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Judicial Independence in Croatia Under European Scrutiny: Analysis of the Ruling Hann-Invest and Others (Or How to Save Judges from Other Judges)

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Abstract: This contribution analyses the first case presented to the Court of Justice of the EU that questions the independence of the judiciary in Croatia. The case has several unique aspects. First, it addresses threats to judicial independence from within the judiciary itself, which is unusual, as most cases typically involve external pressures from the executive or legislative branches. Second, while the judicial practice under scrutiny was deemed contrary to EU law, interestingly the Court explained to Croatian authorities how they could rectify the situation. Third, the Advocate General's Conclusions largely diverge from the Court's ruling. While this is not so uncommon, it proves that this was not an easy case. Last, the case challenges and ultimately deems unjust a judicial practice that persists in Croatia as a remnant of the country's communist past and which draws inspiration from an era when judges were subject to a strict judicial hierarchy to the detriment of their own autonomous opinion. The paper delves into the specifics of the Croatian case. It compares the legal reasoning of the Advocate General and that the Court of Justice, illustrating their differing approaches. The contribution explores other arguments that were not raised in the Conclusions that, interestingly, were included in the Court's judgment. The Court ruled

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that Croatia's practice – where a registrar judge, not involved in the case, could override a decision made by the court handling the case, and where an extended section of the court could also force the judges handling the case to give up their legal reasoning before they could even rule on the case – was incompatible with Article 19 TEU.

1. Introduction

In 2016, the Council of Europe's Commission for Democracy through Law (commonly known as the Venice Commission) outlined in its "Rule of Law Checklist" that the rule of law demands a legal system where laws are clear and predictable.[1] This system must ensure that individuals are treated with dignity, equality, and rationality by decision-makers, and that decisions comply with established laws.[2] Furthermore, people should have the opportunity to challenge these decisions in front of independent and impartial courts through fair procedures. In this checklist, the Venice Commission identified key standards that should guide the evaluation of State actions, which include legality, legal certainty, the prevention of power abuse, equality before the law, non-discrimination, access to justice (which encompasses judicial independence, impartiality, and the autonomy of prosecution services and the legal profession), and the right to a fair trial (which includes access to courts, the presumption of innocence, and the effectiveness of judicial decisions).[3]

A fundamental precondition for upholding the rule of law is ensuring judicial independence. Without this, any external interference in judges' impartial duties could undermine the very fabric of the rule of law. Judicial independence is not a privilege afforded to judges for their own benefit but is a crucial principle that serves as the cornerstone of any democratic state. It is a necessary precondition for the rule of law and a critical guarantee for fair trials. Decisions that undermine judicial independence, especially when disguised, are unacceptable: "Judicial independence is a pre-requisite

1 Council of Europe, Commission Democracy through Law: Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, March 11–12, 2016), 17.
2 Ibid., 12.
3 Ibid., 13.

to the rule of law and a fundamental guarantee of a fair trial. Judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens."[4] Judicial independence is not a privilege or right for the judges themselves, but rather a fundamental necessity for the rule of law and for those who seek and expect justice.[5]

When assessing the independence and impartiality of a tribunal, factors like the method of appointment of its members, their terms of office, safeguards against external pressure, and the overall appearance of independence are all crucial. These elements collectively determine whether a tribunal can be seen as truly independent.[6] Judicial independence extends beyond simply being free from political influence by the executive or legislative branches. It also includes the protection of judges from undue interference from within the judiciary itself. Courts should be independent from legislative bodies, except where they are required to apply laws passed by them. The core issue of judicial independence revolves around ensuring there are no organic ties that could compromise the judiciary's independence from other branches of government. Additionally, the absence of adequate safeguards may not only erode this independence but can also create the perception of bias.[7]

It is crucial that both the judiciary as an institution and individual judges exercise their professional duties without any external influences or even internal pressures. The ability of the judiciary to act impartially and independently is essential for ensuring that justice is done based on law,

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4 Consultative Council of European Judges, Opinion no. 1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges, Strasbourg, November 23, 2001, CCJE (2001) OP N°1, p. 3.

5 Council of Europe, Commission Democracy through Law: Opinion no. 789 / 2014: *Amicus Curiae* Brief for the Constitutional Court of Moldova on Certain Provisions of the Law on Professional Integrity Testing, CDL-AD(2014)039, adopted December 15, 2014, p. 4.

6 Council of Europe, Commission Democracy through Law: Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on Legal Safeguards of the Independence of the Judiciary From the Executive Power of the Netherlands, CDL-AD(2023)029, adopted October 11, 2023, p. 4.

7 Council of Europe, Commission Democracy through Law: Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe, Opinion no. 550/2009, CDL-AD(2010)003, adopted March 16, 2010, p. 8.

thereby preventing any misuse of power. Public trust in the judiciary's ability to operate independently is vital for maintaining the rule of law.[8]

Judges must be able to make decisions without being subject to any form of undue influence, whether from external authorities or internal pressures within the judiciary itself. Judicial independence must be safeguarded both in its "external" components (free from outside influence) and its "internal" components (free from internal pressures or conflicts of interest).[9] An independent judiciary must also be accountable, but this accountability should not infringe upon its independence. Judicial independence should never be used as an excuse to prevent accountability, but accountability measures must be carefully designed to avoid undue pressure on the judiciary. The Venice Commission also reminds us that judges are not mere civil servants because they perform a unique constitutional function. Given this, it is essential to protect the special status of judges and the principles that underpin judicial independence to preserve the integrity of the judiciary.[10]

The "Rule of Law Checklist" of the Council of Europe is one of the most important documents in Europe for discussing the rule of law and judicial independence because it provides a comprehensive framework for assessing the legal and institutional standards that underpin democracy and justice in member states. The "Checklist" offers a set of benchmarks that countries can use to measure their adherence to fundamental democratic values. It emphasizes the essential role of an independent judiciary in maintaining the rule of law, ensuring fair trials, and protecting citizens' rights, making it a crucial reference for both legal experts and policymakers across Europe.

