NEW FRONTIERS FOR ARTICLE 19(1) TEU: A COMMENT ON JOINED CASES C-554/21, C-622/21 AND C-727/21 HANN-INVEST

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Abstract: Hann-Invest *is the first case of the Court of Justice of the EU assessing the state of the rule of law and independence of the judiciary in Croatia, and the most important judgment for the country since its accession to the European Union. But the judgment also has profound transversal relevance for future developments in EU law. In* Hann-Invest, *the Court of Justice ruled that Article 19(1) TEU precludes the Croatian judicial mechanism from ensuring the uniform application of the national case law. The disputed mechanism authorised the involvement of the national courts' judicial administration into the decision-making process of the competent judicial panels, in particular through the so-called 'registrations judges' who were assigned to monitor the coherence of decisions leaving the court's docket and by referring problematic cases to the collective decision-making of the judicial plenums in extra-procedural meetings. By declaring such an organisation of the national judiciary incompatible with EU law, the Court of Justice has established the initial doctrinal framework of 'internal judicial independence' under Article 19(1) TEU – further developing and reaffirming the value of the individual autonomy of national judges which, in its essence, has been considered central to the effective application of Union law since the* Simmenthal *ruling. Moreover, with* Hann-Invest, *the Court has set the trajectory of its future jurisprudence on Article 19(1) TEU beyond the scenarios of rule-of-law 'backsliding', potentially signalling the beginning of intense involvement with standard modes of operation of national judiciaries, which were until recently considered outside the EU's reach.*

Keywords: Article 19(1) TEU, judicial independence, organisation of national judiciaries, scope of EU law, rule of law, judicial autonomy, effective application of EU law.

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1 Introduction

On 11 July 2024, the Court of Justice of the European Union delivered its judgment in Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest*,[1] the first case on the state of the rule of law and independence of the judiciary in Croatia. In the judgment, going contrary to the Opinion of Advocate General Pikamäe,[2] the Court's Grand Chamber ruled that Article 19(1) TEU must be interpreted as precluding the Croatian judicial mechanism for ensuring the uniformity and consistency of case law, in particular of second-instance courts and the Supreme Court. In the national judicial architecture, this mechanism allows, within those courts, for the judgments of a deciding judicial panel in a particular case to be vetted and possibly blocked by internal judicial administration, essentially composed of two aspects. The first is the court's 'registrations judge' who is – sitting outside the deciding panel – assigned by the court's president to monitor the coherence of judgments leaving the court's docket. The second is the court's extra-procedural meeting of all judges (sitting in a section or a full court) who are – on contentious issues – empowered to issue abstract 'legal positions'. These abstract positions, in turn, should bind the judicial panels assigned to individual disputes, even to the extent of altering, *post-facto*, the content of their previously delivered judgments, prior to their notification to the parties. The referring national judges in the present cases were caught in precisely such a deadlock with the court's internal administration, seeking refuge in the Luxembourg promise to uphold the rule of law and the independence of the national judiciary. The Court of Justice responded and delivered a judgment with profound national, as well as supranational, relevance.

Indeed, *Hann-Invest* is the most important judgment of the Court of Justice for Croatia since its accession to the European Union, setting aside the standard and long-lasting operating mode of its judiciary. At the same time, the judgment has transversal relevance. In *Hann-Invest*, the Court established the initial doctrinal framework of internal judicial independence under Article 19(1) TEU, further developing and effectively reaffirming the value of national judges' individual autonomy which, in its essence, has been considered central to the effective application of Union law since the times of *Simmenthal*.[3] By doing so, the Court set the trajectory of its future jurisprudence concerning Article 19(1) TEU beyond rule-of-law 'backsliding', signalling the beginning of potentially

[1] Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest d.o.o., Mineral-Sekuline d.o.o. and Udruga KHL Medveščak Zagreb* ECLI:EU:C:2024:594 (hereinafter *Hann-Invest*).

[2] Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest* ECLI:EU:C:2023:816, Opinion of AG Pikamäe.

[3] Case 106/77 *Simmenthal* ECLI:EU:C:1978:49.

'very intense involvement' with standard modes of operation of national judiciaries.[4]

Such a level of Union intervention into the spheres traditionally perceived as within the national domain is certainly not without its controversies. This is likewise evident from the Court's stark disagreement with its Advocate General Pikamaë who wrote the Opinion in this case. In effect, the Court and the AG went in entirely opposite directions – on both the issue of admissibility of such systemic rule-of-law questions which have no material links to EU law under Article 267 TFEU, and in the final answer to the compliance of the Croatian mechanism with Article 19(1) TEU.

In an earlier contribution to this volume of the Yearbook, we analysed in detail and argued against the Opinion of AG Pikamäe by unravelling the true nature and problematic origins of Croatia's coherence mechanism, inviting the Court to set it aside as contravening the very essence of judicial independence required for the effective application of Union law protected under Article 19(1) TEU.[5] The Court followed the cue. In the present contribution, our aim is to build on our previous arguments and round off the analysis of *Hann-Invest* by juxtaposing the disagreement of the Court with its Advocate General and assessing in detail the grounds of the judgment.

To do so, after outlining the questions posed by the referring national court and the relevant national framework, we will assess the preliminary issue of the admissibility of references for a preliminary ruling such as the one in *Hann-Invest*, which questions the compatibility of national judicial systems and procedures with Article 19(1) TEU. We will then discuss the merits of the questions raised by the referring court in *Hann-Invest*, under which the Croatian mechanism for ensuring the uniformity of case law was declared incompatible with the Treaties.

Finally, we will reflect on the implications of this judgment for the national judicial system, outline the main doctrinal contributions of the judgment and discuss its potential in further developments in Luxembourg's jurisprudence on the rule of law and independence of the national judiciary.

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[4] D Sarmiento and S Iglesias, 'Is This the End? – From the Polish Parliamentary Election to the Croatian HANN-INVEST Case' (*EU Law Live*, 31 October 2023) <https://eulawlive.com/insight-is-this-the-end-from-the-polish-parliamentary-election-to-the-croatian-hann-invest-case-by-daniel-sarmiento-and-sara-iglesias/> accessed 20 November 2024.

[5] N Bačić Selanec and D Petrić, 'Internal Judicial Independence in the EU and Ghosts from the Socialist Past: Why the Court of Justice Should Not Follow AG Pikamäe in *Hann Invest*' (2024) 20 Croatian Yearbook of European Law and Policy ('Online First') <https://www.cyelp.com/index.php/cyelp/article/view/565> accessed 22 November 2024.

2 The national framework and the questions referred

The reference in *Hann-Invest* comes from three appeals procedures before the Croatian High Commercial Court, in which the merits of the cases had no substantive relation to EU law. In particular, the first two cases concerned reimbursements of costs relating to insolvency proceedings, and the third concerned a rejected application to open court-supervised administration proceedings.[6] But the substance of these cases was not even relevant for the issue at stake. Rather, the central problem facing the referring court was of a procedural nature. In all three cases, the competent judicial panels (of three judges) decided to dismiss the appeals and, having signed their judgments, delivered them to the court's case law registration service, in accordance with Article 177(3) of the Rules of Procedure of the Courts.[7] This Article provides:

> A case before a court of second instance shall be deemed to be closed on the date on which the decision is sent from the office of the judge concerned, after the case has been returned by the Registration Service. The Registration Service shall be required to return the case file to the office of that judge *as promptly as possible* after receipt thereof. That decision shall then be notified [to the parties] within a further period of eight days.[8]

In the cases at hand, however, such a prompt return of the judgments following their 'registration' did not occur. In fact, the registrations judge refused to register the judgments on account of his disagreement with the legal positions adopted by the competent judicial panel. To support his decision, in two of the three cases he relied on the existence of opposing legal positions adopted on the same point of law by other panels, one adopted earlier and the other adopted later than the one by the referring court. In the third case, no contravening case law was even cited. In all three cases, the registration of decisions (as a pre-requisite to close the procedure and deliver the judgment to the parties) was conditioned on complying with an alternative approach clearly favoured by the registrations judge, even in situations of existing conflicting trends in the case law of the referring court.[9]

Referring to the text of Article 177(3) of the Rules of Procedure, one may think that such an extensive authority of the registration judge,

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[6] *Hann-Invest* (n 1) para 10.

