Ispitivanje svrhe prethodnog postupka - mehanizam sudske suradnje ili apstraktni sudski nadzor?

Fueh Mihovilović, Julia

The Republic of Croatia
University of Zagreb
Faculty of Law

Student:
Julia Fueh Mihovilović

MASTER THESIS

Questioning the Purpose of the Preliminary Ruling – A Mechanism of Cooperation or Abstract Constitutional Review?

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Mentor:
doc. dr. sc. Nika Bačić Selanec, LL.M. (UMich)

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ABSTRACT

This thesis examines the purpose of the preliminary ruling mechanism in the context of the rule of law case law. The preliminary ruling is an instrument of judicial cooperation used by the national judge to seek assistance from the Court of Justice of the European Union on the interpretation of EU law that has concrete relevance and necessity for the resolution of the pending case. After the Portuguese Judges, the rule of law case law often developed contrary to the purpose and spirit of the preliminary ruling procedure. That is because Article 19 TEU methodology oftentimes uses jurisdiction or the ruling on the substance as the basis for admissibility. This process has two implications. Firstly, when there is no substantial or procedural connection between the interpreted EU provision and ruling on the case, such interpretation loses the quality of a dialogue and elevates to the abstract constitutional revision of the laws of a Member State. Secondly, that process has a further implication that it often unduly burdens the procedural economy of the parties, as the resolution of their legal situations are often being delayed for months and years only for the preliminary ruling to take real effect on the national judicial architecture and not the legal position of the parties. The judgement in Miasto Łowicz explicitly and implicitly acknowledges the problematic aspects of the post Portuguese Judges case law and reinforces the purpose and spirit of the preliminary ruling mechanism. However, case law following the Miasto Łowicz judgement is not consistent. In the currently pending case of Hann Invest, the Court has a chance to take a bold standing on the matter and contribute the coherence and legal certainty on the matter. In light of the found implications, I consider how in its assessment of admissibility, the Court should reinforce it as a tool of cooperation rather than as a tool for revision.

1. INTRODUCTION

This thesis examines the purpose of the preliminary ruling mechanism in the context of the rule of law case law. The preliminary ruling is an instrument of judicial cooperation used by the national judge to seek assistance from the Court of Justice of the European Union on the interpretation of EU law that has concrete relevance and necessity for the resolution of the pending case.[1] Today, it is regulated by article 267 of the Treaty on Functioning of the European Union.[2] Article 267 TFEU on the one hand, grants the national judges power to refer to the Court a question regarding the interpretation or validity of the European Union law and vice versa, it empowers the Court to answer the reference by interpreting and assessing the validity of EU law.[3] The most impactful quality of the preliminary ruling mechanism is that these powers of interpretation or assessment of validity of EU law give „interpretations the force of the final word".[4] This made the preliminary ruling mechanism a cornerstone of the European Union constitutional architecture.[5] Through this mechanism, in the words of Eric Stein, „tucked away in the fairyland Duchy of Luxembourg...the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."[6] The mechanism has been used to broaden the jurisdiction of the Court of Justice and establish the doctrines and principles shaping the Union we know today. In this thesis, I do not aim to examine the scope of jurisdiction of the Court through the preliminary ruling mechanism, but the separate legal concept of a procedural nature, the admissibility of the preliminary ruling references. Precisely, this thesis examines the implications of the broadening of the admissibility criteria before the Court of Justice of the European Union following the case law on Article 19 TEU initiated by the judgement *Portuguese Judges*. My analysis demonstrates that rule of law cases based on Article 19 TEU conjoined the concepts of jurisdiction and admissibility, which resulted in the utilization of the preliminary ruling mechanism contrary to its spirit and purpose. This conjunction resulted in the mechanism serving as an abstract constitutional revision.

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[1] Passalacqua V, Costamagna F. *The law and facts of the preliminary reference procedure: a critical assessment of the EU Court of Justice's source of knowledge.* European Law Open. 2023;2(2):322-344. doi:10.1017/elo.2023.26.

[2] Ćapeta T, *Preliminary ruling procedure*, materials prepared by Tamara Ćapeta for the class Jurisdiction and Role of the European Court of Justice, class 2023/204.

[3] *Ibid.*

[4] *Ibid.*

[5] Passalacqua V, Costamagna, *op.cit.* in reference no. 1.