The European Commission, drawing inspiration from the Council of Europe, offered its own definition of the rule of law in its July 2019

8 Council of Europe, Commission Democracy through Law: Opinion on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement of Malta, Opinion no. 940/2018, CDL-AD(2018)028, adopted November 29, 2018, p. 7.

9 Rule of Law Checklist, p. 39.

10 Council of Europe, Commission Democracy through Law: Ukraine – Joint Follow-up Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe to the Joint Opinion on the Draft Amendments to the Law "On the Judiciary and the Status of Judges" and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (CDL-AD(2020)022), adopted by the Venice Commission at its 136th session, October 9, 2023, p. 8.

Communications on strengthening the rule of law within the EU. According to this definition, the rule of law refers to a system where all public authorities act within the boundaries set by law, respecting democratic values and fundamental rights, and are subject to oversight by independent and impartial courts.[11]

Judicial independence is also a fundamental requirement, deriving from the principle of effective judicial protection outlined in Article 19 of the TEU and the right to an effective remedy before the courts, as stated in Article 47 of the Charter of Fundamental Rights of the EU. It ensures fairness, predictability, and certainty within the legal system. The Court of Justice of the EU defines judicial independence as

> (…) presuppos(ing), 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.[12]

Both the Council of Europe and the European Union recognize justice as a core element of the rule of law. For both organizations, an effective justice system is defined by its independence, quality, and efficiency, which are essential to upholding the rule of law and the values on which the EU is based.

Until recently, the issue of judicial independence had not been raised at the EU level against Croatia. This stands in contrast to the fact that the European Commission's Judicial Scoreboard has consistently shown Croatia's population confidence in its judicial system to be among the lowest in Europe. No other country fares worse. Interestingly, countries such as Hungary, Romania, and Malta – who have been brought before the Court of Justice of the European Union (CJEU) over judicial independence issues – have a better public perception of their judicial systems. Croatian citizens

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11 European Commission, Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Strengthening the rule of law within the Union. A blueprint for action, COM/2019/343 final, July 17, 2019.

12 CJEU Judgment of 27 February 2018, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, ECLI:EU:C:2018:117, para. 2.

cite government and political interference as the primary reason for their perceived lack of judicial independence. In Croatia, 60% of respondents share this view. Furthermore, 47% perceive that the judicial status does not guarantee independence, this figure being – together with Poland – the highest in the EU.[13]

Against this backdrop, in 2021, three cases were referred to the CJEU concerning potential violations of judicial independence in Croatia. These cases were consolidated into a single procedure which dealt with the rejection of requests by the Croatian Financial Agency for reimbursement in insolvency procedures and the initiation of judicial administration. The affaire at stake joined cases C-554/21 (*Financijska agencija v. Hann-Invest d.o.o.*), C-622/21 (*Financijska agencija v. Mineral-Sekuline d.o.o.*), and C-727/21 (*Financijska agencija v. Udruga KHL Medveščak Zagreb*). Advocate General Mr. Priit Pikamäe presented his Conclusions on October 26, 2023 and the judgment was issued by the Grand Chamber on July 11, 2024.[14] The referring national court questioned whether certain procedural mechanisms might violate EU law, particularly Article 19 TEU. The contested mechanism aims to ensure consistency in case law by empowering a "registrar judge," who has not participated in the case, to reject, amend, or even escalate a decision to a larger court panel without direct involvement with the case. It also allows an extended section of the same court to force the judges who have heard the case to change the sense of the resolution they deem appropriate for the specific case before the resolution is issued.

This ruling is noteworthy not only because it marks the first time the CJEU addressed judicial independence in Croatia, but also because it is the first one where the Court considered internal threats to judicial independence rather than interference by the government. Another notable aspect is that the CJEU rejected the Advocate General's opinion, which had initially suggested that the case should be dismissed. Actually, the Advocate General attempted twice to avoid a ruling against Croatia. First, by suggesting the case should be inadmissible, and second, by arguing that Croatian

13 European Commission, Judicial Scoreboard, June 11, 2024, p. 46.

14 CJEU Judgment of 11 July 2024, Financijska agencija v. Hann-Invest d.o.o., Mineral-Sekuline d.o.o., and Udruga KHL Medveščak Zagreb, Joined Cases C 554/21, C 622/21, and C 727/21, ECLI:EU:C:2024:594.

judicial rules did not conflict with EU law. The CJEU finally found this practice incompatible with EU law but offered constructive guidance to Croatia on how to reform its judicial system.[15]

2. Jurisdiction

There are two aspects that are essentially the two sides of the same coin: first, it is the CJEU's responsibility to assess the circumstances in which a national judge refers a case to ensure the Court's jurisdiction and the admissibility of the request for a preliminary ruling. Second, the CJEU can only interpret EU law within the scope of the competences it has been assigned.

