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Editorial comment

Nika Bačić Selanec* and Davor 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*

The Grand Chamber of the Court of Justice of the EU (CJEU, the Court) is within the next few months expected to deliver a judgment in Joined Cases C-554/21, C-622/21 and C-727/21 *Hann Invest*. In the first preliminary reference on the state of the rule of law and independence of the judiciary in Croatia, the referring national court questioned whether the Croatian mechanism for ensuring consistency of case law of second-instance national courts and the Supreme Court complies with Article 19(1) TEU. This mechanism, in short, entails extra-procedural and collective judicial decision-making within the same court (or its specialised sections) on the points of 'abstract' interpretation of law with binding force in individual disputes; and in the case of disobedience, authorises a so-called 'registrations judge', operating outside the deciding judicial panel, to block deliveries of any judicial decision conflicting with the position of a court's prevailing majority. The referring national judges in the present case were caught in precisely such a vicious circle, seeking refuge in the CJEU's promise to upkeep the rule of law and the independence of the national judiciary.

The opinion of Advocate General (AG) Pikamäe in the case was issued in October last year.[1] Aside from problematising the admissibility of such 'systemic' rule of law questions under Article 267 TFEU, the AG considered that, in substance, the Croatian mechanism strikes an appropriate balance between the independence of individual judges, on the one hand, and the legitimate claim for coherence of case law, on the other, grounded in the right of all parties to equal application of the law. Despite the AG's unusually benevolent, and rather cursory, analysis of the mechanism, we anticipate the Court will proceed with the case (and we urge it to proceed) with greater caution.

Our contribution will point out two things currently missing from the debate on *Hann Invest*. We will first lay out the background to the case, the

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

contextual relevance of the questions posed and the central legal concepts involved, setting the ground for pushing back against the opinion of the AG. We will explain why the opinion fails to grasp the true nature of the Croatian model for ensuring uniform application of the law. Far from being an ideal compromise, what the Court is dealing with is a highly controversial model for ensuring judicial obedience – a relic of the socialist regime at odds with the rule of law value of a truly independent judicial branch. We will then recall the basics of EU law, in particular concerning the status of national courts in the EU judicial system. The AG's opinion ignores and fails to confront the Croatian coherence mechanism with some of the central postulates of independence indispensable for national courts to fulfil their 'European mandate' of providing effective judicial protection under EU law.

The judgment's relevance and some background

The judgment is anxiously awaited in the national arena, given its possible effects on the standard and long-lasting mode of functioning of the Croatian judiciary. Simultaneously, *Hann Invest* will have transversal relevance for the development of Luxembourg's case law on the rule of law and the judicial independence. The judgment will allow the Court to set the trajectory of its rule of law jurisprudence beyond situations which are commonly referred to in 'crisis' vocabulary as rule of law 'backsliding'. Put differently, the judgment could signal the beginning of the 'very intense involvement' of the Court of Justice in the standard organisation of national judiciary and the quality of national rules on procedure, traditionally perceived as outside the EU's reach.[2]

Additionally, *Hann Invest* is the first case in which the Court of Justice has been invited to reflect on the issue of internal judicial independence in the context of Article 19(1) TEU. In the judgment, the Court will draft initial contours of judges' independence under EU law from an internal perspective – not against the political branches of government, direct or indirect, as in prior case law on the rule of law – but against their peers within the same judicial ranks. In Strasbourg's jurisprudence, the concept was already defined as requiring that judges are in their individual capacity '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'.[3] Assuming it will follow similar lines of reasoning, Luxembourg will now finally have its own say.

But there is another interesting twist.

Despite never adjudicating precisely on the uniformity mechanism in question in *Hann Invest*, the court in Strasbourg found violations of 'internal'

[2] 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 31 March 2024.
[3] ECtHR, *Parlov-Tkalčić v Croatia*, App no 24810/06, para 86.

judicial independence only for post-communist countries.[4] This is by no means a coincidence. A lack of internal judicial independence is a striking feature of post-socialist judiciary. To that extent, *Hann Invest* is the first direct confrontation of the Court of Justice with the socialist legacy of a number of the EU's eastern members, and the way it still influences the organisation of their judiciaries.

This might be a novel issue in EU law, but scholars studying the Central and Eastern European (CEE) judiciary in the context of EU accession and the rule of law have long warned against the dangers of its post-socialist mindset and the authoritarian judicial culture.[5] Many of these works were published exactly twenty years ago in the first edition of the Croatian Yearbook of European Law and Policy. As part of its current editorial team, it is now our duty to speak up. We fear that, despite their accession, and the continuous efforts of some CEE countries to improve, many of them have not (yet) internalised the values of an independent and democratically accountable judicial branch that operates within the system of checks and balances. In our little corner of the EU, the rule of law debt might already be long overdue. Article 19(1) should now come to collect.

In the remainder of this text, we will explain why.

The Croatian uniformity mechanism

The referral in *Hann Invest* essentially questions whether a judicial panel deciding a particular dispute can be considered internally independent if its autonomous decisions may be blocked by two bodies within the structure of the same court, a 'registrations judge' and a majority of its peers.

The 'registrations judge' is herself not a member of the panel, but is entrusted by the president of the court to monitor the coherence of judicial decisions leaving a court's docket. In this capacity, she is authorised to refuse to send out the deciding panel's judgment to the parties on grounds of incoherence with previous case law of the same court or court section, or the existence of conflicting interpretations on the same point of law. The referral reports that, in 2021, one in 10 cases of autonomous judgments of judicial panels were blocked by the registrations judge, demonstrating just how

[4] For a neat 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.

[5] To name only a few early work, 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.

widespread this practice actually is.[6] Either Croatian judges really know very little about interpreting the law, or the role of a registrations judge too often comes down to being a court's sheriff, policing the judgments' legal outcomes. Or both.

In any case, after being informed about a blocked decision by the registrations judge, the president of the court calls a judicial 'meeting' to resolve the dispute – convening all judges sitting in a court or its specialised section in, for example, criminal law or family law. Despite the whole thing being initiated by a concrete dispute, and after discussing the proper interpretation of supposedly abstract points of law, the judges take a majority vote. The so-called 'legal positions' adopted at such meetings are under Article 40(2) of the Croatian Law on Courts binding on all the chambers or judges of that section or court.

To be clear at the outset, this mechanism does not function as a legal remedy, such as judicial review or higher-instance proceedings upon the parties' appeal, or as a procedural mechanism of referring important cases to a larger formation. Rather, the mechanism entails taking a substantive decision away from the deciding panel and referring it to collegiate decision-making in behind-the-curtain and extra-procedural meeting of all judges. Their majority position is delivered on points of law *in abstracto*, supposedly without referring to the circumstances of particular cases which led to the meeting, but the position is still legally binding on judges adjudicating concrete disputes. The decision-making in the meeting often comes down to raising hands on the proposition of proper interpretation of the law set down by the president of the court or its section. The judges voting on the interpretation of the law never see the case files and supposedly do not discuss the facts of individual cases, but this can hardly be so as factual circumstances are surely raised in defending the prevalence of one possible outcome over the alternative. Still, the parties in the relevant disputes never have a chance to present their arguments, or even know who the judges deciding their matter are, raising significant concerns as to the parties' access to a fair trial and its procedural guarantees. National legislation likewise provides no rules on publication of these abstract legal positions. Each national court publishes them at its own discretion – some are published as acts of judicial administration, some as press releases, some as legal positions not forming part of the court's case law, and some are not published at all. Those that are published rarely amount to more than a sentence or two of abstract legal positions, followed by the name of the court and the deciding date, with no explanation of the judicial rationale or possible interpretations of the law, or information about the cases that led to the dispute, or any other background that led to the court's 'legal position'. As a procedural anomaly, these positions lack any direct legal remedy, and escape constitutional review.