[6] Stein, E, *Lawyers, Judges, and the Making of a Transnational Constitution.* The American Journal of International Law, vol. 75, no. 1, 1981, pp. 1–27. JSTOR, https://doi.org/10.2307/2201413. (Accessed 6 July 2024).

Another implication of Article 19 TEU case law are procedural burdens for the parties whose main interest often is the swift resolution of the dispute. The judgement in *Miasto Łowicz* represents a turnover from the Court of Justice and explicit and implicit acknowledgements of the problematic aspects of the post *Portuguese Judges* case law. However, case law following the *Miasto Łowicz* judgement is far from consistent. In the currently pending case of *Hann Invest,* the Court has a chance to take a bold standing on the matter and contribute the coherence and legal certainty on the matter. Because of the implications arising from the post *Portuguese Judges* case law, I believe how the court should stay consistent to its approach in *Miasto Łowicz*.

Structurally, I will firstly elaborate on the mechanism and purpose of the preliminary ruling. Following this, I will present two landmark cases, namely *Portuguese Judges* and *Miasto Łowicz*, and their impact on the admissibility criteria of rule of law references. I will demonstrate two implications of the post *Portuguese Judges* case law that support the Court further following the *Miasto Łowicz* approach. Lastly, I will present the currently pending case of *Hann Invest* and its significance in unifying the case law on this matter, given the current inconsistencies.

2. THE MECHANISM AND THE PURPOSE OF PRELIMINARY RULING

The preliminary ruling procedure is an instrument of cooperation between the Court of Justice and the national courts through which the Court provides the national courts with the interpretation of EU law, which they need in order to decide the dispute pending before them.[7] This procedure enables to set up a judicial dialogue, which aims to ensure uniform application of EU law within the Union, which is why the Court decisions in the rulings are binding. [8]

Article 267 TFEU grants the Court of Justice of the European Union jurisdiction to give preliminary rulings concerning: the interpretation of the Treaties; the validity and interpretation of

[7] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz v Skarb Państwa — Wojewoda Łódzki* (C 558/18), *and Prokurator Generalny zastępowany przez Prokuraturę Krajową (initially Prokuratura Okręgowa w Płocku) v VX, WW and XV* (C 563/18) [2020] ECLI:EU:C:2020:234, para 44.

[8] Ćapeta T, *op.cit*. in reference no. 2.

acts of the institutions, bodies, offices or agencies of the Union.[9] However, the activation of this power of the Court of Justice depends on the national court of the Member State. „Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court to give a ruling thereon.“[10] In light of this wording, the preliminary ruling mechanism looks like this: the judge on a national court is hearing a case and is puzzled on how to interpret a provision of EU law. That interpretation of EU law is necessary for the judge to resolve a particular legal situation. Therefore, the judge stops the national proceedings and refers the question of interpretation to the Court of Justice. After in average a year and a half,[11] the Court of Justice delivers an answer to the reference with an interpretation of EU law. Then the national court who referred the question, applies that interpretation to the facts of the case to effectively resolve it. This scheme showcases how national courts and the Court of Justice communicate and cooperate through this mechanism to ensure the uniform application of EU law. This communication is however limited in its scope.

The first limit that arises is that this mechanism is limited to the interpretation on EU law, not national law.[12] This is why the references are formulated within the scheme “should provision X of EU law in the circumstances such as those in the case pending, be interpreted to mean Y”. This means that the preliminary ruling mechanism is not an abstract constitutional revision. This is so because the Court cannot start this proceeding *ex officio* and the Court, formally, cannot asses the compatibility of national law with EU law.[13] What the Court does is that it interprets EU law within the factual circumstances provided by the national court. Another limit to this interpretation is that the scope of the Court’s ability to answer the reference depends on the necessity of that reference for the dispute resolution pending before the referring court.[14]

[9] Treaty on the Functioning of the European Union [2007] OJ C 326, 26.10.2012/47–390 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/47–390 (GA), Article 267.

[10] Treaty on The Functioning of the European Union, *op.cit*. in reference no. 9, Article 267.

[11] Ćapeta T, *op.cit* in reference no 2.

[12] Opinion of Advocate General Bobek in Case C-55/20 *Ministerstwo Sprawiedliwości* [2021] ECLI:EU:C:2021:500, para 131.