Regarding the jurisdiction of the Court of Justice, the Advocate General argues that the Court is competent on the issue of interpreting Article 19(1) TEU (composition and functions of the Court), but it is not competent to interpret Article 47 of the Charter of Fundamental Rights (effective judicial protection and the right to a fair trial), despite both provisions being cited by the Croatian court in its request for a preliminary ruling. Article 19 TEU applies to any national body tasked with issues concerning EU law, meaning national judges act as EU judges when dealing with matters related to EU law. Therefore, the Court has jurisdiction in this regard. Conversely, according to Article 51 of the EU Charter, the Charter only applies to member states when they are implementing EU law. Since the Croatian court did not invoke any EU provisions relevant to the case, the Advocate General concluded that the CJEU could not address Article 47 of the Charter in this instance (paras. 24–26 of the Opinion).

It's important to note that the Court of Justice concurs with this view. It first declares its lack of jurisdiction to interpret Article 47 of the Charter because the Croatian court did not indicate that the cases at hand involved the application of any EU legal norm at the national level (paras. 32–33 of the Judgment). It then declares its jurisdiction over Article 19 TEU, as this provision requires member states to establish a system of remedies ensuring effective judicial protection within EU law. Since the Croatian court

[15] A preliminary yet very accurate comment on this judgment can be found in: Nika Bačić Selanec and Davor Petrić, "Reshaping National Judiciaries under Article 19(1) TEU: The Grand Chamber's Decision in Hann-Invest," *EU Law Live. The Week*, no. 35 (2024), accessed April 25, 2025, https://eulawlive.com/op-ed-reshaping-national-judiciaries-under-article-191-teu-the-grand-chambers-decision-in-hann-invest.

forms part of the national judicial system, the Court confirmed its jurisdiction over the three cases (paras. 34–38 of the Judgment).

It may cause surprise that the Court considers itself competent to rule on the application of Article 19 TEU but not on Article 47 of the Charter. The reason lies in the universal application of Article 19 TEU as all judicial bodies in member states may eventually be required to address matters related to EU law. Every national judge is, in effect, an EU judge. Ensuring that national remedies guarantee effective judicial control within EU law is a fundamental requirement. However, Article 51 of the Charter restricts its application to situations where EU law is being implemented, and the Croatian court did not indicate that the disputes involved the interpretation or application of EU law (para. 32 of the Judgment). This is why the Court of Justice found it was not competent to interpret the Charter.

3. Admissibility

A significant point of divergence between the Conclusions and the Judgment concerns the admissibility of the case. While the Advocate General suggested inadmissibility, the Court took the opposite stance and addressed the merits.

The Advocate General suggests that rigor in assessing admissibility is the only limit to reviewing preliminary ruling requests that might be "contrary to the spirit and purpose" of the preliminary reference procedure (para. 30). The Conclusions argue that there must be a clear link between the case and the EU law provisions whose interpretation is requested. The Advocate General elaborates on the "necessity" of a preliminary ruling (para. 31), explaining that this necessity may be direct – when the national court needs to apply EU law to resolve the case – or indirect – when the ruling helps clarify procedural provisions of EU law essential to the national court's decision. He argues that although insolvency procedures have some substantive connection to EU law, the link here is insufficient to meet the necessity criteria. Furthermore, the requests do not demonstrate that the Croatian court must apply Article 19 TUE in resolving the substance of the case (para. 33). The Advocate General adds that the national court does not appear to seek clarification on the substance of the cases but on procedural matters (para. 34). He concludes that the procedural issues raised do not reflect a necessary connection to EU law (para. 35).

The Advocate General notes that judicial independence within the scope of EU law is not different from judicial independence in domestic matters. However, he stresses that this observation does not relieve the Court of the obligation to assess whether EU law is applicable to the case at hand in Croatia (para. 40). According to the Conclusions, an overly broad interpretation of Article 19 TUE could lead to the Court assuming jurisdiction over any judicial matter in a member state, even if the case is not related to EU law, potentially undermining national judicial autonomy. The Advocate General raises the legitimate question of whether Article 19 TUE grants the Court the authority to intervene in any matter affecting the judicial system of a member state, even if the case is unrelated to EU law. If so, it could lead to a form of general competence for the Court, potentially undermining national sovereignty over judicial organization.

Regarding the Court's reasoning on admissibility, the Grand Chamber states that the purpose of a preliminary ruling is not to provide advisory opinions on hypothetical or general matters but to resolve concrete disputes. Thus, a preliminary ruling must be necessary for the national court to issue its judgment (paras. 39–40). The Court finds that the Croatian High Commercial Court in the first two cases (C-554/21 and C-622/21) is confronted with the instructions of the registrar judge, and in the third case (C-727/21), with the obligation to resolve in accordance with the legal position adopted by the expanded commercial section of the court. These instructions and positions affect prior judgments and will not be considered final unless they are followed. Since the Croatian court is seeking clarification on whether these interventions violate Article 19 TUE, which mandates judicial independence in matters related to EU law, the Court declares all three preliminary ruling requests admissible (para. 41).

While the Advocate General sought to differentiate when a ruling is necessary to resolve a case and when it is not, the Court simply declares the requests admissible, arguing that the Croatian High Commercial Court is confronted with binding instructions and legal positions that affect its judgments. The Court does not elaborate on the connection to EU law nor cites any EU provision of secondary law. Instead, it reasons that the involvement of the registrar judge and the expanded section of the court

justifies the need to clarify whether these interventions align with Article 19 TEU (para. 42).