A striking lack of all procedural guarantees in this mechanism should in all serious constitutional regimes instantly raise a red alert.

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[6] Case C-727/21 *KHL Medveščak*, reference for a preliminary ruling from Visoki trgovački sud Republike Hrvatske (Commercial Court of Appeal, Croatia) 3.

National law also fails to regulate what happens if, for example, the president fails to refer the matter to a judicial meeting, or if the deciding chamber refuses to apply the common position or decides to circumvent it – and does this mean that a judgment could indefinitely remain in the registrations' limbo, or that disobedient judges could be charged in disciplinary proceedings. The entire legal regime is significantly underregulated, and there is a historic explanation for this.

As things currently stand, the national framework providing the uniformity mechanism in question consists of an ambiguous combination of legal bases, whether legislative or sub-legislative acts and, above all, well-situated judicial practice. This fragmentation is a result of a number of reforms that were undertaken in the wake of Croatian EU accession negotiations, removing by legislative amendments a good number of the mechanism's original features. The first of these amendments removed the obligatory legal nature of the legal positions in 2000, only to return them in 2004 in an incomplete form, without the original provisions on the exact procedure. Another problematic legislative development occurred just around the time of accession in 2013, when an initial attempt by the legislative proposal to reintroduce the 'duty of the judicial panel to decide the case again' in order to align it to the joint legal position was dropped after being criticised by the European Commission as incompatible with the Copenhagen criteria and the requirement for an independent judiciary. Still, despite the legislative ambivalence, the (underregulated) obligatory nature of these legal positions remained, and the same practice continued, mostly based on strong and resilient judicial customs.[7]

Even the terms used in this instrument – 'meeting' of judges (instead of court deliberations or sessions), 'legal positions' (instead of judgments or court order) reveal its extra-procedural nature. The location of the disputed provision in the preliminary reference is similarly telling – being located not in the Law on Civil Procedure, but the Law on Courts, the purpose of which is to regulate the organisation of courts and their internal administration. In effect, the overall idea of establishing court sections delivering joint opinions is a tool of judicial administration – which was originally designed and utilised in the communist era to implement the idea of socialist collectivism, advancing the interests of the Communist Party.[8] And indeed, the entire system is envisaged as a tool of authoritarian judicial governance in which 'democratic decision-making' by a majority vote is used to provide false legitimacy to programmes of the ruling judicial élites, or to disincentivise and marginalise all dissidents by simply 'out-voting' them. Once, judicial élites answered to the Communist parties, and were most often part of their top hierarchies. Today, the mechanism may not have a direct political affiliation, but still grants extensive powers to the administration of the court and top levels of the judiciary. By its very structure and purpose, it fails to provide sufficient guarantees of the

[7] See A Uzelac, 'Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost' in J Barbić (ed), *Novine u parničnom procesnom pravu* (Hrvatska akademija znanosti i umjetnosti 2020) 111.

[8] For a more detailed explanation of the instrument, its historical genesis, and critique, in Croatian, see ibid.

independence and impartiality of courts free from influences of various interests groups from inside (and outside) the judicial system.

Just how easily manipulated the system can be is evident from a controversial example from relatively recent times. In 2020, the Croatian High Administrative Court used such an 'abstract' position to decide a very individual and highly politicised case, basically setting aside not only the positions of the deciding chamber or their own prior plenary positions, but also the decision of the Constitutional Court. In short, the 'legal position' was used by an administrative court of final instance to declare as lawful the otherwise unconstitutional use of a battle cry 'Za dom spremni'. As a legal position, binding on the judicial panel delivering the final judgment, this outcome literally escaped all possible modes of judicial review. Likewise, no constitutional remedies were available, given that public prosecution, as the applicant in this case, had no standing to file a constitutional complaint. The battle cry in question (translated as 'Ready (to defend) our home') was shamefully borrowed – by certain military regiments in the 1990s war for independence – from the times of the Croatian Nazi-puppet state in WWII. The Constitutional Court had previously declared it unconstitutional as its fascist connotations counter the very foundations of the Republic of Croatia as a constitutional system based on the rule of law which had severed all ties with the dark times of its heritage. Still, the High Administrative Court's exceptional position exculpated a controversial battle song that promoted the re-use of this fascist call in the war for independence in the first place. Interestingly, despite harsh academic criticism, the Croatian Judges Association fully backed the decision of the High Administrative Court to issue such a legal position, demonstrating just how strong the tendencies of judicial élites are to protect their inner circles. The example may be extreme, but it tells a cautionary tale.

And indeed, the use of the uniformity mechanism is a continuous point of conflict in the national arena. Two years ago, the Constitutional Court dismissed a challenge against it brought by a group of top Croatian legal scholars in the field.[9] Similar to the AG in *Hann Invest*, the Court relied on very superficial grounds of the need to ensure uniform application of the law to keep the mechanism standing.[10] In this contribution, we will not go into arguments

[9] Croatian Constitutional Court, Order No U-I-6950/2021 of 12 April 2022 (*constitutionality review of Article 40(2) of the Law on Courts*).

[10] In comparison, the AG at least attempted to paint a picture of balancing the different interests at stake. The Constitutional Court failed to do so. The position of the majority never actually responded to the claimants' arguments of unconstitutional compromises made for the independence of judiciary, even if their pleadings were backed by an overwhelming amount of concurring academic opinions. The decision 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 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 31 March 2024. Then, as if it exists in a parallel universe, the Court never referred back to its own citation; see point 17.1 of the Court's order (n 9). The most extensive part of the decision is actually a mispositioned and weak analysis of a potential violation of EU law – in particular, whether the uniformity mechanism stands at odds with the

on (un)constitutionality from a national perspective, which is a matter deserving of its own analysis. Rather, we feel it necessary to reflect on the relevance of this decision from the perspective of EU law. As was stressed in the dissenting opinion, the Constitutional Court, by deciding the matter itself, failed to fulfil its own obligations under EU law, and refer this matter to the Court of Justice under the preliminary ruling mechanism. At the time, the lower-instance national courts had already referred their questions in *Hann Invest*, and the case was already pending in Luxembourg. It still is. Jumping the scene, the majority in the Constitutional Court have considered themselves expert enough in EU law to resolve the matter on their own. Having considered that the mechanism in no way prevents national courts from referring questions under Article 267 TFEU, the Court concluded there was no violation of EU law. What was completely ignored were the implications for the national mechanism under Article 19(1) TEU. Overall, we would hardly say that such an outcome was surprising. With this decision, the Croatian Constitutional Court only thickened its already shameful record of complying with its obligations under the Treaties.[11] In any case, Luxembourg will soon have a say on whether they were right.