[13] Treaty on the Functioning of the European Union, *op.cit*. in reference no 9, Article 267 TFEU.

[14] Opinion of Advocate General Bobek in *Ministerstwo Sprawiedliwości, op.cit.* in reference no. 12, para 130.

Therefore, in order for the preliminary ruling mechanism to work within its intended purpose and limitations, the reference must possess certain qualities. The references are required to be of a particular, not a general nature, meaning that they must be necessary for the resolution of a pending dispute. Two questions arise from this: what is the content of the necessity and to whom is the assessment of that necessity entrusted?

2.1. The necessity of the preliminary ruling reference.

Article 267 TFEU stipulates, that „the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings…where such a question is raised before…a court of ...Member State… if it considers that a decision on the question is necessary to enable it to give judgment".[15] It seems apparent from the wording of Article 267 TFEU that, for a reference to be qualitatively 'necessary,' the delivered answer must objectively contribute to the effective resolution of the dispute pending before the referring court.[16] This interpretation is supported by the settled case law of the Court of Justice establishing that „the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute."[17]

In his Opinion in case *Prokuratura Rejonowa* Advocate General Bobek pointed out how this necessity requires two conditions: that there is a case *pending* before the national court and that the *referring court must be able to take the answer into account*.[18]
In other words, the Court is not empowered to give its interpretations *in abstracto*,[19] but only when that interpretation is requested and required by the national court. This means that the question is necessary insofar as it can contribute to the resolution of the particular case in which it was proposed. That excludes guidance on future actions of other courts or institutions.[20]

[15] Treaty on The Functioning of the European Union, *op.cit*. in reference no. 9, Article 267.
[16] *Miasto Łowicz, op.cit.*in reference no. 7, para 45.
[17] *Miasto Łowicz, op.cit.*in reference no. 7, para 44.
[18]Opinion of Advocate General Bobek in Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim (and other joined cases)*; [2021] ECLI:EU:C:2021:403, para 77.
[19] Ćapeta T, op.cit. in reference no. 2.
[20] Opinion of Advocate General Bobek in *Ministerstwo Sprawiedliwości, op.cit.* in reference no. 12, para 130.

The second question related to this is, on whom does the assessment of necessity lay? Case law provides that the assessment of the relevance and necessity of the question referred is „in principle, the responsibility of the referring court". "In principle",[21] because the assessment of the national court is still made subject to the "limited verification"[22] by the Court of justice. This verification is enforced by the procedural criteria for admissibility, developed in the case law, which aims to ensure that the purpose and essence of the preliminary ruling mechanism are upheld.[23]

National court's assessment of the necessity of a reference is subject to only limited verification by the Court of Justice, but it is subject to no verification of the parties in the dispute whatsoever.[24] As the preliminary reference mechanism is a mechanism of cooperation between the national courts and Court of Justice, „the procedure is completely independent of any initiative by the parties."[25] However, because the preliminary ruling mechanism is a „burdensome and time-consuming"[26], in the light of the parties' rights to procedural economy, national courts should use them sparingly. Although the references are subject to prior admissibility assessment by the Court, the admissibility assessment also takes time. This can have implications on the parties, as it can significantly prolong the resolution of their legal situation. This further reinforces the need for the reference to be really necessary when it is proposed.

2.2. Verification of the references – admissibility criteria.

Article 267 TFEU gives national courts the widest discretion in referring matters to the Court in case they consider that a case pending before them raises questions involving the interpretation of EU law necessary for the resolution of the pending case.[27] The Court's settled case law confirms that, based on this widest discretion, proposed references on interpretation of EU law enjoy the presumption of relevance.[28] Therefore, the assessment of the relevance and necessity of the

[21] Case C-210/06 *Cartesio Oktató és Szolgáltató bt (Judgement of the Court (Grand Chamber))* [2008] ECLI:EU:C:2008:723, para 96.
[22] *Ibid.*
[23] *Cartesio Oktató*, *op.cit* in reference no. 21, para 67.
[24] *Cartesio Oktató*, *op.cit* in reference no. 21, para 90.
[25] *Ibid.*
[26] Passalacqua V, Costamagna, *op.cit.* in reference no. 1.
[27] *Miasto Łowicz, op.cit.*in reference no. 7, para 56.
[28] *Cartesio Oktató*, *op.cit* in reference no. 21, para 67.

question referred is on the national court to determine and to conclude whether to propose, maintain, amend or withdraw a reference.[29]

This discretion is, however, subject to limited verification from the Court of Justice.[30] This verification is done in the form of the admissibility criteria.[31] Admissibility criteria aim to uphold the purpose of the preliminary ruling mechanism and are therefore the tool of checks-and balances within the process of cooperation between the Court of Justice and national courts. They ensure that the preliminary ruling does not exceed its cooperative nature and elevates to the abstract constitutional revision, but rather maintains a judicial dialogue when „necessary".