Thus, the Court of Justice seems to assert a near-general competence to review the compatibility of member state judicial norms and practices with the TEU, even without demonstrating a clear connection to EU law or its areas of application. Moreover, it appears that the national court does not need to make any real effort to explain the connection between the case and EU law. In essence, the fact that a national judge is also an EU judge seems to grant the CJEU a broad authority to address any issue related to the judicial system of a member state.

4. Merits

Although the Advocate General held the view that the joined cases should not have been admitted, he still examined the substance of the issues raised, aiming for thoroughness in his role of assisting the CJEU.

In essence, the preliminary questions suggest that the referring court has doubts about whether a national mechanism, which includes both national legislation and practices aimed at ensuring the coherence of jurisprudence, is compatible with Article 19(2) TEU. The mechanism involves a judicial decision at second instance being sent to the parties for the conclusion of the case only if a registry judge (who is not part of the judicial panel that issued the decision) approves its content, and if an extended section meeting of that court has the authority to adopt legally binding positions for all the chambers or judges of that court.

The Advocate General organizes his analysis into two main parts: one relating to the requirement for legal certainty, and another to the respect for the right to effective judicial protection. The second part is further divided into three subsections: judicial independence, the right of defense, and access to a tribunal established by law. While the Court of Justice does not follow this structure in its Judgment, it addresses almost all of these issues in one way or another, albeit sometimes only in passing.

4.1. Legal Certainty

The Advocate General offers a detailed analysis of legal certainty, a fundamental EU principle ensuring predictability in legal relationships. He argues that legal norms must be clear, precise, and consistently applied so

individuals can understand their rights and obligations (para. 50 of the Conclusions). Additionally, the Advocate General ties this principle to the Court of Justice's role in maintaining consistent case law to ensure legal certainty across the EU (para. 51 of the Conclusions).The Advocate General contends that a national mechanism ensuring consistent case law is not incompatible with EU law, provided it does not undermine judicial independence or obstruct national courts from referring questions to the Court (para. 52 of the Conclusions). He supports the Croatian procedural mechanism, suggesting second-instance courts should ensure consistency in their case law, promoting horizontal coherence and legal certainty (para. 54 of the Conclusions).

In contrast, the Court of Justice briefly references legal certainty, treating it as a given and emphasizing that national measures to prevent judicial divergence must comply with the requirements of Article 19(2) TEU (para. 48 of the Judgment).

4.2. Effective Judicial Protection

The Advocate General's discussion of effective judicial protection begins by emphasizing the EU's foundational values, particularly the rule of law as enshrined in Article 19 TEU. He asserts that member states must ensure their judicial systems respect the principle of effective judicial protection in line with EU law. States may reform their judicial systems to enhance the protection of the rule of law but cannot diminish it (para. 56 of the Conclusions). Judicial independence is crucial, and any measures undermining it must be avoided. The Advocate General further ties the principle of effective judicial protection to Articles 6 and 13 of the European Convention on Human Rights (ECHR), ensuring the right to a fair trial and access to an effective remedy. He references both Article 47 of the Charter and Article 19 TEU, arguing that member states must establish legal systems that guarantee effective judicial protection in EU law areas (para. 57 of the Conclusions). While he acknowledges the relevance of Article 47 of the Charter, his earlier position that the Court was not competent to interpret this provision creates some confusion when he emphasizes its importance in this context.

The Advocate General's reasoning draws from early jurisprudence, where the Court recognized fundamental rights as part of EU law's general principles, based on the constitutional traditions of member states and

international human rights conventions[16] (para. 58 of the Conclusions). Effective judicial protection is one of these principles, which includes judicial independence and access to an independent judge. However, when discussing Article 47 of the Charter, the Advocate General shifts focus away from the constitutional traditions and the ECHR, which could have been more central to the analysis in this case.

The Court of Justice generally follows the Advocate General's reasoning, recognizing judicial independence and access to an independent judge as essential for effective judicial protection. However, the Court adopts a broader approach, referencing Article 47 of the Charter and its own case law, while also integrating the ECHR into its interpretation. The Court notes that Article 47 corresponds to Article 6(1) of the ECHR and frequently refers to the ECHR, but does not base its reasoning solely on Article 47 (para. 46 of the Judgment).

While the Court refers to the ECHR, it only cites two relevant Judgments of the European Court of Human Rights (ECtHR): *Parlov-Tkalčić v. Croatia*,[17] regarding judicial independence, and *Coëme and Others v. Belgium*,[18] which discusses the requirement that a tribunal be "established by law" (paras. 54 and 57 of the Judgment). The Court's reliance on these two cases is a missed opportunity to incorporate a wider range of ECtHR case law on judicial independence, such as *Baka v. Hungary*, *Grzęda v. Poland*, or *Guðmundur Andri Ástráðsson v. Iceland and Others*,[19] which could have enriched the Court's reasoning.

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16 See on this: Manfred A. Dauses, "La Protection des Droits Fondamentaux dans l'Ordre Juridique Communautaire," *Revue Trimestrielle de Droit Européen*, no. 3 (1984): 401–24; José C. Moitinho de Almeida, "La Protección de los Derechos Fundamentales en la Jurisprudencia del TJCE," in *El Derecho Comunitario Europeo y su Aplicación Judicial*, eds. Gil C. Rodríguez Iglesias and Diego J. Liñán Nogueras (Madrid: Cívitas, 1993), 97–131.

17 ECtHR Judgment of 22 December 2009, Parlov-Tkalčić v. Croatia, application no. 24810/06, hudoc.int.

18 ECtHR Judgment of 22 June 2000, Coëme and Others v. Belgium, applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, hudoc.int.