There is a final point worth mentioning about the current shape of the Croatian judicial system that is relevant for a broader understanding of *Hann Invest*. It concerns another method for ensuring uniformity of case law that has recently become available in the national procedural framework. In 2019, the Croatian Law on Civil Procedure was amended to introduce a so-called 'model procedure' which involves, in essence, referring cases which are problematic for equal application of the law to a higher-instance judicial formation – the Supreme Court. Under this 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.[12]

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judicial prerogatives to ask preliminary questions under Article 267 TFEU, while not even mentioning the independence concerns under Article 19 TEU. In its final conclusion, the Court bluntly proclaimed that 'having account of the aforementioned' (we are just not sure what the aforementioned is), no concerns are raised under the Constitution. The system sparkles with rainbows and sunshine.

[11] For our prior critique of its jurisprudence, see D Petrić, 'The Application of Article 47 of the Charter in Croatia' in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 2: The National Courts' Perspectives* (Hart 2023) 29; N Bačić Selanec, D Petrić and S Vasiljević, 'Mutual Trust, Mutual Recognition and the Rule of Law in Croatia' in A Kornezov (ed), *The XXX FIDE Congress in Sofia 2023, Congress Publications, Vol 1* (Ciela Norma 2023) 210; N Bačić Selanec, T Ćapeta, I Goldner Lang and D Petrić, 'National Courts and the Enforcement of EU Law: The Pivotal Role of National Courts in the EU Legal Order – Report for Croatia' in M Botman and J Langer (eds), *The XXIX FIDE Congress in The Hague 2020, Congress Publications, Vol 1* (Eleven International 2020) 115.

[12] See Articles 502i–502n of the Croatian Law on Civil Procedure (Official Gazette 70/19).

The impact of this novel procedural instrument is self-evident, and should carry weight in the decision to be made in Luxembourg. In other words, even if the Court of Justice in *Hann Invest* considers that binding legal positions delivered in judicial meetings and the role of the registrations judges in the Croatian judicial process violate Article 19(1) TEU – the judicial system in Croatia does have an alternative. It could reorient itself to other (this time procedural and more rule of law friendly) mechanisms of achieving the same goals of ensuring the equal application of the law. The 'model procedure' framework was designed precisely to provide all requisite procedural guarantees absent from behind-the-curtain judicial meetings, indicating a (recent) level of consciousness of the Croatian legislature seeking to introduce more transparent judicial mechanisms of ensuring equal application of the law which, at the same time, do not stand at such striking odds with standard operations of the judiciary under the rule of law. Having all this in mind, keeping outdated and malleable judicial methods stemming from the socialist regime seems all the more futile and counterproductive, both from the perspective of national law and EU law. The post-socialist chains around the judicial branch, maintaining the old authoritarian patterns, should finally come off.

Post-socialist judiciary and why its features still defy the rule of law: a story of internal and external judicial (in)dependence

Croatian judiciary is not alone in this fight. Its uniformity mechanism is indeed a resilient legacy of all post-socialist judiciaries. As Zdeněk Kühn reported, many CEE countries have since their communist past continued to use judicial interpretational statements to ensure the uniformity of case law, in one variant or another.[13] Some of these countries have (recently) made efforts to dispose of such mechanisms themselves. For example, the Estonians have removed a similar mechanism by legislative amendments, while the Latvian Constitutional Court has (unlike its Croatian counterpart) recently declared it unconstitutional. The Lithuanian Constitutional Court did so already in 2006.[14] In contrast, the mechanism is still alive and well in Hungary. Uniformity decisions by the Hungarian judiciary are, moreover, formally binding even on their lower courts which must follow the interpretative directions of their judicial superiors. A convenient instrument of ensuring obedience, and telling, given the current state of illiberalism in the country.

[13] Z Kühn, 'Interpretational Statements of Supreme Courts in Central and Eastern Europe' (2016) Evropeiski Praven Pregled <https://evropeiskipravenpregled.eu/interpretational-statements-of-supreme-courts-in-central-and-eastern-europe/> accessed 31 March 2024.

[14] R Norkus, 'Introductory Report: The Filtering of Appeals to the Supreme Courts' (2015) Network of the Presidents of the Supreme Judicial Courts of the European Union, Dublin Conference <https://www.lat.lt/data/public/uploads/2018/01/introductory-report-the-filtering-of-appeals-to-supreme-courts-president-rimvydas-norkus.pdf> accessed 31 March 2024.

In reality, all these 'abstract' interpretative statements are a prime example of what Zdeněk Kühn called 'authoritarian legal culture at work'.[15] And indeed, as Siniša Rodin legendarily proclaimed in his first contribution to our Yearbook, the authoritarian approach to law still governs post-socialist legal discourse and is deeply embedded in its legal culture.[16]

By allowing for extra-procedural and collective decision-making within the same judicial ranks, the uniformity mechanisms facilitate internal dependence of the judiciary, and are truly an anomaly to the liberal ideal of the rule of law. Instead of functioning in a system of separation of powers which is premised on judicial independence, both internal and external, the uniformity mechanism was envisaged to further the goals of a uniform communist government in which the judiciary was, much like all the other branches, subject to a hierarchical structure and authoritarian obedience to the ruling political élites.

In contrast, in a system based on the rule of law, uniformity of case law ought to be ensured through the system of judicial review, not behind-the-curtain judicial lawmaking with weak pretences of abstract decision-making. And definitely not through inconspicuous forms of 'binding' positions that are the results of *de-facto* political negotiations by the judiciary determining how supposedly autonomous judges should decide individual disputes. In constitutional democracies, judges do not adjudicate disputes as legislators using abstract resolutions passed by a majority vote, but by interpreting the meaning of the law as evaluated in light of the concrete facts of individual cases.

This culture of collectivism in the judiciary served its purpose in the socialist regime to ensure the uniformity of judicial policies with the communist parties' political agendas, but should hardly have its place in a system of liberal constitutionalism in which the rule of law depends on the existence of a truly independent judicial branch – free from external as well as internal pressures on the individual autonomy of judges. It all fits into a bigger picture.