Therefore, the court will decline to rule on a reference from a national court only when it is quite obvious that the sought interpretation is (a) unrelated to the actual facts of the main action or its purpose (b) where the problem is hypothetical, (c) where the Court does not have before it the factual or legal material necessary to give a useful answer to the submitted question.[32]

Another relevant provision for the admissibility assessment is Article 94 of the Rules of Procedure of the Court of Justice, which regulates the content of the reference for a preliminary ruling.[33] According to that article, the request for a preliminary ruling shall contain (a) a summary of the subject-matter of the dispute and the relevant facts and findings; (b) the tenor of applicable national provisions and if appropriate, the relevant national case law; (c) a statement of the reasons which prompted the referring court to inquire the interpretation of the provision of EU law and the relationship between the provisions and the national legislation applicable to the main proceedings.[34] The Court of Justice named this criteria „ a connecting factor"[35] between the provision of EU law to which the questions referred for a preliminary ruling relate and the disputes in the main proceedings, and „which makes it necessary to have the interpretation sought so that

[29] *Cartesio Oktató*, *op.cit* in reference no. 21, para 96.
[30] *Ibid.*
[31] *Ibid.*
[32] *Cartesio Oktató*, *op.cit* in reference no. 21, para 67.
[33] Rules of Procedure of the Court of Justice, *OJ L 265, 29.9.2012, p. 1–42 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV),* Article 94.
[34] Rules of procedure*, op.cit.* in reference no. 33, Article 94.
[35] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 49.

the referring courts may, by applying the guidance provided by such an interpretation, make the decision needed to rule on those disputes".[36]

In the judgement *Miasto Łowicz*, the Court distinguished two types of connecting factors, direct/substantive or indirect/procedural.[37] The connecting factor is (a) direct when "the national court is required to apply the EU law whose interpretation is sought in order to determine the substantive solution to be given to the main dispute."[38] However, the question referred for a preliminary ruling need not to be directly relevant for the adjudication of the case on merits.[39] The court has consistently stated that questions are admissible when they concern issues of procedure relating to the whole procedure leading to the referring courts judgement.[40] Therefore, the connecting factor is also present and (b) indirect in two situations: (1) when the reference is capable of providing the referring court an interpretation of the procedural provisions of EU law which it must apply in order to give judgment and (2) when an interpretation of EU law would allow it to resolve procedural questions of national law before it, before being able to rule on the substance of the dispute before it. [41]

When the reference does not meet some of the admissibility criteria, it does not possess a quality of being particularly necessary. In that case the reference is of a general nature and therefore not to be addressed through the preliminary ruling because that would be contrary to the spirit of that mechanism.[42]

3. THE IMPACT OF THE PORTUGESE JUDGES JUDGEMENT ON THE PRELIMINARY RULING MECHANISM.

[36] *Miasto Łowicz, op.cit.*in reference no. 7, para. 52.
[37] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 49-51.
[38] Opinion of Advocate General Pikamäe in Case Case C-554/21 *Hann-Invest* [2023] ECLI:EU:C:2023:816, para 32.
[39] C-748/19 to C-754/19 *Prokuratura Rejonowa*: Opinion of AG Bobek, para 80.
[40] C-748/19 to C-754/19 *Prokuratura Rejonowa*: Opinion of AG Bobek, para 84.
[41] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 32.
[42] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 53.