19 ECtHR Judgment of 23 June 2016, Baka v. Hungary, application no. 20261/12, hudoc.int; ECtHR Judgment of 15 March 2022, Grzęda v. Poland, application no. 43572/18, hudoc.int; ECtHR Judgment of 1 December 2020, Guðmundur Andri Ástráðsson v. Iceland, application no. 26374/18, hudoc.int.

The Court does not extensively engage with the vast body of ECtHR case law on judicial independence, despite the relevance of many key decisions, which could have provided additional depth to the judgment. The limited reference to ECtHR jurisprudence in the judgment may be seen as a missed chance to further align the EU's interpretation of judicial protection with established international human rights standards.

In short, the Advocate General provides a thorough exploration of legal certainty and effective judicial protection, emphasizing their importance in ensuring predictability and upholding the rule of law in the EU. He discusses the role of the Court in maintaining consistent case law and ensuring that national mechanisms align with EU law, while maintaining judicial independence. Although the Court of Justice adopts a similar approach, its judgment is more concise, referencing both Article 47 of the Charter and the ECHR. However, the Court limits its engagement with ECtHR case law, missing the opportunity to draw on the full body of relevant judgments that could have further informed its analysis of judicial independence in the EU context.

4.2.1. Judicial Independence

The Advocate General raises an important question regarding judicial independence: whether the involvement of the registrar and the judges' section in Croatia undermines the independence of the judicial panel. His answer is negative. While his conclusion might be debated, the Advocate General provides a comprehensive explanation of judicial independence. He explains that judicial independence is essential to the judicial function, directly linked to the right to effective judicial protection and the right to a fair trial – both fundamental rights necessary to uphold the EU's rule of law, as enshrined in Article 2 TEU. Judicial independence includes two key aspects: external and internal. External independence ensures that judges act without external pressures, particularly from the executive and legislative branches. Internal independence relates to impartiality, ensuring that judges remain neutral and are not influenced by the parties involved in the case. To safeguard these principles, the Advocate General argues that certain rules are necessary, such as those governing the composition of the judiciary, the length of judicial mandates, and grounds for recusal. These rules are vital to maintaining both the legitimacy of the court and public confidence in the judiciary. Furthermore, the appearance of judicial independence is as

critical as its substance, and any internal pressures within the judicial system must also be considered.

In this particular case, the Advocate General evaluates whether the Croatian mechanism for ensuring consistent case law, which involves the registrar and the judges' extended section, threatens judicial independence. He relies on ECtHR's case-law to argue that judicial independence must guard against both external and internal pressures. While he acknowledges that the registrar's involvement could be seen as disruptive, he justifies it as part of the mechanism to maintain legal consistency, stating that it does not undermine judicial independence as long as it is appropriately implemented. The Advocate General also highlights the tension between ensuring uniformity in judicial decisions and safeguarding judicial independence. However, he concludes that the Croatian system system, which includes broad participation and still allows the judicial panel to make the final decision, does not violate judicial independence. The process may appear intrusive, but it does not infringe on the domestic court's ability to make its final decision (paras. 61–63 of the Conclusions).

The Court of Justice largely follows the Advocate General's reasoning here but further emphasizes that judicial independence is indispensable for effective judicial protection and a fair trial. It reiterates the need to safeguard both external and internal judicial independence, asserting that strict rules governing judicial composition are crucial for maintaining impartiality and preventing undue influence. The Court underscores that threats to judicial independence, whether internal or external, must be prevented to ensure the integrity of the judicial system within the EU (paras. 55–59 of the Judgment).

4.2.2. The Right to Defense

The Advocate General discusses the right to defense as a central component of effective judicial protection within the Croatian judicial framework. He references again the Charter and, particularly Article 47, as well as Article 6 of the ECHR, which protects the right to a fair trial. For its part, the Commission raises concerns about the Croatian procedure, particularly that section meetings are not public, parties cannot present their arguments during these meetings, and judges may participate without having reviewed the case submissions (para. 73 of the Conclusions). In response, the Advocate General asserts that the right to defense includes the right to be heard. He

acknowledges that while the Croatian process might seem opaque, the deliberation phase does not violate the right to defense. He clarifies that no resolution is made until after the deliberation, allowing judges to discuss abstract legal principles. He views deliberation positively as it provides an opportunity for judges to reflect on the case and applicable legal norms, even if some issues were not raised by the parties themselves, provided it respects the adversarial process (paras. 76–78 of the Conclusions).

When the Court of Justice issued its Judgment, it incorporated the right to defense within the broader framework of judicial fairness, rather than addressing it as a separate issue. The Court included the right to defense within its general emphasis on the requirement for an effective trial (paras. 55–59 of the Judgment).

4.2.3. Access to a Court Established by Law

The Advocate General discusses the meaning of "a court established by law," an essential principle for ensuring the rule of law. He draws on established ECHR case law to argue that a court must be pre-established by law and governed by legislation, preventing arbitrary decisions by the executive. This principle ensures that courts operate within a legal framework set by the legislature, ensuring transparency and predictability in the judicial system.