Matej Avbelj neatly noted how the post-socialist countries, despite becoming members of the European Union, still have a 'weak democratic and rule of law tradition'.[17] In these systems, a low level of legal and political culture facilitates the resilience of old patterns, maintaining a packed and massive system of the judiciary operating in a bureaucratic mode, 'composed of hundreds of anonymous judges in service of justice' under the hierarchical guidance of a small and closely tied judicial élite. The system has certainly evolved during the past few decades, but the essence of its operating mode has remained the same.[18] While formally relinquishing authoritarianism and

[15] 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.
[16] Rodin (n 5).
[17] M Avbelj, 'Judges Depending on Judges: A Missing Brick in the CJEU Jurisprudence on Judicial Independence' (*Verfassungsblog*, 10 July 2019) <https://verfassungsblog.de/judges-depending-on-judges/> accessed 31 March 2024.
[18] ibid.

adopting constitutionalism, the post-socialist judiciary has very eagerly internalised the need to separate the judiciary from other branches of government, pushing the ideal of judicial self-government to the extreme. From within, the judicial structure has maintained *internal* dependence, but has shifted the orientation from the outside, and, ironically, taken refuge in external independence. The entire concept has been misused, turning it into full judicial isolationism, which ultimately prevents the judiciary from meaningfully contributing to the rule of law and participating in the system of checks and balances. The authoritarian discourse and pattern still survive, they are now just following different leaders. Those from the inside. As Michal Bobek remarked many years ago, they have built their 'fortress of independence'.[19]

We have already argued elsewhere that this extreme external independence of the judiciary hardly achieves what the purpose of independent judiciary actually is.[20] In itself, this mutation of independence violates the rule of law. In the Croatian context, 'independence' is far too often used not to promote, but to thwart the judiciary's democratic accountability, openness and transparency, and to escape the system of checks and balances. This very neatly explains the Commission's continuous findings in the Rule of Law reports on Croatia, demonstrating a remarkably high level of (external) judicial independence in the country (as if there is nothing wrong with the system, from a rule of law perspective), coupled with diametrically opposing and a monstrously low level of public trust in the judiciary, effectively the lowest in the EU. Non-transparent and malleable instruments of judicial control, such as the uniformity mechanism in question in *Hann Invest,* further aggravate that already gloomy image. Instead of ensuring the equal application of the law, they deteriorate 'trust which justice in a democratic society governed by the rule of law must inspire in individuals', contravening the rationale for safeguarding the independence of national judges under EU law.[21]

We do not believe that the central features of national justice systems are very different in other comparable countries. To date, despite some ongoing efforts, the post-socialist mindset of the CEE judiciaries has not fundamentally changed. Their judicial branches still fail to operate under the principle of true judicial independence, significantly undervaluing its *internal* dimension, including the individual autonomy and authority of judges in interpreting the law. Simultaneously remaining faithful to *internal* autocratic legacies and hierarchical patterns, whilst being *externally* far too independent, is too dangerous a combination for the rule of law. And not what the 'common' value of the rule of law under Article 2 TEU, and the system of checks and balances, is all about. Being mindful of what really is at stake in *Hann Invest*, the Court of Justice should not be led astray so easily.

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[19] Bobek (n 5). For other perils of judicial self-governance, see D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016), and D Kosař (ed), *Judicial Self-Governance in Europe* (2018) 19 German Law Journal (Special Issue).

[20] N Bačić Selanec, D Petrić and I Goldner Lang, 'Rule of Law in the EU and the State of Croatian Judiciary' in J Puljiz and H Butković (eds), *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia* (Routledge 2024, forthcoming).

[21] Case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596, para 60.

Why the AG Opinion sidelines the basics of EU law and judicial independence

Our prior conclusion stands all the more, as the Croatian uniformity mechanism is at striking odds with the central postulates of EU law on the role of the national judiciary and its 'European mandate'.

To prove that point, there are four aspects of the Opinion of AG Pikamäe that we need to address. They concern, first, the admissibility of the questions referred by the Croatian court; second, the (mis)understanding of the relevant provisions of national law; third, the main and erroneous assumption on which the AG relied when discussing the substance of the questions referred; and, finally, what was left unsaid by the AG yet concerns the integral elements of the 'European mandate' of national courts, which should have informed the assessment of the central issue raised in this preliminary reference.

(i) Admissibility

It is undisputed that, in the context of this preliminary reference, the Court of Justice has jurisdiction to interpret Article 19(1) TEU. Case law concerning this provision is wide enough to cover *any* national court that *potentially* comes into a position to interpret or apply EU law. So, in relation to these courts – essentially, all national courts – Member States are obliged to ensure their independence, which is a prerequisite for them to be able to ensure effective judicial protection of EU law.

However, in *Hann Invest*, the Court was asked to interpret Article 19(1) TEU in order to enable the national court to resolve, as a preliminary matter,[22] an issue of national procedural law which purportedly threatens its independence, before that court could proceed with deciding the dispute in the main proceedings which in substance has no connection to EU law.[23] And AG Pikamäe believes that this is the kind of question that the Court should not be answering in the preliminary ruling procedure. In his view, the Croatian court is inquiring about an issue that is 'of singular importance',[24] which does not seem to give rise to serious and systemic infringements of the rule of law. Rather, it would belong to the same category as concerns like 'I do not like how the cases are allocated in my court', 'I am not satisfied with my salary', or 'I am unhappy that I was not promoted'. To the AG, references of this sort are being (ab)used by national courts as 'a procedural pretext […] to present before the Court […] [their] dissatisfaction with and/or criticism of the functioning of the national judicial system'.[25] As such, he considers them to be 'contrary to the spirit and purpose' of the preliminary ruling procedure.[26] The Court should therefore be more rigorous in its assessment of the admissibility of references of this kind. And, where appropriate, the Court should reject them in order to

[22] That is, before the beginning of litigation, also referred to as the *in limine litis* question.
[23] Opinion of AG Pikamäe (n 1) para 36.
[24] ibid, para 30.
[25] ibid, para 30 fn 13.
[26] ibid, para 30.

limit incoming questions that are not appropriate for it to be involved in, and discourage national courts from referring them in the first place. In the context of this reference, the AG thus proposes: 'reject as inadmissible'.

Nevertheless, AG Pikamäe is fair enough to admit that his approach might be different from what the Court of Justice has started doing recently. Indeed, as he further notes, in the newer case law the Court seems to have admitted scenarios like the one in the main proceedings and provided the answers on the merits of the referred questions.[27] Still, the AG considers that the Court should revisit those 'outlier' cases and draw the admissibility line more firmly and less expansively. Otherwise, he fears that a welcoming approach of the Court concerning admissibility, coupled with a far-reaching interpretation of Article 19(1) TEU concerning the substance, 'would lead to 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'.[28] His hope, then, is that the Court will restrain itself through the admissibility criteria and hence escape the responsibility of addressing the sensitive issues that national judiciaries undergo.

Although restraint is sometimes welcome, the Court of Justice will not be able to avoid ruling on the issue faced by the Croatian court, now or at some later point, in a case that will jump through the admissibility hoop more easily. And the reason seems obvious. The case law on judicial independence as it has been developed since the *'Portuguese Judges'* case has made a hole in exclusive national competence to organise the justice system that is large enough to allow the Court to squeeze in many (far-reaching) requirements that Member States have to comply with when exercising that competence. But these requirements are only minimal requirements,[29] the 'red lines' that should not be crossed.[30] Beyond them, Member States remain free to put in place a system that they prefer. Of course, some of those requirements may effectively take a particular institutional arrangement out of the hands of national authorities – some of those requirements may indeed be 'all or nothing' when it comes to certain mechanisms. After all, when it comes to judicial independence, there can be no 'judicial independence within the scope of EU law as opposed to judicial independence in purely national cases'.[31] But this should not be confused with the Union's complete and unwarranted occupation of a field that is considered to be fully within the domain of national law.