The case *Associacao Sindical dos Juizes Portuguess* is a foundation of the new constitutional methodology of Treaty interpretation of the Court of Justice.[43] Following that judgement, when ruling on the substance, the Court often overlooked the admissibility criteria. The case addressed the claims of the association of Portuguese judges which claimed that Portugal's new austerity policy, which included the lowering of judge's salaries, is contrary to the principle of judicial independence enshrined in Article 19 TEU.[44] The interpretation of Article 19 TEU in that judgement expanded the scope of application of the principle of judicial independence as a constitutive element of the right to effective judicial protection to situations that are not related to the scope of application of EU law.[45] Due to the ongoing rule of law crisis in the EU, the Court followed the Portuguese judges reasoning in the rule of law case law to identify and consolidate EU's constitutional identity.[46] That resulted in the broadening of, or rather disregarding, the application of the admissibility criteria in order for these, often of general nature, questions be addressed before the court.[47]

What this chapter aims to examine is the influence of the broadening of the Court's jurisdiction in that judgement on the admissibility criteria. Although jurisdiction and admissibility are two separate legal concepts,[48] the intuitive notion is that they would follow each other in its scope. However, this should not be the case.[49] The jurisdiction has to be maintained within the procedural scope of the admissibility criteria of the preliminary ruling mechanism.

Although, in Portuguese Judges, the Court decided that the measure was not contrary to the Article 19 TEU, the legacy of that judgement is in its established methodological approach to Article 19 TEU. The organization of justice in the Member States falls within the competence of those Member States. However, when exercising that competence, the Member States are required to

[43] Sarmiento D and Iglesias S, *Is this the End? – From the Polish Parliamentary Election to the Croatian HANN-INVEST case,* (EU Law Live, 31 October 2023), available at: 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 July 10 2024).
[44] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] ECLI:EU:C:2018:117, paras. 1-2.
[45] Sarmiento D and Iglesias S, *op.cit.* in reference no. 43.
[46] *Ibid.*
[47] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 30.
[48] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 39.
[49] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 39.

comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.[50] Under that provision, Member States have to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law.[51] This means they have to provide a system of remedies and procedures to ensure effective judicial review in those fields.[52] That obligation refers to the 'fields covered by Union law', irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter.[53]

Therefore, the second subparagraph of Article 19(1) TEU is freestanding and intended to apply to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law and which therefore fall within the fields covered by that law.[54]

This interpretation resulted in a very broad scope of the second subparagraph of Article 19(1) TEU and the corresponding jurisdiction on that matter. As stated by Advocate General Pikamäe in his Opinion in *Hann Invest*:

> „since the adoption of the judgment in *Associação Sindical dos Juízes Portugueses*, the Court has received a number of references for a preliminary ruling requesting an interpretation of that provision in a wide range of cases – some revealing serious infringements of the rule of law and, in particular, serious breaches of judicial independence, and others concerning the issue of the failure to promote a judge, his or her grading on the salary scale, the rules governing the allocation of cases within a court, the status of a signatory to a defense or the moment when a judgment is delivered – which have no clear link to the subject matter of the dispute in the main proceedings."[55]

[50] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 25.
[51] *Ibidem.*
[52] *Ibidem.*
[53] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 24.
[54] Platon, S. *All Bark and No Bite. Another Case of Mixed Signals From the Court of Justice Regarding the Independence of National Courts (CJEU, Grand Chamber, 26 March 2020, Miasto Łowicz, Joined Cases C-558/18 and C-563/18) (July 30, 2020)*, Common Market Law Review, Available at SSRN: http://dx.doi.org/10.2139/ssrn.3686497 (accessed July 10 2024).
[55] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, 30.

When that case law is considered within its wider political context, it is understandable why the Court took that route.[56] Besides preliminary ruling, the only other remedy available for the violations of Article 19 TEU is infringement procedure. However, it's initiation by the Commission is subject to political calculations. Therefore, the preliminary ruling was often the only path through which these issues could reach and be addressed by the Court. Therefore, even though the references did not always possess the necessity criteria, they were addressed through the preliminary ruling because it was important to rule on the substance.

On the grounds of jurisdiction, this recourse is legitimate as judicial independence truly is legally indivisible and, as Advocate General Bobek pointed out, "there is, in essence, no 'judicial independence within the scope of EU law as opposed to judicial independence in purely national cases. "[57] However, the basis for the Court's jurisdiction on general rule of law issues established by Article 19 cannot be the basis for the admissibility of references for a preliminary ruling. That is so because those are the two separate legal concepts.[58] Therefore, ruling on the broad jurisdiction of Article 19, as pointed out by Advocate General Pikamäe, „does not permit the Court to bypass the stage of examining the admissibility of the questions referred and thereby dispense with the need to consider whether EU law is in fact applicable in the dispute in the main proceedings which the referring court must resolve." [59] If that would be the case, the admissibility criteria of the preliminary references would become meaningless and redundant.[60] Abandonment of the admissibility criteria results in preliminary ruling mechanism no longer maintaining its originally intended purpose of being the mechanism of judicial cooperation. That is because admissibility criteria are precisely the tools that serve for the maintenance of the spirit of that mechanism.