The Advocate General explains that the issue in this case is not the existence of the Croatian Commercial Court, but the mechanism it uses for decision-making. He discusses whether the involvement of the registrar and the judicial section in this process affects the requirement that the court be established by law. He concludes that the Croatian rules governing the deliberation phase meet this requirement, as they are based on legal provisions that ensure the legitimacy of the process. Although the Advocate General focuses primarily on the registrar's role, he briefly mentions the participation of the expanded judicial section. He argues that the registrar's intervention in ensuring consistency in case law does not violate the requirement for a court established by law. However, he provides a more limited analysis of the expanded section's involvement, suggesting it does not raise significant concerns under this principle (para. 79 of the Conclusions).

The Court of Justice's judgment expands on this issue, emphasizing that the requirement of a court established by law refers not only to the legal foundation of the court but also to its composition and the transparency

of the decision-making process. It agrees with the Advocate General that the court must issue its judgment in accordance with a transparent procedure that guarantees fairness and the right to an effective trial. The Court stresses that the formation of the judicial body responsible for the decision must be clearly defined, and that any undue external influence, including from judges not directly involved in the case, violates the principle of judicial independence. The Court concludes that the registrar's role, as well as the expanded section's participation, could infringe the requirement for a court established by law, as both involve individuals who may not be fully familiar with the case or the facts, potentially influencing the final outcome without the parties having had a chance to present their case (paras. 55–59 of the Judgment).

5. Autonomous Arguments Invoked by the CJEU

After the previous analysis of the applicable principles, the CJEU presents its own autonomous legal reasoning, departing from the structure of the Advocate General's Conclusions (para. 60 of the Judgment).

The Court evaluates the role of the registrar judge in the main proceedings, noting that neither Croatian procedural regulations nor the Law on the Judiciary grant this judge the authority to control the content of judicial rulings. However, in practice, the role of the registrar judge exceeds his administrative function, as he can block the registration of decisions, thus preventing their finalization and notification to the parties. This allows the judge to send the case back to the judicial formation for reconsideration and even urge a meeting to establish a binding legal position. The Court concludes that this constitutes undue interference, as the registrar's intervention lacks a proper legal foundation, is not based on clear and objective parameters, and affects the final resolution (paras. 61–69 of the Judgment).

Next, the CJEU addresses the role of the expanded section of the court. It acknowledges that Croatian law allows the intervention of a section meeting in cases of interpretative disagreements between sections, panels, or judges. This meeting, which can be called by the registrar judge, has the power to issue a binding legal position for the entire section or court. Although it does not resolve the case definitively, the position adopted can influence the final content of the ruling (paras. 70–74 of the Judgment). The Court observes that the intervention of the expanded section does

not meet sufficiently objective parameters and lacks transparency, as the parties are unaware of the meeting's convocation and cannot participate. Therefore, this intervention is also incompatible with the right to effective judicial protection (paras. 75–79 of the Judgment).

Finally, the CJEU introduces a new argument, which seems to serve as a "safety valve" for the Croatian judicial system. The Court outlines the conditions under which the intervention of the judge's or the expanded section's intervention could be compatible with Article 19 TEU. These conditions include that the matter has not yet been submitted for deliberation by the relevant formation, the criteria for such a referral is clearly defined in the applicable law, and the referral should not deprive the interested parties of the opportunity to participate in the procedure before the expanded formation. These conditions would ensure that a procedure aimed at avoiding or correcting conflicting jurisprudence does not contravene Article 19 TEU and guarantees the legal certainty inherent in the rule of law. The CJEU notes that this additional point was not raised by the parties but is nonetheless included as a constructive suggestion to Croatian authorities on how they might amend their judicial system to comply with EU law (para. 80 of the Judgment). Thus, the CJEU appears to provide a "constructive" solution, explaining how Croatian judicial regulations could be reformed to align with the EU's expectations on judicial independence.

6. Consequences of the Judgment for the Croatian Legal System

Croatia successfully adhered to EU standards at the time of its accession meeting the criteria for an efficient and independent judicial system. However, over a decade later, the Croatian judiciary is far from being considered a model of excellence by either the European Commission or Croatian public opinion.[20] In fact, Chapter 23 of the acquis, which addresses the judiciary and fundamental rights – an essential condition for Croatia's EU membership – was one of the most challenging and contentious areas for the country's candidacy.

[20] Mateja Čehulić and Dario Čepo, "Hiding behind Digitalization: Judiciary Reform Strategies," in *¿La Europa de los valores? El declive del Estado de Derecho en la UE*, ed. Susana Sanz-Caballero (Navarra: Aranzadi, 2023), 371–92.

The reforms implemented during negotiations with the EU had a positive impact on the judicial system, accelerating the fight against corruption and improving the protection of fundamental rights, ultimately enabling Croatia to join the Union. That said, the results fell short of expectations.[21] In Croatia, as in other Eastern European member states, many reforms initiated after meeting the EU's criteria were not fully implemented due to changes in government or shifting political priorities.[22] Some reforms were even reversed later, either through amendments to existing policies or a conscious decision to abandon them.[23]

Consequently, the Croatian judicial system retains practices inherited from the past, some of which persist either due to inertia or unconscious repetition. These outdated practices and norms reflect an earlier era, more akin to the control expected in a communist judicial system than in a democracy.[24] In Croatia, there is not only a serious perception of interference from other state powers in the judicial process, but also a significant concern about corruption within the judiciary itself.[25] In many cases, judges simultaneously hold other professional or honorary positions – such as being members of chambers of commerce, football club presidents, or real estate agents. These additional roles, often doubling their income, make it

21 Tina Đaković, *Policy Insight: Partial Reforms and Incomplete Europeanisation – Croatia's Experience in Conducting Reforms in the Context of the Chapter 23 Negotiations with the EU* (Skopje: European Policy Institute), https://epi.org.mk/wp-content/uploads/Policy-Insight-_Partial-Reforms-and-Incomplete-Europeanisation_Croatia%E2%80%99s-Experience-in-Conducting-Reforms-in-the-Context-of-.pdf.