[7] Rules of Procedure of the Courts (Sudski poslovnik) Official Gazette 37/14, 49/14, 8/15, 35/15, 123/15, 45/16, 29/17, 33/17, 34/17, 57/17, 101/18, 119/18, 81/19, 128/19, 39/20, 47/20, 138/20, 147/20, 70/21, 99/21 and 145/21.

[8] Emphasis added.

[9] *Hann-Invest* (n 1) paras 12–14.

which effectively allows him to influence the judgments' final outcome, is not even prescribed by law. However, this provision of the Rules of Procedure does not exist in isolation, but within the wider framework of national law prescribing a mechanism for ensuring the consistency of the case law leaving a court's docket, in which judicial administration, and in particular the registrations judge, plays a crucial role. When the described deadlock occurs between the registrations judge and a deciding judicial panel, in line with long-lasting judicial practice, the matter is referred to a plenary meeting of judges, sitting in their extra-procedural formation (a section or a full court), and their majority vote should break the tie. The national legislation on the organisation of the judicial branch, and in particular Article 40 of the Law on Courts, provides for such an extra-procedural mechanism for ensuring the consistency of the case law, by prescribing as follows:

1. A section meeting or a meeting of judges shall be convened where it is found that there are differences in interpretation between sections, chambers or judges regarding questions relating to the application of the law or where a chamber or a judge of a section departs from the legal position previously adopted.

2. The legal position adopted at the meeting of all the judges or of a section of the Supreme Court [or of the second-instance courts, including the High Commercial Court] shall be *binding* on all the chambers or judges at second instance of the section or court concerned.[10]

In simpler terms, when a judicial panel competent to decide a particular case refuses to comply with the position of the registrations judge (which might or might not differ from the other judgments of the same court), the contentious questions on the proper interpretation of the law are referred to the court's (section) meeting. In this meeting, held behind closed doors, all sitting judges of the court – the judges originally assigned to the case, and those who are not, including the registrations judge – deliberate on the matter and deliver a joint 'legal position' by a majority vote. This entire process and the intervention of the registrations judges or the judicial meeting, moreover, occurs without any knowledge or intervention of the parties in the original dispute. And indeed, in accordance with Article 40 of the Law on Courts, the legal position adopted at the judicial meeting should be binding on all judicial panels of that court in subsequent decisions, including the unregistered judgment from which the dispute originated. Even if such a judgment was previously adopted and voted on by the deciding panel, the judgment should subsequently be altered to comply with the majority's legal position, or else the

[10] Law on Courts (Zakon o sudovima) Official Gazette 28/13, 33/15, 82/15, 82/16, 67/18, 126/19, 130/20 (emphasis added).

original judgment may be stuck in a judicial administration limbo, being delivered by the competent panel, but unregistered in the registration services' drawers, which keeps it from being notified to the parties.

Being stuck in such circumstances in the three cases of *Hann-Invest*, the national court referred two questions to the Court of Justice concerning the compatibility of such (extra-)procedural judicial mechanisms designed to ensure the consistency of the case law with the standards of judicial independence under Union law. More particularly, the questions were: are Article 177(3) of the Rules of Procedure (prescribing the role and duties of the court's registrations' office) and Article 40(2) of the Law on Courts (laying down that the court's abstract 'legal positions' are binding on its individual panels) compatible with Article 19(1) TEU and Article 47 of the Charter?[11]

3 Jurisdiction and admissibility

To get a reply from the Court of Justice on the substance of the referred questions, the first obstacle is always the question of admissibility. As is well known, in the framework of the preliminary ruling procedure under Article 267 TFEU, the Court's interpretations of the provisions of EU law are meant to enable the national court to 'give judgment' in the main proceedings. So, if there is no link between the provisions of EU law whose clarification the referring court seeks and the dispute before it, there is nothing for the Court of Justice to interpret. In such situations, the Court will consider the referred questions to be inadmissible. And the reason is that the Court refuses to issue advisory opinions or interpret EU law in abstract terms or in relation to hypothetical disputes. In its view, the purpose of the preliminary ruling procedure is to establish *meaningful* cooperation through which the Court supports the administration of justice before national courts. So, the Court needs to provide a useful answer to the national judge to directly assist that judge in resolving the real dispute in the main proceedings.

To complicate matters, we have the ruling in *Portuguese judges*.[12] Here, as is also well known, the Court of Justice interpreted the scope of Article 19(1) TEU, which requires Member States to 'ensure effective legal protection in the fields covered by Union law', in a broad manner, in fact more broadly than the scope of Article 47 of the Charter of Fundamental Rights, which requires Member States to guarantee the right to an effective remedy and the right to a fair trial but only when they are 'implementing EU law', in the sense of Article 51(1) of the Charter. So, from

[11] *Hann-Invest* (n 1) paras 24–25.

[12] Case C-64/16 *Associação Sindical dos Juízes Portugueses (ASJP)* ECLI:EU:C:2018:117.

Portuguese judges it follows that Article 19(1) TEU requires all national courts to remain independent at all times and be capable of ensuring effective legal protection in general, and not only in particular situations when they are applying EU law to solve disputes. But then the question is in which cases are interpretations of Article 19(1) TEU – related to, say, systemic concerns over judicial appointments – really necessary for a national court to 'give judgment' in the main proceedings whose subject matter is related to something very specific, such as protection of copyright?

In *Hann-Invest*, the referring court considered that the interpretation of Article 19(1) TEU was essential for solving, as a preliminary matter (or *in limine litis*), an issue of national procedural law, which contained mechanisms that were threatening its independence. Only after that, the referring court considered, would it be able to bring the disputes in the main proceedings to a close. Yet, importantly, those disputes – which arose in the framework of insolvency proceedings, as already mentioned – had no apparent substantive connection to EU law. Still, the fact was that the referring court could be called upon to rule on questions of interpretation and application of EU law and therefore constitutes part of the judicial system providing legal remedies in Croatia. As such, the referring court is tasked with ensuring effective legal protection in the 'fields covered by Union law', in accordance with Article 19(1) TEU after *Portuguese judges*.[13] So, in relation to such a national court, the Court of Justice does have jurisdiction to interpret Article 19(1) TEU.[14] No surprises there. But this does not tell us anything about whether an interpretation of Article 19(1) TEU in relation to Croatian procedural law is necessary for the referring court to solve disputes about insolvency law in the main proceedings. This is where the admissibility question kicks in.

At first glance, there appears to be a precedent for dealing with admissibility in circumstances like these. This is *Miasto Łowicz*.[15] In this judgment, the Court of Justice laid down scenarios in which the referred questions need to fall in order to be accepted as admissible. The key thing is whether there exists 'a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue

[13] *ASJP* (n 12) paras 29–37.

[14] *Hann-Invest* (n 1) paras 34–38. See also Case C-824/18 *AB and Others v Krajowa Rada Sądownictwa* ECLI:EU:C:2021:153, paras 108–114; and Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311, paras 36–39. However, compared to these cases, the Court in *Hann-Invest* relied on a broad scope of Article 19(1) TEU to establish its jurisdiction in the context of verifying whether the referred questions are admissible, rather than in the central part of the judgment in which the Court discusses the merits of the referred questions.

[15] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* ECLI:EU:C:2020:234.

of which that interpretation is objectively required for the decision to be taken by the referring court'.[16] This 'connecting factor', which can be direct or indirect, is taken to exist in the following three situations.[17] In the first, it is direct when the dispute in the main proceedings is *substantively* connected to EU law whose interpretation is sought, and the referring court needs to apply that law to solve the dispute. In the second, it is indirect when the referring court has to apply some *procedural* provision of EU law, whose interpretation it needs before it can deliver a ruling in the main proceedings. And in the third, it is also indirect when the referring court seeks an interpretation of EU law to allow it to resolve a *procedural* question of *national* law, before being able to rule on the substance of the dispute before it. In this third situation, the general impression was that the substance of the dispute before the referring court had to have some relation to EU law.[18]

In his Opinion, AG Pikamäe proposed that the Court should reject the reference in *Hann-Invest* as inadmissible. The reason was that the referred questions do not correspond to either of the three admissibility scenarios, and as such lacked the requisite 'connecting factor'. The main problem was that the disputes before the referring court did not have a clear substantive link to EU law – or better, the referring court did not establish the existence of such a link. Hence, in his view, the referring court failed to prove that the interpretation of Article 19(1) TEU was indeed necessary for it to deliver a ruling in the main proceedings.