It is legitimate to question the claim that such broad jurisdiction is contrary to the preliminary ruling's intended purpose. Historically, the Court used the preliminary ruling mechanism to broaden its jurisdiction, develop principles such as direct effect and legal supremacy and in the words of Eric Stein, „tucked away in the fairyland Duchy of Luxembourg...the Court of Justice of

[56] Sarmiento D and Iglesias S, *op.cit.* in reference no. 43.
[57] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 40.
[58] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 39.
[59] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 40.
[60] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 39.

the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."[61] None of these outcomes were originally intended nor anywhere draft as a purpose of the preliminary ruling mechanism. Therefore, how to assess what is and what isn't in light of the purpose of this mechanism? The preliminary ruling is a procedural instrument of judicial cooperation. As a procedural instrument, it does not define the content of that communication, but the objective of that communication. The objective or the purpose is to help the refereeing court to correctly interpret EU law in order to effectively resolve the dispute pending before it while assuring the uniform interpretation of EU law. [62] That means that within those boundaries, the communication, as it historically did, can result in the expansion of jurisdiction, creation of new legal concepts and doctrines insofar as those methodological takes are necessary for the resolution of a concrete dispute. As long as the Court's answer to the reference can be objectively utilized in the pending case in order to resolve it, the preliminary ruling mechanism maintains it purpose.[63] Therefore, this thesis does not aim to examine the substantial content or scope of the judicial dialogue, but the correct procedural utilization of that dialogue.

In addition, the best object to demonstrate this on is the very Portuguese Judges judgement. Although the methodology developed in that judgement resulted in a strand of case law, which did not precisely meet the admissibility criteria, ironically the admissibility criteria in that particular case were perfectly maintained.[64] The court's interpretation of Article 19 TEU in that reference was indeed necessary for the referring court to resolve the dispute pending before it.[65] The dispute was precisely about the interpretation of that provision in circumstances of that case i.e. in circumstances of an introduced salary reduction measure.[66] The courts answer to the reference was utilized by the referring court to resolve the dispute pending before it.[67]

[61] Stein, E, *op.cit.* in reference no. 6.
[62] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 44.
[63] Opinion of Advocate General Bobek in *Ministerstwo Sprawiedliwości, op.cit.* in reference no. 12, para 130.
[64] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 49.
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*

4. THE IMPACT OF THE MIASTO ŁOWICZ JUDGEMENT ON THE PRELIMINARY RULING MECHANISM

Miasto Łowicz is a judgment from 2020 in which the Court answered a reference proposed by two Polish judges who, in fear of becoming subject to newly established disciplinary proceedings, questioned whether such practice was precluded by Article 19 TEU.[68] The Court found the references to be inadmissible[69] and, in its answer, the Court of Justice (1) reassessed the purpose of the preliminary ruling mechanism[70] and (2) made a clear cut distinction between the preliminary ruling request and ruling on an action for failure to fulfill obligations.[71]

This case is seen as a turnover from the jurisdiction following *Portuguese judges*. In the context of this thesis, this judgement is particularly important because it tackles precisely the issue central to its arguments. In *Miasto Łowicz*, the Court acknowledged the jurisdiction and admissibility as two separate legal concepts.[72] Furthermore, it implicitly suggested how particular matters regarding Article 19 TEU are better to be addressed in the infringement procedure when they cannot meet the admissibility criteria required by the preliminary ruling mechanism.[73]

4.1. The purpose of the preliminary ruling procedure

In paragraph 44 of the judgement, the Court reinforced the purpose and spirit of the preliminary ruling procedure. The Court articulates how „it has been consistently held that the procedure provided in Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of EU law which they need in order to decide the disputes before them.“[74] The Court goes further by clarifying how „the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it