22 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (The Hague: Kluwer Law International, 2008); Dimitry Kochenov and Petra Bard, "Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement," *Reconnect Working Paper*, no. 1 (2018), https://ssrn.com/abstract=3221240.

23 Andrea Cassani and Luca Tomini, "Reversing Regimes and Concepts: From Democratization to Autocratization," *European Political Science* 19, no. 3 (2020): 272–87; Elyse Wakelin, "EU Conditionality: An Effective Means for Policy Reform?," November 2013, accessed April 25, 2025, https://www.e-ir.info/pdf/43900.

24 Josip Jambrač, "Croatian Post-Socialist Transition or Transformation: Lost in Translation," *Croatian and Comparative Public Administration* 20, no. 4 (2020): 649–76, https://doi.org/10.31297/hkju.20.4.3.

25 Nika Bačić Selanec, Iris Goldner Lang, and Davor Petrić, "Rule of Law in the EU and the State of Croatian Judiciary," in *Crisis Era European Integration: Economic, Political and Social Lessons from Croatia*, eds. Jakša Puljiz and Hrvoje Butković (London: Routledge, 2024), 77–96.

easy for judges to become entangled in clientelism, cronyism, nepotism, or influence peddling.

The fact that the Croatian Constitution declares the rule of law as the supreme value is insufficient to ensure its effectiveness. What truly matters is its implementation in everyday life. Surveys show a low level of trust in the judiciary and profound dissatisfaction with its functioning, which points to an "internal" crisis of trust in the judicial system, compounded by an "external" crisis and latent tensions within and around the Croatian judiciary. In addition to factors related to the functioning of the judiciary, external influences – such as a disorganized legal system and an overburdened court system – contribute to a negative balance. These unfavorable impressions lead to a loss of confidence in the judicial system, reducing its authority and, consequently, the capacity to implement and protect rights. This situation could lead to legal uncertainty, which is disastrous for any society.[26]

Against this backdrop of dissatisfaction with the Croatian judiciary – both due to external pressures on judges and the internal permeability to corrupt or unethical practices – the first case on judicial independence was presented to the CJEU. However, instead of addressing the previously mentioned issues, this case questions an internal procedural practice aimed at correcting divergences in case-law within the same court.[27] The case does not address issues such as the appointment of judges, a politicized judicial council, executive interference in the judiciary, judges holding multiple jobs or receiving extra salaries, nepotism, or judicial misconduct, some of which have been central to other EU member states' cases. The case is nevertheless significant for the rule of law because it concerns a procedural practice – largely oral rather than written – that contradicts the logical idea that the judicial formation responsible for a case should be the only one to issue the final resolution of that case. No one else, not even from the same

26 Jakša Barbić, "Administration of Justice and the Rule of Law in the Republic of Croatia," *Croatian Academy of Legal Sciences Yearbook* 13, no. 1 (2022): 161–72.

27 Alessandro Schmidt, "When the Threat Comes from Home: the Grand Chamber's Review of the Croatian Judicial Uniformity Mechanism under Article 19 (1) TEU in Hann-Invest," BlogDUE, November 5, 2024, accessed April 25, 2025, https://www.aisdue.eu/alessandro-schmidt-when-the-threat-comes-from-home-the-grand-chambers-review-of-the-croatian-judicial-uniformity-mechanism-under-article-19-1-teu-in-hann-invest/.

court, should be able to force a change in the outcome of a decision after the judges have deliberated.[28]

Although this may seem like a minor issue compared to more severe violations of judicial independence that have been brought before the CJEU in recent years, the Court nonetheless declares that the powers granted to the registration judge and the expanded section meeting to alter the decision after deliberation constitute an anomaly. Such practices undermine transparency and involve undue interference by judges who have not examined the case in the final resolution to be notified to the parties. Nevertheless, the CJEU offers a constructive approach, outlining how this procedural mechanism could be compatible with EU law if certain conditions are met. These include ensuring that the case has not yet been submitted for deliberation by the relevant formation, that the criteria for referral are clearly defined in applicable law, and that the parties still have the opportunity to participate in proceedings before the expanded court formation.[29]

Equally intriguing is the fact that the Croatian Constitutional Court had previously validated the constitutionality of this mechanism, deeming it unnecessary to refer the matter to the CJEU for an opinion on its compatibility with EU law, even when the Hann-Invest case was pending before the CJEU. What appears to be a benign and well-intentioned Croatian mechanism designed to prevent contradictions in case law actually reflects outdated collectivist practices from the communist era, when there was total vertical judicial submission to higher-ranking judges. The current apparent lack of interference from other state powers contrasts with a judicial system that is hierarchically organized, where lower-ranking judges are reduced to bureaucrats without free opinion, following the directives of superior judges, often aligned with government interests.[30] Thus, there

28 Nika Bačić Selanec and Davor 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," *Croatian Yearbook of European Law & Policy* 20, (2024): 127–54.

29 Marc de Werd, "Uninvited Oversight: Judges Watching Judges – The ECJ Hann-Invest Case," Amsterdam Centre on the Legal Professions and Access to Justice, July 16, 2024, accessed April 25, 2025, https://aclpa.uva.nl/en/content/news/2024/07/blog-marc-de-werd.html?cb.