Moreover, the AG suggested that, as a general matter, these are not the kinds of questions that the Court of Justice should be dealing with in the preliminary ruling procedure under Article 267 TFEU. To him, the reference in *Hann-Invest* was similar to other references thrown at the Court following the landmark *Portuguese judges* ruling, which concerned questions such as the allocation or transfer of cases within a court, the promotion of judges or their salary scales, which likewise had no clear link to the substance of disputes in the main proceedings.[19] These references are, then, concerned with issues that are of limited and singular importance, which do not result in serious and systemic infringements of the rule of law in the Member State concerned. In fact, the AG considered that some national courts that wish to draw the Court into deciding on these controversies are abusing the preliminary ruling procedure. They

[16] ibid, para 48.

[17] ibid, paras 49–51.

[18] As it followed from Joined Cases C-585/18, C-624/18 and C-625/18 *AK and Others* ECLI:EU:C:2019:982, to which the Court referred when describing this third admissibility scenario.

[19] *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 30.

are trying to come up with any 'procedural pretext […] to present before the Court […] [their] dissatisfaction with and/or criticism of the functioning of the national judicial system'.[20] This is 'contrary to the spirit and purpose' of Article 267 TFEU, the AG suggested.[21] Therefore, the Court should be more cautious not to get drawn into these controversies. To stay out of them, it has to be more rigorous in assessing the admissibility of these references, even if this means rejecting them to limit the barrage of questions that are inappropriate for its involvement, and ultimately to discourage national courts from referring them in the first place.

Despite this, AG Pikamäe admitted that his proposal did not sit well with some recent decisions of the Court of Justice. He mentioned several cases in which the Grand Chamber of the Court agreed to rule in circumstances comparable to those in *Hann-Invest*, and accepted the references in question as admissible.[22] The relevant case law on this point was thus not settled. With concerns of institutional policy in mind, the AG urged the Court to adopt a stricter and tighter admissibility check, hence choosing a less expansive approach and implicitly discarding those several recent rulings as outliers and aberrations. If the Court did not follow his proposal, AG Pikamäe saw the floodgates opening. In his view, (too) loose admissibility criteria plus a far-reaching interpretation of Article 19(1) TEU on the merits would mean 'an extensive, not to say unlimited, application of that provision in a field, the organisation of justice in the Member States, which is supposed to fall within the jurisdiction of the Member States'.[23] Is, therefore, a restrained court, which stays away from somewhat sensitive (or perhaps petty) issues – usually of a procedural nature – which national judges face, a good court?

The Grand Chamber of the Court of Justice did not think so, and refused to follow the proposal of AG Pikamäe. As some authors predicted,[24] it established its jurisdiction to interpret Article 19(1) TEU and declared the references admissible. And it did so laconically and without spilling too much ink. Without reflecting on the admissibility criteria from *Miasto Łowicz*, the Court simply asserted that its reply was necessary for the referring court to conclude three disputes in the main proceedings in

[20] ibid, para 30 fn 13.

[21] ibid, para 30.

[22] Citing Case C-256/19 *S. A. D. Maler und Anstreicher* ECLI:EU:C:2020:523 (Order of the Court); Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* ECLI:EU:C:2021:931; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others* ECLI:EU:C:2021:393; and Joined Cases C-615/20 and C-671/20 *YP and Others* ECLI:EU:C:2023:562; see *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 42–43.

[23] *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 45.

[24] Sarmiento and Iglesias (n 4).

which it had already reached decisions, yet where those proceedings were interrupted first by the registrations judge who refused to register those decisions and deliver them to the parties, and then by the section meeting that adopted a 'legal position', which was meant to bind the referring court and force it to change the content of its initial decisions.[25] To put it simply, the referring court faced a very practical and concrete dilemma: if the Croatian mechanism for ensuring the uniformity of case law was compatible with the standards of judicial independence under the Treaties, the referring judges would have to abide by the 'legal position' and modify their decisions. And if not, the referring judges could keep their original decisions which would have to be delivered to the parties without delay. In this sense, the 'connecting factor' was established between Article 19(1) TEU, to which the referring court turned in its reference, and the disputes in the main proceedings before that court. So, it was necessary for the referring court to receive an interpretation of that provision from the Court of Justice, and – by following the guidance provided by the Court therein – to bring the disputes in the main proceedings to an end.[26]

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[25] *Hann-Invest* (n 1) para 41.

[26] This is where the fourth reference from the same court failed and was consequently declared inadmissible: see Case C-327/22 *Prom-Vidija* ECLI:EU:C:2023:757 (Order of the Court). In it, the referring court questioned the compatibility of provisions found in the Rules of Procedure of the Courts and the decisions of the president of their court with Article 19(1) TEU. These provisions set the order in which cases have to be dealt with by judicial panels of the same court, whereby cases received years earlier had to be given priority and treated in an urgent manner. The same provisions also prohibited delivery to the parties of judgments that were not issued in this pre-determined order. The task of ensuring that the order of handling cases is complied with was shared between the registrations judge and the vice-president of the court. The fact that in this way some decisions may be held back for months was, in the referring court's view, contrary to the requirements of efficient judicial protection and the parties' access to justice. However, the Court of Justice noted that the interpretation of Article 19(1) TEU was not necessary for the referring court to solve the substance of the dispute in the main proceedings. Namely, when the registrations judge and the vice-president informed the referring judges that their decision cannot be delivered to the parties because it was not issued in the determined order, they did not require the content of that decision to be changed, unlike what we saw in *Hann-Invest*. Rather, the problem occurred with the timing of the delivery of the decision, and the Court's reply would not change anything in that respect since the merits of the dispute in the main proceedings had already been settled by the referring court. For this reason, the Court rejected this reference as inadmissible. Note also that the fifth reference from the same court, which contained identical questions to the three references joined in *Hann-Invest*, was withdrawn after the Court's registrar informed the referring court of the ruling in *Hann-Invest*, since thereby all the questions had been answered. See Case C-361/21 *Pet-Prom* ECLI:EU:C:2024:913 (Order of the President of the Court). And there is a sixth and final reference from this Croatian court, in Case C-403/24 *Prvo plinarsko društvo*, currently pending before the Court of Justice, in which one of the referred questions concerns the role of the registrations judge under Article 177(3) of the Rules of Procedure of the Courts and its compatibility with Article 19(1) TEU, which was resolved in *Hann-Invest* and thus became moot. The other referred question concerns the obligation of courts in civil proceedings, involving payments based on contracts for gas supply from a Russian company, to take into account decisions of the Council adopted in the area of the Common Foreign and Security Policy.

From this we can see that, compared to the AG, the Court had a much broader understanding of what is 'necessary to enable [a national court] to give judgment' under Article 267 TFEU. The AG read this as meaning that the Court's ruling needs to be necessary for the national court to determine or change the substance of its judgment. The Court read it as meaning that its ruling is also necessary to enable the national court to physically issue its judgment and literally 'give' it to the parties so that it can start producing effects. So, the AG's reading would be a narrower, content-dependent, and 'substantive-questions-only' one, while the Court's would be a wider, content-independent, and 'procedural-questions-also' reading.[27] It remains to be seen whether this approach will be consolidated in future cases, so that requested interpretations of Article 19(1) TEU will always be acknowledged as necessary for national courts to resolve procedural questions of national law pertinent to the ongoing main proceedings (even though those proceedings have no substantive link to EU law) and as such make the references for a preliminary ruling admissible.[28]

4 Merits of the judgment: can judges depend on other judges when judging?

After dealing with the questions of jurisdiction and admissibility, what was left were the merits of the case. Here again, we saw a stark disagreement between AG Pikamäe and the Court of Justice concerning the interpretation of Article 19(1) TEU and what it means specifically in relation to this 'internal' dimension of judicial independence, as was brought out by the circumstances of the reference in *Hann-Invest*.

The AG did not offer many arguments to support his conclusion that Article 19(1) TEU does not preclude the application of a procedural mechanism such as the Croatian one for ensuring the consistency and uniformity of case law, for which he had already been criticised at length.[29] His positive assessment was essentially hanging on an assumption about the difference between the 'interpretation' and the 'application' of the law.[30]

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[27] For an earlier discussion of the Court's understanding of what is necessary for a national court to give a judgment, see Sébastien Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: *Miasto Łowicz*' (2020) 57 Common Market Law Review 1843, 1855 ff.