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[27] ibid, para 32 (referencing three admissibility scenarios that were laid down in Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny* ECLI:EU:C:2020:234) and paras 42–43 (referencing later cases in which the Court admitted references that went beyond these scenarios); for further remarks, see Sarmiento and Iglesias (n 2) 5.

[28] Opinion of AG Pikamäe (n 1) para 45.

[29] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19 *Asociația 'Forumul Judecătorilor din România' and Others* ECLI:EU:C:2020:746, Opinion of Advocate General Bobek, para 230.

[30] Cf 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.

[31] Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* ECLI:EU:C:2021:403, Opinion of Advocate General Bobek, para 136.

AG Pikamäe seems to be aware of all this, so he does proceed to assess the merits of the question, offering some thoughts about the compatibility of the Croatian uniformity mechanism with Article 19(1) TEU and standards of judicial independence developed by the Court of Justice. Whatever the Court makes of this reference, and even if the Court disagrees with the AG, the points he raises in the Opinion will remain interesting since his view of this important matter is the first to come from the Luxembourg court.

(ii) Another look at national law

Before we get to the substance of the analysis of the questions referred by the Croatian court, we should briefly discuss the relevant provisions of national law, whose (mis)understanding might have framed the AG's assessment. Obviously, it is not the task of the Court of Justice or its Advocates General to interpret national law in the preliminary ruling procedure. But, at the same time, when assessing its compatibility with EU law, they need to have some working understanding of the meaning and scope of application of national law. And in that sense, they can rely on the input from the referring court and the national government that typically intervenes in cases that come from their countries.

To stay on the safe side, the AG insists on 'the literal interpretation' of the provisions of national law.[32] Let us then first remind ourselves of the most important provision, Article 40(1) of the Law on Courts. It says that '[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'.

Now, the purpose of the Croatian mechanism for ensuring the consistency of the case law, which is a legitimate aim indeed, is to resolve contradictions that might arise from judgments which contain divergent interpretations of the law or in which those interpretations were differently applied. All this, of course, as a means to ensure legal certainty. And if one reads Article 40(1) of the Law on Courts more carefully, it is premised on the existence of judgments which contain divergent interpretations: the provision indeed uses the present tense ('there are differences'; in Croatian, 'postoje razlike') to emphasise this. So, the implication is that those judgments were already published when it became apparent that they say different things.

However, the Croatian uniformity mechanism is used to prevent the publication of judgments that may contain different interpretations of the law. Because until it is published, a judicial act is not a 'judgment', only a 'potential judgment' or 'judgment in the making'. As if Article 40(1) of the Law on Courts read 'where it is found that there *potentially may be* differences in interpretation […]'. So, in the present case, we are not dealing with a mechanism aimed at resolving contradictions that arise from judgments which contain divergent

[32] Opinion of AG Pikamäe (n 1) para 36.

interpretations but a mechanism that effectively prevents any contradiction from arising before a judgment is formally 'delivered'. This seems a very radical solution. It certainly makes us wonder why we have other mechanisms for ensuring the consistency of case law, in particular the appellate jurisdiction of higher courts. Because some contradictions in some judgments are not immediately contrary to legal certainty.

This is something that the AG recognises himself, when he cites the case law of the European Court of Human Rights (ECtHR). This court emphasises that 'the possibility of conflicting decisions as between national courts or within the same court is an inherent trait of any judicial system', that 'such a situation is not in itself contrary to [Article 6 of the Convention]', and that only '[t]he persistence of conflicting court decisions can create a state of legal uncertainty'.[33] Compare this 'persistence' again with the Croatian mechanism that effectively blocks any conflicting decisions. What is more, the AG later quotes the same case law of the ECtHR, in which it was added that '[c]ase-law development is not, in itself, contrary to the proper administration of justice since a failure to maintain a dynamic and evolutive approach would risk hindering reform or improvement'.[34] So, one could consider this rigid mechanism as being there to shut down every form of dissent that would propose a change in society. This does not sound like the proper administration of justice.

Clearly, the AG can be excused for relying on someone else's explanations of the details of the national law in question. But some of the inferences from the Opinion suggest a misplaced sympathy for the way in which the Croatian uniformity mechanism is being used. For example, the Opinion reports how the Croatian government has 'pointed out that the legal positions adopted by the higher courts are not binding on courts of first instance'.[35] This explanation is accepted by the AG too readily, one could say. Although legal positions are *formally* not binding on courts of first instance, imagine if one of those courts adopted a decision contrary to the legal position of the higher court. Undoubtedly, such a decision would be instantly appealed, and it would arrive before the same higher court, which would be bound by the legal position in question. This shows why the government's inputs in the preliminary ruling procedure should not be taken for granted.

The Opinion also contains a misplaced analogy. When discussing the procedure that leads to the adoption of a legal position and the fact that it subsequently binds the deciding judge or chamber, the AG compares it to the judgment of a supreme court ruling solely on a point of law, which then binds the court whose decision was appealed.[36] However, in that scenario, the deciding court was already able to adopt its decision in line with the rules of procedure and its integral guarantees of a fair trial, and publish this decision,

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[33] ibid, para 53, citing ECtHR, *Lupeni Greek Catholic Parish and Others v Romania*, App no 76943/11, ECLI:CE:ECHR:2016:1129JUD007694311, para 116.
[34] Opinion of AG Pikamäe (n 1) para 91, citing *Lupeni Greek Catholic Parish and Others v Romania* (n 33) para 116.
[35] Opinion of AG Pikamäe (n 1) para 54 fn 36.
[36] ibid, para 69.

which logically had to happen for an appeal to proceed before a supreme court. This is unlike the present case, where the decision of a judge or chamber is blocked and suspended until an extra-procedural session of the judicial plenum or section adopts its own binding legal position, which ought to prevail in the judgment's final outcome.

Inevitably, this makes one wonder whether we can even consider the deciding judges in the Croatian system as 'judges'. No one doubts that the independence of judges is 'inherent in the task of adjudication'.[37] *Making a decision independently* from any interests, influences or pressures outside the existing procedural frameworks is what makes a judge a 'judge'. Does this mean that the ability to *physically make a decision in the first place* is also 'inherent in the task of adjudication'? In real life, using the Croatian uniformity mechanism looks like a scenario where you are doing something, and are investing a lot of time and effort in doing it right, but then someone interrupts you and says 'okay, I will take it from here'. The jurisdiction and control over a case a judge was initially entrusted with, and her responsibility to resolve the dispute *based on the law,* is being taken away from her. Having this in mind, it is not difficult to see how this mechanism infantilises deciding judges, and from the status of truly independent members of the judicial branch relegates them to the status of judicial bureaucrats (of a socialist and post-socialist kind).

The question whether abstract legal positions can bind judges and chambers deciding concrete disputes that have been started and effectively completed before the adoption of the joint position therefore raises serious legal concerns in light of the standard of judicial independence and the guarantee of effective judicial protection. But not only that. This is simultaneously difficult to square with the ordinary understanding of what judges do and why we even have them in the first place, in national law or EU law or in general.

