ireland as a response to the financial crisis was used as an example of how the fundamental rules connected to remuneration would apply in practice (2.2.1.1). In respect to disciplinary regimes and the related issue of term durations, the replacement of Advocate General Sharpston in the wake of the Brexit crisis was also analysed from the perspective of the applicable "fundamental rules" (2.3), and it was argued that this replacement is in breach of these fundamental rules and therefore incompatible with judicial independence. Like the crisis-related examples explored in Section 1 in respect to the substantive "essential guarantees" of judicial independence, this Section 2 has further illustrated the insight that can be drawn from assessing measures that may arise in times of crisis for the purpose of identifying the substance of judicial independence as required in the EU. These insights may ultimately assist in bolstering the independence of the EU judiciary.

3. CONCLUSION

Since 2018, the opportunity to strengthen the independence of the EU judiciary has become greater in light of the newly identified broad scope of application of Article 19 TEU. Whereas several valuable contributions have been made exploring the implications of the scope of this provision, this piece sought to add to the EU judicial independence literature by elaborating on the substantive requirements of judicial independence in the EU. This has been achieved by arguing that from the Court's case law it can be observed that the provision of "essential guarantees" and respect for "fundamental rules" related to the Union judiciary together form the substance of judicial independence. Moreover, a substantive analytical framework has been developed in this respect, proposing that when a given measure is under scrutiny from the perspective of an EU judicial independence provision, it can be asked whether 1) a particular measure fails to ensure the provision of an essential guarantee of judicial independence and, if not, it can then be asked whether 2) it constitutes a breach of a "fundamental rule" integral to the establishment or functioning of the judiciary.

On the one hand, the "essential guarantees" of judicial independence were identified in Section 1 as including essential guarantees connected to disciplinary regimes (including irremovability) (1.1) commensurate remuneration (1.2), and freedom from undue external influence or pressure (1.3). On the other hand, the "fundamental rules" integral to the judiciary were identified in Section 2 as including rules related to judicial appointments and term durations (2.1), and it was further argued that equally fundamental rules must also exist in regard to remuneration and disciplinary regimes (2.2).

Throughout these sections, it was observed that it is especially through the crisis-related case law of the ECJ that the substantive requirements of the EU judicial independence requirements have emerged and/or could be assessed for useful insight. In that regard, the rule of law, economic, and Brexit crises have all given rise to especially challenging circumstances for the EU judiciary and complex questions in terms of what is required from the perspective of the judicial independence provisions. However, as was demonstrated throughout this piece, valuable lessons can and should be drawn from these crises, in the sense that the experience and knowledge gained therefrom can be leveraged to bolster the independence of the judiciary going forward and ensure that past mistakes are not repeated. With that in mind, public authorities at both the national and supranational levels must be careful in how they respond to the current Covid-19 pandemic and ensure that the essential guarantees of judicial independence are upheld and that the fundamental rules integral to the establishment and functioning of the EU judiciary are not infringed.