[28] Cf *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 39–41, where he argued that 'the basis for the Court's jurisdiction cannot be the basis for the admissibility of references for a preliminary ruling, as this would confuse two separate legal concepts and render that latter requirement meaningless'.

[29] See Bačić Selanec and Petrić (n 5).

[30] To make this assumption more plausible, the AG recalled a familiar example: preliminary ruling mechanisms that exist in many Member States, including the one from Article 267

Therefore, in the key parts of this Opinion, the AG argued that 'if the distinction between interpretation and application of a legal rule is accepted',[31] then the Croatian mechanism raises no concerns for the independence of judges that are tasked with solving a particular dispute or for the right to a fair trial of the parties to that dispute. In his view, when delivering 'legal positions', section meetings are only concerned with the interpretation of disputed legal provisions in abstract terms. They do not decide on the application of those provisions to a particular set of facts in concrete disputes. This is a task for the deciding judges, who are bound only by the abstract interpretations contained in 'legal positions', which they remain free to apply to specific factual circumstances. So, the independence of the deciding judges remains. It remains intact even after the intervention of the registrations judge, since that judge cannot, in the AG's view, impose his view on the deciding chamber, influence the content of their decision, or ultimately determine what the adopted 'legal position' will be. On paper at least, the registrations judge can only warn the deciding judges about possible inconsistencies with earlier case law, and later alert the president of the court about their disagreement. And it is only the president who can decide whether a section meeting has to be convened; and it is only the section meeting that can adopt a binding 'legal position', in which the view of the deciding judges or the view of the registrations judge will be endorsed.[32]

Since the interpretation of the law is 'by its nature, the work of a judge', the AG continued, section meetings do not have to be open to the parties in disputes.[33] In short, *iura novit curia*, only stretched to its limit. Under this principle, often taken to an authoritarian extreme by post-socialist judiciaries,[34] the law is removed from the parties' sight, and left exclusively in the hands of the court. The interpretation is not a

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TFEU, where the ideal division of tasks is that the Court of Justice interprets EU law but cannot apply it to specific cases, which is for the referring court to do freely and on its own. See *Hann-Invest*, Opinion of AG Pikamäe (n 2) para 68.

[31] ibid, paras 69 and 78.

[32] ibid, para 70.

[33] ibid, paras 67, 71, 77.

[34] As beautifully explained by Zdeněk Kühn, who wrote that this principle, whose original logic in the Continental legal tradition was to oblige the courts to raise points of law even without the parties' request, in the post-socialist countries received the following traits: 'the pluralism of opinions is absent'; '[t]he "right" answer is achieved through a "one-way" process and is backed entirely by threat and force'; '[t]hose to whom decisions are addressed cannot participate in finding the "right" answers; instead of being subjects, they are rather objects of authoritarian decision-making'; 'legal meanings are produced from above and […] the existence of any dispute, questioning, legitimate disagreement, or construction of the law from the bottom-up is unthinkable'. See Z Kühn, 'The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts' (2006) 2 Croatian Yearbook of European Law and Policy 19, 20–25.

discursive and argumentative process but a magisterial and bureaucratised one. The legal 'positions' are unmistakeably found at the top and imposed on those below. Only by understanding interpretation and the law in this way was it possible for the AG to conclude that there are no problems with formulating binding 'legal positions' behind closed doors, during meetings to which the parties have no access, and which are not regulated by rules of judicial procedure; or that these 'legal positions' come with no reasoning or argumentation to justify the majority decision of the judges that took part in the meeting. A meeting is not a hearing or a trial, so nothing that happens at that meeting or comes out of it can affect the parties' right to a fair trial.

Where AG Pikamäe went left, the Grand Chamber went right, taking an opposite direction. To espouse its own view of the questions raised by the referring court, it first had to set the scene. The background to the scene was made of familiar pieces from the earlier case law on judicial independence.

The Court started by saying that all national rules and practices that aim at ensuring the consistency and uniformity of the case law and at safeguarding legal certainty, which is itself an important element of the rule of law, must be compatible with the requirements that stem from Article 19(1) TEU.[35] In so doing, the Court referred to its standard expression of supremacy of EU law, which operates even over retained competences of the Member States, such as the organisation of the judiciary, in cases where the two overlap. The Court stated that even if, in principle, the establishment, composition and functioning of national courts fall within the competence of the Member States, in exercising that competence, the Member States must comply with EU law and, in particular, the standards of independence of the judiciary as prescribed in Article 19 TEU.[36] This 'spillover' formula indeed demands that Member States comply with the 'radiating' requirements of EU law even in the areas of their exclusive competence; or, on the flipside, it enables those general requirements of EU law to apply in the areas where Member States have not conferred competence on the EU, such as the organisation of national justice systems.[37] In this way, EU law as interpreted by the Court of Justice 'frames' national substantive and procedural laws.[38]

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[35] *Hann-Invest* (n 1) para 48.

[36] See N Bačić Selanec, 'A Realist Account of EU Citizenship' (doctoral dissertation, University of Zagreb 2019) 282–294; see also L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 European Journal of Legal Studies 192.

[37] Other typical examples include criminal law, direct taxation, attribution of nationality, health, education, social security, citizens' civil status, marriage and adoption laws, and so on.

[38] K Lenaerts, 'Federalism and the Rule of Law: Perspectives from the European Court of Justice' (2010) 33 Fordham International Law Journal 1338, 1343 ff.

The supremacy clause was followed by reiterating well-established case law, from which it follows that an essential requirement under Article 19(1) TEU is the independence of national courts. This independence comes in two dimensions, external (institutional) and internal (vis-à-vis the subject matter of the dispute or the parties to it), as is well known. Yet in *Hann-Invest*, the Court confirmed for the very first time that the 'external' dimension of judicial independence, although originally intended to shield judges from interference of the legislature and the executive, since it revolves around the idea of the separation of powers,[39] also protects them from undue influences that come from within their courts.[40] With this, the Court added an internal dimension to the already recognised external one. It clearly differentiated between a 'court' in the institutional sense, which can be subject to undue pressure from other institutions of the government (external independence), and a 'court' in the functional sense, as a judge or a panel of judges seized of a dispute, who may be subject to undue pressure from other judges holding administrative positions within their own institution (internal–external independence).

Besides the requirements of judicial independence and impartiality, the Court continued by elaborating another requirement that follows from Article 19(1) TEU, and that is the existence of a court 'previously established by law'.[41] This principle in EU law covers not only the legal basis of a court or the composition of its bench in particular cases. It also implies that the judicial panel originally seized of a case is the only one that can make the decision to bring proceedings to an end. This confirms the autonomy of judges in the functional sense, ie their exclusive power to determine the content of their rulings and the procedural fate of the cases they hear, where any external instructions or interventions are entirely prohibited, including those coming from their peers, especially those who enjoy administrative powers.[42] In simple terms, judges judge, and (judicial) administrators administer.[43]

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[39] Cf Case C-430/21 *RS (Effect of the decisions of a constitutional court)* ECLI:EU:C:2022:99, para 42: 'In accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the courts must be ensured in relation to the legislature and the executive'.

[40] *Hann-Invest* (n 1) para 54, referring to *Parlov-Tkalčić v Croatia* App No 24810/06 (ECtHR, 22 December 2009) para 86.

[41] *Hann-Invest* (n 1) para 55.

[42] The same idea was already included in *Portuguese judges*, where the Court held that '[t]he concept of independence presupposes, in particular, that the body concerned *exercises its judicial functions wholly autonomously*, without being subject to any hierarchical constraint or subordinated to any other body and *without taking orders or instructions from any source whatsoever*, and that it is thus *protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions*' (emphasis added). See *ASJP* (n 12) para 44.