(iii) The (un)questionable assumption

Irrespective of the (mis)understanding of the relevant provisions of national law, the AG's entire assessment of the compatibility of the Croatian mechanism with EU law hinges on a weak assumption. Namely, he gives a 'thumbs up' based only on the suggested difference that ought to exist between the 'interpretation' and the 'application' of the law. In all key places of his assessment, the AG suggests that 'if the distinction between interpretation and application of a legal rule is accepted',[38] the Croatian mechanism should not be considered contrary to the requirement of independence of the court or the requirement of a fair trial. But what does he mean by this?

The assumption is that a section meeting or a meeting of all judges, when delivering a 'legal position', engages only in general, abstract interpretation of the disputed provisions of the law, and does not engage with the particular, concrete issues of fact or the application of the law to the facts raised in the main proceedings. Afterwards, the deciding judge is bound by the abstract

[37] ibid, para 60.
[38] ibid, paras 69 and 78.

interpretation of the law, which they ought to apply to the specific factual circumstances of the main dispute, which is thereby brought to an end. The judicial meeting does not apply the law in order to settle concrete disputes. And since the interpretation of the law is 'by its nature, the work of a judge', it does not have to involve parties to the concrete dispute in any way.[39] An informed reader will immediately recognise the famous *iura novit curia* principle, which is taken too literally and drastically by the post-socialist judiciaries. And indeed, taking this principle to its extreme entails isolating the law entirely, taking it out of the parties' reach, and making it the exclusive domain of the court. This is another classic characteristic of *authoritarian* judicial discourse and understanding of the law, diametrically opposing the discursive approach that is present elsewhere in Europe.[40] Still, it explains well the AG's position – that it does not matter that 'legal positions' were formulated during the meeting held behind closed doors, a meeting that was not regulated by any rules of procedure and in which the parties had no say; or that 'legal positions' contain no reasoning that would justify the majority decision of the judges that participated in the meeting and explain why a particular position was preferred over the alternatives. None of these characteristics can throw shade on the independence of the deciding judges or on the fairness of the trial from the perspective of the parties. A judicial meeting is, simply put, nothing like a trial.

To confirm that his differentiation between abstract interpretation and concrete application makes sense, AG Pikamäe first notes that other national legal systems recognise the same difference, and then adds a familiar example: it 'is the very essence of any preliminary ruling mechanism and, quite clearly, corresponds to that referred to in Article 267 TFEU'.[41] In the preliminary ruling procedure in the EU, the ideal division of labour is indeed: the Court of Justice interprets EU law; the national court applies EU law thus interpreted; and the Court does not and cannot apply EU law on its own to specific cases.

It is difficult to accept that anyone would believe so naïvely that such a formalistic and superficial view of the nature of the juristic operations that judges perform would convince the EU legal community that there is nothing wrong with the functioning of the Croatian mechanism for ensuring the consistency of case law.

First of all, differentiation between interpretation and application exists only on paper and not in real life. Every question of interpretation of law arises from a real-life case or controversy. Law is not interpreted by courts in a

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

[40] See Kühn (n 15) 20–25, who explains that *iura novit curia*, a principle originating in the Continental legal tradition (the purpose of which was to oblige the courts to raise issues of law even without the litigants' assistance), was taken to the extreme by the post-socialist judiciary, mutating it into a tool of authoritarian judicial governance: 'the pluralism of opinions is absent. The "right" answer is achieved through a "one-way" process and is backed entirely by threat and force. Those to whom decisions are addressed cannot participate in finding the "right" answers; instead of being subjects, they are rather objects of authoritarian decision-making. Authoritarian discourse implies that legal meanings are produced from above and that the existence of any dispute, questioning, legitimate disagreement, or construction of the law from the bottom-up is unthinkable'.

[41] Opinion of AG Pikamäe (n 1) para 68.

vacuum, dislocated from the social context in which it was created and which it is intended to regulate. Judges do not just wake up one day and say 'hey, let's interpret this legal provision, and let's do it generally and abstractly, without thinking about specific circumstances to which our interpretation could apply'. Even on paper, the proposed differentiation does not hold, and has forever been disputed in scholarship. No legal theorist or philosopher has yet managed to propose a solid conceptual account of the two operations that would convincingly establish a clear borderline between them.

Secondly, even the relevant provision of national law, Article 40(1) of the Law on Courts, read 'literally' as proposed by the AG, shows how the two operations are inherently intertwined. Namely, this provision refers to situations in which different sections, chambers or judges of the court adopt *different interpretations of the law in relation to its application*.

To clarify what we mean, let us imagine a situation in which a judicial meeting adopts one such joint 'legal position' on abstract interpretation of the law. The premise is that a deciding chamber applies that abstract interpretation to the specific facts of a case. As the AG notes (relying on the Croatian government's position which, in turn, relied on the Croatian Constitutional Court's problematic position), the deciding chamber in principle still has discretion to decide whether the conditions for *applying* the abstract *interpretation* to the facts before them are fulfilled.[42] If they decide that the conditions are not fulfilled, the judges are obliged to state reasons for not applying the abstract interpretation. However, in real life, there are no two perfectly identical scenarios, which means that in order to dispose of the binding nature of the legal position, judges would have to distinguish the facts of a concrete dispute in front of them from the facts of a generic dispute that informed the abstract interpretation of the law from the legal position. A single relevant factual or legal difference would need to be found to justify a different interpretation of the law. However, what happens then? Particularly in actual judicial ranks? Most likely, and paradoxically, the registrations judge would then refuse to send out their decision to the parties. And the reason would be that the deciding chamber has departed 'from the legal position previously adopted' in that they erroneously applied the abstract interpretation from that legal position. The vicious circle, precisely the one in which the judges in *Hann Invest* were stuck, would keep turning. To make things worse, this is all in line with Article 40(1) of the Law on Courts and the way it relates the interpretation of the law to its application. The deciding chamber would either have to yield and eventually do whatever the registrations judge tells it to do, or continue playing ping-pong with the judicial administration while the parties wait for the resolution of their dispute without knowing what is going on in the court's *couloirs*.

As a third reason why differentiating between interpretation and application is artificial, let us go back to EU law. The wording of Article 267 TFEU, as well as of Article 19 TEU, indeed separates the interpretation from the application of EU law. But anyone who knows anything about the

[42] ibid, para 68 fn 48.

preliminary ruling procedure knows that this very procedure undermines any practical difference between the two juristic operations. Often the Court of Justice receives very concrete, circumstantial, and fact-specific questions (of interpretation?) of EU law from national courts. To keep the legal fiction in place, the Court will, of course, generalise the matter and abstract it. So, it will not speak about 'whether the specific Croatian law is incompatible with EU law' or 'whether Jane Doe has the right to emergency health care' but about 'whether EU law should be interpreted as meaning that a national law, such as this Croatian law in the main proceedings, should be considered as incompatible with EU law' or 'whether EU law should be interpreted as meaning that an individual, such as the applicant in the main proceedings, is entitled to receive a social benefit like emergency health care that is offered under national law'. Yet rephrasing the question and pretending to be only interpreting EU law cannot hide that what the Court is in fact doing is deciding on the application of EU law. Because the referring national court does not have but one way how to 'apply' the EU law previously 'interpreted' by the Court in this manner.