30 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," *Croatian Yearbook of European Law & Policy* 20, (2024): 155–79.

is nothing innocent or benevolent about this mechanism of unifying case law, which still survives in Croatia and other former communist countries, such as Hungary, while countries like Estonia, Lithuania and Latvia have moved past it.[31]

In democracy, the way to challenge an unsatisfactory judicial decision is through an appeal before a higher court that reconsiders the case and hears the parties. The solution is not to have judges who have not examined the case overturn the decision made by those who have, under the pretext of unifying case law. As established in the "Rule of Law Checklist":

> The possibility of appealing judgments to a higher court is a common element in judicial systems and must be the only way of review of judges when applying the law. Judges should not be subject to supervision by their colleague-judges, and a fortiori to any executive hierarchical power, exercised for example by civil servants. Such supervision would contravene their individual independence and consequently violate the Rule of Law. The guarantee can be understood as having two aspects. One relates to the court as a whole. The other relates to the individual judge or judicial panel dealing with the case. It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance.[32]

Or, as expressed by the ECtHR, there might be potential interference with the decision-making of judges originating from within the judiciary. Internal judicial independence requires that judges be free from directives or pressures from fellow judges. Also, from those who have administrative responsibilities in a court, such as, for example, the president of the court[33] (or registration judges, for the same reason). And not only internal independence is important since the absence of sufficient guarantees against

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31 Ibid., 163. Different but, at the same time, similar concerns arise in Romania – and also in Hungary – from the discretional power that the presidents of courts have in the allocation of cases (Petra M. Gyöngyi, "Judicial Reforms in Hungary and Romania. The Challenging Implementation of EU Rule of Law Standards" [PhD diss., Erasmus University Rotterdam, 2019], 158, 179).

32 Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008, March 16, 2014.

33 ECtHR Judgment of 22 December 2009, Parlov-Tkalčić v. Croatia, application no. 24810/06, para. 86, hudoc.int.

internal pressures might also amount to a breach of the right to an independent judge.[34]

There are further questions raised by Croatian scholars, such as whether this registrar or expanded section judges act as "sheriffs," whether they believe the judges who have examined the case do not know the law, whether the system marginalizes disobedient judges, or what the implications are of the fact that much of this mechanism is unwritten and therefore poorly regulated.[35] It is worth noting that the Advocate General responsible for the Hann-Invest case was Estonian, and one might speculate whether this fact influenced the leniency of his opinion on the questioned mechanism, despite its criticism in the Judgment. Many Central and Eastern European countries lived under similar mechanisms of jurisprudential unification during the communist era, and there may be an unconscious empathy or understanding toward such practices in countries where similar systems existed.

7. Conclusions

While member states have discretion in organizing their judicial systems, they must comply with EU law requirements. The deficiencies in the Croatian judicial system are well known, as reflected year after year in the European Commission's Justice Scoreboard. These deficiencies appear to trace back to the time when Croatia was part of the former Yugoslavia, as critical data and opinions about the Croatian judiciary date back to the same period when the country joined the EU. However, until the summer of 2024, no case had been brought before the CJEU questioning the Croatian judicial system or its independence (no referrals, annulment actions, or infringement procedures). Therefore, there was no formal judicial evidence at the European level regarding these deficiencies.

Curiously, the first case that reached the CJEU, although related to judicial independence, does not concern any law that blatantly ignores the rule of law and the standards set out in Article 19 TEU. Instead, it addresses a procedural practice that, although with the seemingly noble aim of

[34] ECtHR Judgment of 6 October 2011, Agrokompleks v. Ukraine, application no. 23465/03, para. 137, hudoc.int.

[35] Council of Europe Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System. Part I: The Independence of Judges, CDL-AD(2010)004, Study No. 494/2008, March 16, 2014, pp. 3–5, 8–10.

avoiding contradictory jurisprudence within the same court, imposes an external judicial criterion on judges who have already considered the case. Judges who have not heard the case should not be able to influence the final decision.

The fact that Croatia may not have been condemned is reflected in the Conclusions of the Advocate General, who suggested that the case be inadmissible, or if it were examined, the procedural practice could be deemed compatible with Article 19 TFEU. The ruling also took the Croatian Constitutional Court by surprise, as this national Court had ruled in 2022 that the mechanism was constitutional and did not warrant a referral to the CJEU to assess its compatibility with EU law.

However, the CJEU is not obliged to follow the reasoning of the Advocate General or accept a national Constitutional Court's opinion on the compatibility of a national provision with EU law. The ruling raises two significant questions. First, whether the CJEU's competence to review the judicial organization of EU member states is unlimited, granting it the broad authority to demand changes in the judicial systems of all 27 EU countries. Second, whether the CJEU, through its rulings, creates law. In this case, beyond merely pointing out the incompatibility of national legislation with EU law, the Court actively offered solutions on how to adapt the Croatian system to meet EU standards.

The ruling underscores the need to protect judges not only from external pressures but also from themselves. Internal pressures, such as the intervention of judges who have not considered the case, can undermine judicial independence. While the goal may be the unification of jurisprudence, this practice reflects a remnant of the judicial system from the former Yugoslavia era, in which the judicial elite could correct the decisions of other judges. This case is expected to prompt legislative reform that aligns Croatia's judicial system with EU rule of law standards. It will also serve as a warning to other EU member states that retain judicial mechanisms inherited from the Iron Curtain era.

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