[43] Cf A Uzelac, 'The Meaning of "Court"' in B Hess, M Woo, L Cadiet, S Menétrey and E Vallines García (eds), *Comparative Procedural Law and Justice* (Max Planck Institute

In addition, the principle of a court 'previously established by law' requires that in the course of judicial proceedings, all procedural guarantees are ensured.[44] These guarantees include the parties' right to be heard, as an essential element of their right to a fair trial and effective judicial protection expressed in Article 47 of the Charter.[45] Parties, therefore, must have the opportunity to hear and respond to all points of law and fact that may be decisive for the outcome of their dispute.[46] The composition of the judicial panel that decides on their matter must be transparent and known to them in advance, which excludes the possibility of any 'external' interference in the decision-making process by judges or officials who were unknown to the parties and with whom they did not have the chance to argue about relevant legal or factual questions.[47] With this, the Court adopts a conception of judicial proceedings and interpretation of law which is radically different from AG Pikamäe's. Here, the parties are involved through and through, and judicial decision-making is a process more inclusive, discursive, and argumentative than what the AG imagined. This picture fits well with the recent landmark rulings of the Court, which link Article 47 of the Charter and the parties' role in judicial proceedings to the duty of national courts to state reasons for their interpretations of EU law and refusals to refer questions of interpretation to the Court of Justice,[48] which in a similar manner speaks of how the Court sees the nature of the judicial process.

Moving from the general to the specific part of the judgment, the Court decided to further assist the referring court. It acknowledged, as always, the sole jurisdiction of the Croatian court to take previously described EU requirements of judicial independence, which were interpreted in an abstract manner and in the form of guidance, and apply them when assessing the compatibility of the Croatian procedural mechanism with Article 19(1) TEU in specific cases. But this time, the Court decided to throw in its own view of the matter, invoking the spirit of cooperation looming over the preliminary ruling procedure which requires it to give

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Luxembourg for Procedural Law, University of Luxembourg 2024) para 60 <https://www.cplj.org/publications/2-1-organization-of-the-civil-justice-system-and-judicial-independence> accessed 25 November 2024.

[44] *Hann-Invest* (n 1) para 57.

[45] ibid, para 58.

[46] ibid. In this respect, cf *Kress v France* App No 39594/98 (ECtHR, 7 June 2001) para 74: '[T]he concept of a fair trial also means in principle the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed […] with a view to influencing the court's decision'.

[47] *Hann-Invest* (n 1) para 59.

[48] See Case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799, especially para 51.

a 'useful' answer to its interlocutor,[49] hence preordaining the outcome at which the referring court should eventually arrive.

Firstly, concerning the more important issue of the power of section meetings to adopt 'legal positions' by which they can force the deciding judicial panels to change their rulings after they have already been adopted, the Court ruled that the provisions of national law in question are incompatible with Article 19(1) TEU. To get there, at the outset the Court expressly disregarded the suggested difference between the abstract 'interpretation' and concrete 'application' of the law, which was relied on by AG Pikamäe in his positive assessment of the Croatian rules. It did so by noting that although the section meeting does not decide on the application of the law to specific facts, when adopting a 'legal position' it does interpret the law in the light of the specific dispute that gave rise to its convening and intervention.[50] So, this formalistic difference was not able to save the national provisions from being strictly scrutinised by the Court.

Going further, the Court rightly pointed out that the section meeting enables a number of judges who are not members of the deciding judicial panel to influence the content of the final ruling which was already deliberated and agreed upon by that panel.[51] The Court then explained the most problematic aspects of this arrangement. On the one hand, there are no sufficiently objective criteria that govern circumstances in which the section meeting intervenes in a given proceeding. Although the Croatian Law on Courts does mention existing or potential departures from the established case law of a high court, the cases before the referring judicial panel revealed that the section meeting can be convened even when there is no alleged inconsistency in the case law, or only because the registrations judge disagrees with the legal view adopted by the deciding panel. As a consequence, the autonomy of the deciding judges inherent in the judicial function is negated, and the majority of their peers can easily downgrade them to something like ordinary bureaucrats. These kinds of external interventions are therefore clearly incompatible with the principle of a court previously established by law, and threaten the independence of individual judges and their decision-making. On the other hand, the parties to the proceedings before the deciding panel are left in total darkness regarding the continuation of their case. They are not aware of anything happening during the section meeting. They have no idea of the judges who sit and decide at that meeting (which can, in some cases, raise concerns about judicial partiality). They have no information or knowledge about the reasoning behind the 'legal position'

[49] *Hann-Invest* (n 1) para 60.

[50] ibid, para 73.

[51] ibid, paras 75–76.

adopted at the section meeting. All this leads to a complete disregard of the parties' procedural right to be heard and their right to argue about the applicable law.[52] In such circumstances, the effective judicial protection of their rights clearly remains a mere illusion.

With a similar tone, the Court of Justice went on to examine the power of the registrations judge to intervene and block the delivery of decisions to the parties and hence prevent the decisions from becoming final. The Court ruled that this practice is likewise incompatible with Article 19(1) TEU. In this part of the judgment, it is interesting how the Court deeply engaged with the reading of national law, and in several places rightly pointed out that such a role of the registrations judge is not even envisaged in the national law.[53] The Court emphasised that, although the registrations judge cannot directly influence the content of the ruling of the deciding judicial panel, the intervention of the registrations judge can in practice nevertheless influence the final outcome.[54] This influence is exerted by refusing to register the ruling and returning it to the deciding panel for re-examination; and where the panel disagrees with the registrations judge's observations, the latter can invite the president of the court's section to convene a meeting which adopts a 'legal position' that will strictly bind the deciding panel.

In the Court's view, there are two particularly problematic things related to such an intervention of the registrations judge, which mirror those highlighted when examining the powers of the section meetings. The first is that it happens after the deciding panel has deliberated and adopted its ruling, even though the registrations judge is not a member of that panel and does not participate in the proceedings that lead to the decision.[55] And the second is that that intervention is not based on clear and objective criteria provided in national law.[56] The discretion of the registrations judge is therefore practically unlimited, and the registrations judge is not required to provide a specific justification of his or her intervention. That this is not merely a hypothetical possibility can be seen in the cases before the referring judicial panel, where the registrations judge returned to them decisions either without pointing to an alleged inconsistency with the case law of their court or because the registrations judge preferred a different legal view or outcome. So, these kinds of interventions of the registrations judge in the judicial procedure and decision-making are likewise contradictory to the EU law requirements

[52] ibid, paras 77–78.

[53] ibid, paras 61–63, 66.

[54] ibid, paras 64–65.

[55] ibid, para 67.

[56] ibid, para 68.

of a court previously established by law and judicial independence and autonomy, which are there to guarantee effective judicial protection.

Before signing off on its judgment, the Court of Justice at the very end decided to go above and beyond the reply to help the referring court in solving the immediate case. In the very last paragraph, the Court added several lines that can be read as a general message not only to the Croatian judiciary but all national judiciaries in the EU. There, the Court sketched the contours of procedural mechanisms whose aim would be to ensure consistency and uniformity of the case law and safeguard legal certainty, yet which would remain within the framework of Article 19(1) TEU requirements.[57]

Firstly, and obviously, the judicial panel originally seized of the case can always decide autonomously and of its own will to refer contentious points of law raised in the course of the proceedings to an extended formation of the same court. Indeed, mechanisms like this already exist in different Member States, and as such are not suspect from the perspective of judicial independence and effective judicial protection.[58]

Secondly, and more importantly, are the mechanisms that allow judges who *are not* members of the panel originally seized of the case to refer the matter to an extended formation of their court. They can remain in place or be introduced only if the following conditions are met: (i) the judicial panel originally seized of the case has not yet deliberated and adopted its decision; (ii) national legislation contains clear criteria under which such referral can be made; and (iii) the referral to an extended

[57] ibid, para 80. Elsewhere, the Court somewhat similarly elaborated on the substantive and procedural conditions which must be met to ensure respect for judicial independence in procedures which involve external interferences (ie from the legislator or the executive) with the functioning of national judiciaries. See Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531, para 111: '[T]he fact that an organ of the State such as the President of the Republic is entrusted with the power to decide whether or not to grant any such extension [of judges' mandate or term in office] is admittedly not sufficient in itself to conclude that that principle [of judicial independence] has been undermined. However, it is *important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions* are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them' (emphasis added).