It is also interesting to note how the AG's proposal to differentiate interpretation from application sounds very similar to what has previously been proposed by many national courts of last instance, again in the context of the preliminary ruling procedure. Namely, those courts were claiming that they are merely *applying* EU law and not *interpreting* it, so that they cannot be obliged under the third paragraph of Article 267 TFEU to make a reference for a preliminary ruling to the Court of Justice. So, this is the same legal fiction, but only reversed. It is clear, however, that neither in this context can the proposed differentiation hold. Even the Court of Justice seems to have abandoned the difference on paper, when in a recent landmark ruling it changed the vocabulary from 'application' to 'interpretation' and started talking about situations in which 'the correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt'.[43]

The AG surely knows all this. He therefore mentions, as a sidenote, that '[i]t is true that, in certain cases […] the dividing line between the concepts of interpretation and application of the legal rule may be tenuous'. Still, for him it was not 'possible to assess, *de jure*, the conformity of the Croatian mechanism in the light solely of the particular factual circumstances of certain cases, which cannot render the conceptual distinction in question irrelevant'.[44] The force of this legal fiction seemed too strong to him. But what is puzzling in all this is that he nevertheless relied on this fictitious difference as the key argument in his assessment. This is why in several places he writes 'if this distinction is accepted', 'if this distinction is accepted…', then there are no problems with the Croatian mechanism. But what if this distinction is not accepted? Is it possible for someone to place all their bets on a single (and very weak) conditional and

[43] Cf Case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799, para 39; and Case 283/81 *CILFIT* ECLI:EU:C:1982:335, para 16 (where it mentioned situations in which 'the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved').
[44] Opinion of AG Pikamäe (n 1) para 68 fn 51.

hope that everyone will buy it? Were there no other arguments worth mentioning, which could also speak in favour of the Croatian mechanism?

The Opinion of AG Pikamäe is not peculiar only because it rests on a single argument, as was just discussed, but even more because it is decidedly one-sided. Despite a declared duty to assist the Court, he barely reflects on the arguments that would show why the Croatian mechanism might be contrary to EU law. This is unlike what many other Advocates General do in their opinions – spell out alternative outcomes and explore reasons for and against those outcomes – which makes those opinions much more dialectical and layered. There is always the chance that there are simply no valid counterarguments to challenge the reasoning and the suggestion made by the AG, so for him the question was clear beyond reasonable doubt. But the fact that the case is being decided by the Grand Chamber, which is in charge of particularly difficult or important cases,[45] suggests otherwise, which makes one wonder even more about the picture painted by the AG.[46]

In our view, the following are the important alternative points that the AG failed to mention in the Opinion. They deserve to be restated, at least as a matter of principle, whenever the status of national courts in the EU judicial system is being questioned.

(iv) What makes a national court an 'EU court'

The starting point is always Article 19(1) TEU. This provision defines the mandate of national courts in the EU legal order. As is well known, they are required to ensure effective legal protection of EU law and rights guaranteed

[45] See Article 60(1) of the Rules of Procedure of the Court of Justice ('Assignment of cases to formations of the Court').

[46] There is another reason for serious criticism of the AG's opinion. It concerns a conspicuously casual and perfunctory reliance on comparative law, which is again very odd when one thinks about the typical style in which these opinions are written. In several places he refers to similar mechanisms allegedly found in 'various national legal systems' (paras 71 and 72) or in 'many legal orders in continental Europe' (fn 34) or in 'the legal orders of the European Union' (fn 35). Yet he does not provide references to the actual provisions of laws of other Member States, from which it would be possible to ascertain how they indeed compare to the Croatian mechanism for ensuring the consistency of the case law. Nor is there information from which Member States these comparable mechanisms come. What is more, in certain places he uses generic examples to show how the Croatian mechanism is nothing unusual when compared to other legal systems. However, these examples are misplaced since they differ from the Croatian mechanism in crucial aspects. They would actually be more appropriate to show how the Croatian mechanism departs from the standard, and is indeed different in its design. For example, the AG compares the legal position adopted by the section meeting which binds the deciding judge or chamber to a ruling of the supreme court on the point of law which binds the court whose decision was appealed (para 69). As we have shown above, this is wholly out of place. Another example is the comparison with 'internal *procedural* mechanisms' that involve enlarged formations of the court, whose decisions on points of law should be taken into account by the initially seized chamber (para 71). But the crucial differences with the Croatian mechanism are that (i) in those cases the deciding chamber on its own initiative, and not the registrations judge or the president of the court, refers the matter to an enlarged formation; (ii) the position adopted by the enlarged formation is not necessarily strictly binding on the deciding chamber; and (iii) the proceedings of the enlarged formation are regulated by procedural rules, and not as in Croatia completely beyond the pale of procedural law.

under EU law. And Member States are obliged to provide them with sufficient tools to make that possible. Article 19(1) TEU, as interpreted by the Court of Justice, covers *any* national court that *could* interpret or apply EU law.[47] It basically means that all national courts are EU courts *all the time*, and not only when they are actually dealing with EU law. Therefore, the Court emphasises that

> Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals […]. Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.[48]

To be able to perform this mandate and ensure effective judicial protection of EU law, national courts must be independent. They must independently and autonomously interpret and apply EU law in the disputes that are brought before them. And national law cannot fully or partially prevent them or make it more difficult for them to give full effect to EU law. This is where, we would submit, the principles that make the 'European mandate' of national courts that were recently developed in Article 19(1) TEU jurisprudence should be joined with the principles that make the same mandate, which were already consolidated in *Simmenthal*.[49] There, the Court of Justice stressed that 'every national court must, in a case within its jurisdiction, apply [EU] law in its entirety and protect rights which the latter confers on individuals';[50] so

> [a]ccordingly any provision of a national legal system and any legislative, administrative or judicial 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 set aside national legislative provisions which might prevent [EU] rules from having full force and effect are incompatible with those requirements which are the very essence of [EU] law.[51]

Finally, the Court added that the same would hold even if 'such an impediment to the full effectiveness of [EU] law were only temporary'.[52]

As we can see, the Court of Justice considers the requirement of ensuring full effectiveness of EU law and protection of EU rights to be the very essence of the EU legal order. Provisions of national law or judicial practice cannot therefore prevent a national court from doing *everything necessary* to ensure

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[47] See Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, para 51.
[48] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117, paras 32–33.
[49] Case 106/77 *Simmenthal* ECLI:EU:C:1978:49.
[50] ibid, para 21.
[51] ibid, para 22.
[52] ibid, para 23.

full effectiveness of EU law and protect those rights, with two important exclamation marks: one, *at the exact moment of the application* of EU law, and the other, even if the obstacle faced by the national court is only *temporary*.

Now, let us translate that to the disputed Croatian mechanism for ensuring the consistency of the case law. That mechanism would prevent the deciding judge or chamber, acting as an EU court, from ensuring full effectiveness of EU law and from protecting EU rights at the moment when they reach their final decision concerning the resolution of the dispute. The registrations judge is first able to block their decision and prevent its publication and delivery to the parties. And eventually, the section meeting is able to adopt a legal position that would replace the decision of the deciding judge or chamber. That mechanism and the possibilities it provides for is clearly incompatible with the aforementioned requirements that define the mandate of national courts as EU courts.