[58] Some of them were mentioned by AG Pikamäe in his Opinion, yet were improperly equated to the Croatian mechanism in *Hann-Invest* by a failure to notice that (i) some of those mechanisms result in a non-binding decision of an enlarged judicial formation, which is addressed only to the initial judicial panel and not to other panels of the same court; or that (ii) sessions of an enlarged judicial formation can be convened only at the initiative of the judicial panel originally seized of the dispute and not of some other administrative body of the same court; or that (iii) proceedings before an enlarged judicial formation are regulated by national procedural rules, which guarantee the rights of the parties to the original dispute. See *Hann-Invest*, Opinion of AG Pikamäe (n 2) paras 71–72 and fn 34–35.

judicial panel guarantees all procedural rights of the parties to the original dispute.

Interestingly, in setting out these conditions, it seems that the Court of Justice had in mind a mechanism for ensuring the consistency of case law that has recently become available in the national procedural framework. In 2019 and 2022, the Croatian Law on Civil Procedure was amended to introduce another mechanism of referring cases which are problematic for the equal application of the law to a higher-instance judicial formation of the Supreme Court – so-called 'extended panels'. This highest formation of the national Supreme Court is composed of thirteen judges to whom cases may be referred within the Supreme Court on contentious legal issues relevant to the uniform interpretation and application of the law, either by regular five-judge panels of the Supreme Court in the case of their mutual disagreements,[59] but also by lower courts.[60] These recent legislative novelties push the Croatian judicial system towards better procedural mechanisms for resolving inconsistencies in the case law of the courts which are arguably in full compliance with the requirements of Article 19(1) TEU. They also show that Croatia does have an alternative solution for ensuring the equal application of the law, instead of insisting on outdated and malleable extra-procedural techniques relying on judicial administration, such as the one in *Hann-Invest*. Regardless of the spiteful resilience of Croatia's old coherence regime, especially in the light of the new alternatives, it was truly time for the mechanism to be struck down.

5 The national dimension and violation of EU law: federalism strikes back

National judicial circles received the verdict with understandable initial shock, especially considering that the AG's Opinion initially suggested the Court might take a different, more lenient route. Still, all the

[59] See Article 390(2) of the Law on Civil Procedure (Zakon o parničnom postupku) Official Gazette 80/22.

[60] This so-called 'model procedure', in a way, operates similarly to the dialogue of national courts with the Court of Justice in the preliminary reference mechanism, just at the national level. Through the model procedure, 'any judicial chamber of a lower court facing a contentious legal issue that could be "important for ensuring the uniform application of law" can refer the case to the Supreme Court which can, in turn, decide to seize the dispute if it estimates that systemic disruption in the judicial system could occur because of a large number of similar cases pending in front of lower courts, justifying the need for an early intervention prior to the exhaustion of regular judicial remedies. The Supreme Court would then decide a single case on the merits in full compliance with the rules of civil procedure, by delivering a "model" judgment which becomes binding on all courts deciding on the same points of law'. See Articles 502i–502n of the Croatian Law on Civil Procedure (Zakon o parničnom postupku) Official Gazette 70/19, and Bačić Selanec and Petrić (n 5) 7.

relevant national actors soon responded in a conciliatory tone. Despite the inevitable side-comments about how *Hann-Invest* would 'impact legal certainty for Croatian citizens', and result in 'increasing judicial contradictions', both the President of the Supreme Court and the Minister of Justice immediately issued statements confirming that Croatia would comply with the Court's judgment and make prompt efforts to align its sub-legislative and legislative acts, and the resulting judicial practice, with Article 19(1) TEU.[61]

At present, more than five months after the judgment, no such legislative or even sub-legislative consolidation with EU law has taken place.[62] Assuming (and hoping) this will eventually occur means that, in hindsight, the Croatian Constitutional Court will remain the lone outcast.

Two and a half years ago, while the reference in *Hann-Invest* from the High Commercial Court on the same point was already pending before the Court of Justice, the Croatian Constitutional Court took matters into its own hands. In two decisions issued in April 2022, it declared that the Croatian coherence mechanism (simultaneously being reviewed in Luxembourg) does not violate either national constitutional law, *or*

[61] See Ministry of Justice, Administration and Digital Transformation of the Republic of Croatia, 'Ministar Habijan o odluci Suda EU: Analizirat ćemo odluku i pristupiti izmjenama – ključno je da građani imaju pravnu sigurnost' [Minister Habijan on the judgment of the CJEU: We will analyse the decision and implement the amendments – ensuring citizens' legal certainty is central] (11 July 2024) <https://mpudt.gov.hr/vijesti/ministar-habijan-o-odluci-suda-eu-analizirat-cemo-odluku-i-pristupiti-izmjenama-kljucno-je-da-gradjani-imaju-pravnu-sigurnost/28373> accessed 29 November 2024; see also Supreme Court of the Republic of Croatia, 'Sudbena vlast Republike Hrvatske provest će odluku Suda Europske unije, no očekuje se povećanje suprotnih sudskih odluka' [Judicial government of the Republic of Croatia will implement the decision of the CJEU, but an increase in contradictory judicial decisions is expected] (11 July 2024) <https://www.vsrh.hr/sudbena-vlast-republike-hrvatske-provest-ce-odluku-suda-europske-unije-no-ocekuje-se-povecanje-suprotnih-sudskih-odluka.aspx> accessed 29 November 2024.

[62] At the moment of finalising this paper, we cannot confirm with certainty that, despite the announcements, the Croatian authorities will truly conform with the Court's judgment in *Hann-Invest*. The Ministry of Justice has formed a working group for the implementation of the judgment composed of government officials, judges of the Supreme Court and external experts in procedural law (not EU or constitutional law, *nota bene*), who are supposed to create a package of proposals for the requisite legislative reforms. However, the working group was formed only in mid-October (four months after *Hann-Invest*) and, to our knowledge, to date, its progress is slow, with no results visible or available to the public. Another important development that will need to occur to align the national framework with *Hann-Invest* is at the level of the Supreme Court – which will have to amend its own internal Rules of Procedure, in which the powers of the registrations judge to block judgments and refer them (via the court's president) to the court's (section) meeting is directly prescribed. This is actually the only (sub)legislative act which explicitly envisages such extensive powers of the registrations judge which the Court of Justice declared contrary to Article 19(1) TEU in *Hann-Invest*. See Articles 37, 40 and 40a of the Rules of Procedure of the Supreme Court (Consolidated version from 11 December 2023) <https://www.vsrh.hr/EasyEdit/UserFiles/normativni-akti/2024/procisceni-tekst-poslovnika-vsrh-od-5-2-2024.pdf> accessed 30 November 2024. At the moment, these Rules of Procedure are still in force.

EU law, given that it does not prevent national courts from submitting references to the Court of Justice under Article 267 TFEU.[63] What the Constitutional Court completely ignored – and which was highlighted in the dissenting opinion – were the implications of the mechanism under the standards of judicial independence under Article 19(1) TEU.[64]

By failing to stay its own proceedings or join the reference, the Constitutional Court jumped the gun, while downgrading national constitutional standards of judicial independence far below the European level. Federalism struck back. *Hann-Invest* clearly confirms that the Croatian Constitutional Court violated its own obligations under the Treaties to refer the final decision on the interpretation of EU law (and the corresponding compliance of the national judicial architecture with Article 19(1) TEU) to the Court of Justice in Luxembourg. The operation of supranational checks and balances truly worked at its very best.

And indeed, from a constitutional perspective, this case presents a classic tale of federal checks and balances, exemplifying successful recourse to the supranational level when the national level fails. Long before the matter was referred to Luxembourg, or even to the national Constitutional Court, the Croatian coherence mechanism had been the subject of controversies and continuous disputes in the national arena, not least because of its problematic origins. Our original and detailed analysis of its true nature and origins has already been published in our earlier contribution to this Yearbook on the Opinion of the Advocate

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[63] Croatian Constitutional Court, Decisions no U-I-6950/2021 of 12 April 2022 (challenging Article 40(2) of the Law on Courts on the binding nature of 'legal positions') and U-II-1171/2018 et al of 12 April 2022 (challenging Article 177(3) of the Rules of Procedure on the powers of the registrations service).