This conclusion would moreover be a logical extension of another well-established principle that forms the 'European mandate' of national courts. It provides that national judges cannot be bound by decisions of their superior courts that would prevent them from referring questions for a preliminary ruling to the Court of Justice.[53] The same principle should apply *a fortiori* to situations in which national judges would be bound by decisions of their superior court (or superior formations within the same court) that would prevent them from effectively enforcing EU law, which is what the Croatian mechanism enables.

An argument could be made that, still, the Croatian mechanism cannot prevent the deciding judge or chamber from making a reference for a preliminary ruling to the Court of Justice. Hence, the Court would be able to step in to untie the knot, and the registrations judge or the judicial meeting would not be able to keep preventing forever the effective enforcement of EU law by the deciding judge or chamber. This is indeed something that AG Pikamäe relies on in his assessment.[54] He seems comforted by the fact that '[t]he present proceedings demonstrate, moreover, that there appears to be nothing to prevent the Croatian courts of second instance from referring a matter to the Court for a preliminary ruling under Article 267 TFEU in order to seek an interpretation of the applicable provisions of EU law'.[55] What is more, he does not see any problem if, in this case, the Court does not even come to examine the compatibility of the Croatian mechanism with EU law. Because, as he asks, 'is it reasonable to consider that that mechanism will in the future never be called into question by a Croatian court of second instance in a dispute relating to EU law?' And moreover, 'it is possible to envisage infringement proceedings being brought by the Commission […]',[56] he points out.

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[53] Case C-173/09 *Elchinov* ECLI:EU:C:2010:581, para 27.
[54] And was likewise emphasised by the majority decision of the Croatian Constitutional Court, which was convincingly criticised in the dissenting opinions.
[55] Opinion of AG Pikamäe (n 1) para 68 fn 29.
[56] ibid, para 22.

Again, the well-established case law of the Court of Justice tells us why, when it comes to the effective enforcement of EU law by national courts, we cannot make any compromises by relying on the potential involvement of the Court through the preliminary ruling procedure or hoping that the European Commission will launch an infringement action. As the Court held in *Kücükdeveci*, national courts are required to ensure the full effectiveness of EU law at the moment of its application without being 'compelled to make […] a reference to the Court for a preliminary ruling before doing so'.[57] The possibility to initiate the preliminary ruling procedure cannot therefore 'be transformed into an obligation',[58] in order to enable national courts to comply with this requirement. This makes sense, because effective protection of EU rights could hardly be 'effective' if it came with a year-and-a-half delay, which is approximately how long on average it takes the Court to reply to a preliminary reference. Moreover, the Court cannot be seriously expected to intervene in every case in which national courts are required to ensure the effective protection of EU law. This is not what the preliminary ruling procedure was made for, and in any event would amount to an unreasonable waste of the Court's procedural economy, time and resources.

As for the possibility that these kinds of problems will be solved through the action of the Commission, it suffices to reiterate the basic rationale of the foundational ruling in *Van Gend & Loos*. There, the Court of Justice stated that the fact that the Treaties envisage infringement actions does not cancel out the requirement to ensure effective protection of EU rights through actions before national courts.[59] Indeed, if everything ultimately depended on the good will of the Commission to exercise its political discretion, we would risk having ineffective or less effective protection of EU rights, since the Commission's action would always come after the breach of those rights. For this reason, the Court concluded that '[t]he vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted […] to the diligence of the Commission'.[60] By extension, the vigilance of national courts tasked with ensuring effective protection of EU rights under Article 19(1) TEU makes an essential contribution to the system of enforcement of EU law, alongside the infringement actions which are entrusted to the Commission. Given the rising politicisation of the role of the Commission as a 'guardian of the Treaties', especially in recent times, keeping the door opened to national courts is all the more relevant.

With all this in mind, we can go back to reiterate our main point. The requirement to ensure effective judicial protection of EU law implies not only that national judges must be independent, both externally and internally, but also that they are able to act as EU judges, and thus exercise the mandate conferred on them by the Treaties. National laws and practices that allow for blocking the judgment of the deciding panel, at the moment when it could be called upon to enforce EU law, and replacing its judgment with collective

[57] Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21, para 53.
[58] ibid, para 54.
[59] Case 26/62 *Van Gend & Loos* ECLI:EU:C:1963:1, 13.
[60] ibid.

behind-the-curtain decision-making of its judicial peers, should be considered incompatible with the requirements stemming from Article 19(1) TEU and the case law of the Court of Justice. These central tenets of EU law are completely ignored in the AG Opinion. Our hope is that the Court of Justice will not make the same mistake, and instead clearly and unequivocally (re)state the position of EU law regarding the status of national courts as EU courts.

It took a lot of time and effort to get national judges to internalise the powers and duties that the Court of Justice envisaged as parts of their 'European mandate'. In Croatia, this process is still going on. At this delicate moment, the Court of Justice should live up to its promise and ensure that national judges can indeed exercise their role autonomously and independently, both externally and internally.

Conclusion

In the upcoming decision on *Hann Invest*, the Court of Justice will adjudicate on the adequacy of (one of many variants of) post-socialist models of 'judges depending on judges', and finally fill the gap in the rule of law jurisprudence anticipated by Avbelj already five years ago.[61]

In juxtaposing these models to the liberalist ideal of true judicial independence, the AG's opinion simply fails to deliver. It is strikingly one-dimensional and overly understanding to national law, ignoring some of the central tenets of EU law which essentially depend on national courts independently fulfilling their 'European mandate', and standing as foundational pillars of the EU legal order. Moreover, if one scratches a mere layer beneath the surface of praising the values of uniform application of the law and legal certainty, and employs a more contextual approach in legal analyses of the Croatian coherence regime, the nature of this instrument immediately appears far less equitable than what the AG's opinion would lead us to believe. The case puts into the spotlight a highly controversial model for ensuring judicial obedience which is a relic of the Yugoslavian socialist regime. To that extent, *Hann Invest* touches into the core of the post-socialist baggage common to many Member States of the EU, a legacy of the EU's 'third legal tradition'[62] that has never yet been confronted by the Court of Justice so directly. The Court's upcoming decision on this instrument will thus inevitably surpass the mere Croatian context. It could reopen some of the old wounds of the EU's enlargement and remind us of failed expectations from the Copenhagen criteria. Put differently, it should make us question to what extent have the EU's editions from the CEE truly internalised the 'common' value of the rule of law, outside the context of backsliding in 'bad' Member States, and whether Article 19(1) TEU jurisprudence can help us deal with it.

[61] Avbelj (n 17).
[62] Uzelac (n 5).

Remaining faithful to the ideal of the rule of law requires the Court to continue the path paved in the *Portuguese Judges'* case, and remain consistent in applying the standard equally to all, even when dealing with ghosts from the socialist past. This might be a Pandora's box just waiting to be opened. Still, we are eager to see the lid come off.