[64] See the Dissenting Opinion of Justices Abramović, Kušan and Selanec in Decisions nos U-I-6950/2021 and U-II-1171/2018 (ibid). The position of the majority never actually responded to the claimants' arguments of unconstitutional compromises made for the independence of the judiciary, even if their pleadings were backed by an overwhelming number of concurring academic opinions. The decision of the Court's majority was, in general, strikingly inconsistent. For example, the Court first cited the Consultative Council of European Judges, whose opinion from 2017 clearly provides that abstract interpretational statements of courts 'raise concerns' for the role of the judiciary in the system of separation of powers, and that the uniformity of case law should rather be ensured by procedural mechanisms and judicial remedies. See Consultative Council of European Judges (CCJE) Opinion No 20 (2017) 'The Role of Courts with Respect to the Uniform Application of the Law' <https://rm.coe.int/opinion-ccje-en-20/16809ccaa5> accessed 30 November 2024. However, the Constitutional Court never even referred back to its own citation; see point 17.1 of the Court's Decision no U-I-6950/2021 (ibid). The most extensive part of the Decision is actually a misplaced and weak analysis of a potential violation of EU law – claiming that the uniformity mechanism is not at odds with the judicial prerogatives to ask preliminary questions under Article 267 TFEU, while not even mentioning the independence concerns under Article 19(1) TEU. In its final conclusion, the Court merely proclaimed, with no substantive analysis to support it, that no concerns were raised under the Constitution.

General, and we will not revisit it at length here.[65] In a nutshell, the entire mechanism as it operated in Croatia until now was a relic of the Yugoslavian socialist regime, utilised to ensure hierarchical judicial dependence in the system of uniform communist government.[66] As such, the very nature of the coherence mechanism designed to ensure judicial obedience stands at striking odds with the requirement of the separation of powers and the true substantive independence of the judicial branch under the rule of law. Over time, the original procedural features of the socialist mechanism were attenuated by numerous legislative amendments, especially those from the times of Croatian accession to the EU. Still, the mechanism remained resilient and vigilant in Croatian judicial practice. When the national Constitutional Court was called upon to intervene and set the mechanism aside, it failed to achieve this task. Still, a much-needed remedy for this contentious constitutional issue finally came from the supranational level. In its judgment, the Court of Justice made clear that the functioning of national judiciaries in such ways – permitting competent judicial panels to be blocked in their autonomous decision-making by the structures of judicial administration – simply cannot be reconciled with the Union's core value of the rule of law and the true independence of the judicial branch.

6 Setting the standards of internal judicial independence and the new trajectories for Article 19(1) TEU

In the overall development of Luxembourg's rule of law jurisprudence, *Hann-Invest* truly comes with the potential of becoming one of the most important pieces.

At a conceptual level, *Hann-Invest* confirms that judicial independence under EU law must entail the protection of national judges from undue pressures not only from the political branches of government, direct or indirect, as in Luxembourg's prior case law on the rule of law

[65] See Bačić Selanec and Petrić (n 5).

[66] Interestingly, the initial origins of judicial 'registration' services date back even to the times of the Habsburg Monarchy, of which Croatia formed part. The original design of the registration (evidentiary) services, or 'Evidenzstelle' and 'Evidenzsenate', was actually designed in the middle of the 19th century for Austrian courts, and was copied in the rest of the monarchy. In the 20th century, the mechanism was taken over by communist governments of the post-Habsburg countries in Eastern Europe (and beyond), further instrumentalising the mechanism to secure the goals of uniform governance of the communist parties. For this reason, a similar mechanism to the one in Croatia was until recently, or even up to the present, found in a number of post-Austro-Hungarian countries. See 'Introduction' in M Bobek, P Molek and V Šimíček (eds), *Komunistické právo v československu: Kapitoly z dějin bezpráví* [Communist Law in Czechoslovakia: Chapters from the History of Lawlessness] (Masaryk University 2009). We would like to thank Michal Bobek for pointing out this historic gem.

– but also from their peers within the same judicial ranks. In other words, the concept of judicial independence protected under Article 19(1) TEU also includes an internal dimension. In making this determination, the Court of Justice relied on the already developed jurisprudence of the Strasbourg court in that regard.[67] In *Parlov-Tkalčić*, the European Court of Human Rights had defined the concept as requiring judges in their individual capacity to be 'free from directives or pressures from fellow judges or those who have administrative responsibilities in the court, such as the president of the court or the president of a division in the court' … 'judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within'.[68]

Luxembourg's conclusions follow Strasbourg, but also go beyond.[69]

In *Hann-Invest*, the Court of Justice developed the concept of internal judicial independence within the specific context of Union law. The judgment confirms that internal judicial independence under Article 19(1) TEU protects the unfettered autonomy of judges and judicial panels deciding a case, which must remain solely responsible for taking a final decision on the merits, with no undue or prevailing influence from judicial administration, including registrations judges or extra-procedural meetings of their peers. To that extent, the judgment should be considered a welcome continuation of Luxembourg's case law, emphasising the central role of the individual autonomy of national judges, as the essence

[67] For a detailed analysis of the concept of internal judicial independence as developed in Strasbourg's jurisprudence, see J Sillen, 'The Concept of "Internal Judicial Independence" in the Case Law of the European Court of Human Rights' (2019) 15 European Constitutional Law Review 104.

[68] *Parlov-Tkalčić v Croatia* (n 40) para 86.

[69] See also ECtHR judgments in *Cupara v Serbia* App no 34683/08 (ECtHR, 12 July 2016), and *Popova and Popov v Bulgaria* App no 11260/10 (ECtHR 11 April 2019). In these judgments, the Court in Strasbourg declared that there is no violation of the right to a fair trial under Article 6 ECHR arising from the inconsistent application of case law by national courts, as the national legal systems in these countries envisage a 'mechanism capable of remedying the case-law inconsistencies'. A particular problem with these judgments in light of *Hann-Invest* is that the national coherence mechanisms in question – just like the Croatian one – relied on the involvement of registrations judges and the joint legal position of the courts' (section) meetings. The Serbian mechanism was even a direct transposition (and succession) of the former Yugoslavian Law on Courts, exactly the same as the Croatian version thereof. One could thus argue that, indirectly, the ECtHR had found no problems under Article 6 ECHR with the Croatian-type coherence regime. We strongly disagree. In these judgments, the Court in Strasbourg never directly assessed the compliance of this coherence regime with the standards of judicial independence – nor was such a request even made by the applicants. Instead, the Court's only conclusion was that since, in principle, the Bulgarian and Serbian national legislation provides a mechanism to ensure case law coherence, there is no violation of the parties' rights to the uniform application of the law under Article 6, when the outcome of their case differs from an alternative line of case law. Arguably, after *Hann-Invest*, Strasbourg's future cases on such matters might take a different route.

of their European mandate required for the effective application of EU law, following the original logic of the Court's empowerment of national judiciaries going all the way back to the establishment of the principles of the supremacy of Union law and its direct effect. In other words, in *Hann-Invest*, the jurisprudence under Article 19(1) TEU meets and greets *Simmenthal*, complementing its standards of judicial autonomy underpinning the European mandate of national courts.[70] Along those lines, *Hann-Invest* should also be considered as following the trends of more recent developments in the case law of the Court of Justice on the principle of supremacy of Union law. This particularly relates to the Court's judgments on the Romanian judges, such as *Euro Box, RS*, or *Lin*, which emphasise that no higher judicial instances or the pressures of higher courts (in those cases, in the form of decisions of the national Supreme or Constitutional Court) can prevent the competent lower-instance national court from autonomously applying Union law.[71] In these judgments, the Court confirmed that

> any national rules or practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary *at the moment of its application* to disregard a national provision or practice which might prevent EU rules from having full force and effect are incompatible with the requirements which are the very essence of EU law.[72]

This power is, moreover, 'an integral part of the role of a court of the European Union [...] and the exercise of that power constitutes a guarantee that is essential to judicial independence as provided for in the second subparagraph of Article 19(1) TEU'.[73] *Hann-Invest* reaffirms the same rationale, placing the individual autonomy of the deciding national judges on the central pedestal.

Certainly, the judgment confirms that national judges may always have recourse to Article 19(1) TEU when the underlying dangers and undue pressures on their judicial autonomy result from the structural rules on the organisation of the national judiciary. The mechanisms for ensuring consistency of case law overly relying on the involvement of judicial administration are precisely such a problematic structural threat. It is all the more relevant to note this, as Croatia is not the only post-socialist country that has maintained such a judicial regime long after cutting ties with its communist past from which the regime was inherited. Up to now,

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[70] For a more elaborate version of this argument, see Bačić Selanec and Petrić (n 5).

[71] See Joined Cases C-357/19 et al *Euro Box Promotion* ECLI:EU:C:2021:1034; Case C-430/21 *RS* ECLI:EU:C:2022:99; and Case C-107/23 PPU *Lin* ECLI:EU:C:2023:606.

[72] *Euro Box Promotion* (n 71) para 258.

[73] ibid, para 257.

several other Member States of the EU retain a very similar mode of internal operation to ensure the uniformity of case law as the one in *Hann-Invest*, which arguably makes all these mechanisms immediately contrary to EU law and subject to the direct operation of Article 19(1) TEU.[74]

To this extent, we are certain that *Hann-Invest* will serve as an important precedent for future cases reviewing structural barriers to judicial autonomy, in national mechanisms for ensuring the equal application of the law in the case law of national courts, and beyond. The judgment has truly set the stage for further doctrinal developments in requisite standards in the organisation of national judiciaries. In which directions these developments might head is at this moment a point of speculation. But the possibilities are plentiful, in particular when the organisation of the post-socialist judiciary in Central and Eastern European Member States is at stake. A number of prominent scholars studying the judiciary in Central and Eastern Europe have long warned that many of these countries have not yet fully internalised the rule of law values of liberal democratic constitutionalism.[75] Despite the formal adoption of rule-of-law standards (which mostly occurred during the process of EU accession), many of these countries still maintain significant patterns of inherited authoritarian legal culture and post-socialist mindset, in particular in the modes of organisation and operation of their judiciary, which stands at odds with the liberal understanding of judicial autonomy and substantive independence. This is further supported by recent research by Sillen, who found that all the violations of 'internal' judicial independence found to date by the European Court of Human Rights in Strasbourg pertains to post-communist countries.[76]

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[74] To our best knowledge, a comparable mechanism of ensuring the uniformity of case law still exists in Hungary, Slovakia, Bulgaria, Romania and Poland. Other countries have, in contrast, disposed of such mechanisms through national legislative reforms or constitutional reviews, despite having a history of using such mechanisms in the past (such as Estonia, Latvia, Lithuania and Slovenia). See Bačić Selanec and Petrić (n 5). See also Consultative Council of European Judges (CCJE) Opinion No 20 (2017) 'The Role of Courts with Respect to the Uniform Application of the Law' <https://www.coe.int/en/web/ccje/the-role-of-courts-with-respect-to-uniform-application-of-the-law> accessed 23 November 2024.

[75] To name only a few early works, see S Rodin, 'Discourse and Authority in European and Post-Communist Legal Culture' (2005) 1 Croatian Yearbook of European Law and Policy 1; T Ćapeta, 'Courts, Legal Culture and EU Enlargement' (2005) 1 Croatian Yearbook of European Law and Policy 23; Z Kühn, 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries' (2005) 1 Croatian Yearbook of European Law and Policy 55; F Emmert, 'The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe' (2001) 3 European Journal of Law Reform 405; M Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2008) 14 European Public Law 99; A Uzelac, 'Survival of the Third Legal Tradition?' (2010) 49 Supreme Court Law Review 377.

[76] See Sillen (n 67).

But the effects of such a type of review should and hopefully will not be limited to the EU's 'Eastern Bloc'. On the contrary, *Hann-Invest* should serve as an important precedent for the operation of mechanisms to ensure the uniformity of the case law at the level of appellate and supreme courts in all EU Member States, and will surely make a major contribution to an already burgeoning Europewide debate on the proper modes of organisation of national judiciaries.[77]

That, perhaps, is the judgment's most important transversal value. *Hann-Invest* has confirmed that Article 19(1) TEU no longer serves as an ultimate remedy for addressing rule-of-law 'backsliding', the grave and systemic disruptions of the rule of law in EU Member States or the reforms of the structure of national (judicial) bodies undermining the effective application of Union law. Rather, *Hann-Invest* has opened a Pandora's box of using Article 19 TEU as a standard mode of supranational review of the standard (even long-lasting) modes of national judiciaries.[78] The future developments of Luxembourg's jurisprudence on the rule of law will most likely follow the same path.

7 Conclusion

In *Hann-Invest*, the Court of Justice set the foundation for the EU's standards of internal independence of the judiciary under Article 19(1) TEU. Taking a generous approach to the requisite standards for effective judicial protection under national law, the judgment confirms that deciding national courts cannot be blocked in their autonomous decision-making by the structures of judicial administration. To that extent, *Hann-Invest* should certainly be added to the list of the most important judgments of the Court of Justice defining the essence of the national court's independence and autonomy required for the successful fulfilment of its European mandate.

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[77] A case raising similar concerns is currently pending before the ECtHR; see *Kuijt v the Netherlands*, App No 19365/19 (ECtHR, lodged on 4 April 2019). The case involves a challenge against the practice of the Dutch Hoge Raad, regulated by internal and publicly available acts of that court, by which the so-called 'reservisten' judges (who are not members of the judicial panel originally seized of the case) may join the deliberation phase yet cannot participate in the final vote on the outcome. The applicant claimed that this practice is incompatible with Article 6 of the Convention, as it goes against the principle of a court 'previously established by law' and enables undue influence of the 'reservisten' judges over the deciding judges, thus jeopardising the latter's independence and impartiality. For a further elaboration of this case and its underlying issues, see the discussion in Marc de Werd, 'Uninvited Oversight: Judges Watching Judges – The ECJ Hann-Invest Case' (*Amsterdam Centre on the Legal Professions and Access to Justice Blog*, 16 July 2024) <https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html?origin=iR%2FZNOHmRye9b1db42mh1Q> accessed 23 November 2024.

[78] Bačić Selanec and Petrić (n 5) 24.

Moreover, this judgment might become the key for deciding on the admissibility of references that question the compatibility of national judicial systems and procedures with Article 19(1) TEU, which arrive at the Court of Justice from disputes whose substance is not linked to EU law. The logic of admissibility underlying the preliminary ruling procedure was interpreted widely, which suggests that the Court intends not to shy away from engaging with issues of the organisation of national justice systems. To that extent, *Hann-Invest* could open the doors for interested national judges to bring forward more questions concerning the operation of their national judicial systems and challenge their compatibility with the EU rule-of-law standards.

And indeed, aside from its important doctrinal developments, the judgment in *Hann-Invest* is remarkable for its potential, and its constructive tone. Despite a clear and persuasive line of reasoning that led to declaring the Croatian mechanism incompatible with the EU's standards of judicial independence, in *Hann-Invest* the Court made an obvious effort not to draft the judgment in a condescending or a forceful tone, but to constructively assist the national judicial system to ensure that the 'red lines' of Article 19(1) TEU are not crossed.[79] Reading the judgment, one cannot but notice the Court's thoughtful engagement with the facts, and a thorough analysis of the structure of the national judiciary, clearly outlining and even suggesting to the national system which elements of its internal modes of functioning are problematic, how to fix them, and how to use other procedural mechanisms for ensuring the consistency of the case law that are already in place.

In *Hann-Invest,* the Court of Justice made a visible effort to engage in a constructive dialogue with the national judiciary over the proper understanding of common rule-of-law standards as they are applied to the judicial branch. The Court's intention must have been to demonstrate that Article 19(1) TEU can indeed be used to remedy not only grave disruptions or attacks on the independence of national judiciaries, but also the standard modes of their operation which might, because of their systemic nature, in principle impact the effective application of Union law. As suggested in our previous contribution to this Yearbook, this has set the trajectory of Article 19(1) TEU jurisprudence beyond rule-of-law 'backsliding'. As 'judicial umpiring' of the common legal order under the rule of law evolves and matures, *Hann-Invest* brings it a step closer to a full-fledged constitutional review of national judicial architectures:

[79] On the 'red lines' of Article 19(1) TEU, see A von Bogdandy, P Bogdanowicz, I Canor, M Taborowski and M Schmidt, 'Guest Editorial: A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines' (2018) 55 Common Market Law Review 983.

supranational, through a framework of cooperation. If we are to judge by the dialogical standards set therein, interesting new developments in the case law surely lie ahead. Dancing on a thin line between federal overreach and constructive assistance, Luxembourg has this time around 'not failed to meet the challenge'.[80]

Suggested citation: N Bačić Selanec and D Petrić, 'New Frontiers for Article 19(1) TEU: A Comment on Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest*' (2024) 20 CYELP 127.

[80] K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205, 263.