[68] Platon, S. op.cit. in reference no. 54.
[69] *Miasto Łowicz, op.cit.*in reference no. 7, para 60
[70] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 44.
[71] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 47.
[72] *Miasto Łowicz, op.cit.*in reference no. 7, paras. 34, 37, 60.
[73] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 47.
[74] *Miasto Łowicz, op.cit.*in reference no. 7, para. 44.

is necessary for the effective resolution of a dispute.“[75] The Court reminds once more how it is „apparent from the actual wording of Article 267 TFEU, the question referend for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgement' in the case before it.“[76] In the following paragraph 46, the Court instructed on the two criteria which constitute necessity: “the Court has thus repeatedly held that it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring the matter before the Court by a way of a request for a preliminary ruling unless a case is pending before it which it is called upon to give a decision which is capable of taking account of the preliminary ruling.”[77]

4.2. Preliminary ruling vs. infringement procedure

In paragraph 47 of the *Miasto Łowicz* judgement, the Court distinguishes between the two mechanisms through which a matter can be brought before the court. „The task of the Court must be distinguished according to whether it is requested to give a preliminary ruling or to rule on an action for failure to fulfil obligations.”[78] Then it goes on to express the objective and ultimately the differences of those two mechanisms.

> „Whereas, in an action for failure to fulfill obligations, the Court must ascertain whether the national measure or practice challenged by the Commission or another Member State, contravenes EU law in general, without there being any need for there to be a relevant dispute before the national courts, the Court's function in proceedings for a preliminary ruling is, by contrast, to help the referring court to resolve the specific dispute pending before that court.”[79]

Here, the Court set a guideline on when it is suitable to address a certain question through the preliminary ruling and when trough the infringement procedure. That depends on the quality of a reference i.e. on the particular or general need of an answer. The court can interpret the provision of EU law through the preliminary ruling only as far as it is necessary for the referring Court to resolve the dispute in which the reference has been referred and which is still pending by the time

[75] *Ibid.*
[76] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 45.
[77] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 46.
[78] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 47.
[79] *Ibid.*

the answer is delivered. On the other hand, in the Infringement procedure, this particularity is not needed. There, the Court can address the general rule of law issues and can in fact do an abstract revision of the compatibility of the provisions of national law with Treaty obligations. This seems to suggest how, when a question regarding Article 19 TEU does not serve the purpose of the preliminary ruling, it represents an issue of general nature, which can and should only be addressed in the infringement procedure.

4.3. The assessment of jurisdiction and admissibility

This is another landmark judgement regarding its influence on the admissibility criteria. When assessing the admissibility of a reference, the Court distinguishing the case at hand from another landmark case Portuguese judges.[80] The Court starts its ruling by establishing its jurisdiction based on that judgement.[81] However, in the paragraph 48 it developed the argument that a preliminary ruling reference requires a connecting factor between the sought interpretation and an objective need for that interpretation.[82] Then, in the following paragraph 49, the Court holds how the disputes in the main proceedings are not substantively connected to EU law nor to the second subparagraph of Article 19 TEU.[83] Therefore, the referring judges do not have to apply that provision to decide on the cases pending before them. The Court recognized how „In that respect, the present joined cases can be distinguished... to the judgement... *Asssociacao Sindical does Juizes Portugueses*."[84] That is so because in that case, the referring judge „had to rule on an action seeking annulment of administrative decisions reducing the remuneration of the members of... (Court of Auditors, Portugal) pursuant to national legislation which provided for such a reduction and whose compatibility with the second subparagraph of Article 19(1) TEU was challenged before that referring court".[85] As I have previously stated in my thesis, the Court's answer to the sought reference in Portuguese Judges was indeed relevant to the resolution of the dispute pending before it. It therefore, in my view, does not seem legitimate that the methodology established in that case, precisely for the need of the resolution of that case, is being generally applicable to all cases

[80] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 49.
[81] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 33, 34, 37.
[82] *Miasto Łowicz, op.cit.*in reference no. 7para. 48.
[83] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 49.
[84] *Ibid.*
[85] *Ibid.*

concerning Article 19 TEU when the admissibility criteria in those particular cases are not met. The Court should undertake this kind of more rigorous screening of the (a) connecting factor of a reference and the case resolution and consequently (b) the actual existence of the objective need for interpretation of Article 19 TEU for the resolution of the case in which a reference is proposed. In *Miasto Łowicz*, following this analysis, the Court found the references to be inadmissible.[86] By basing its jurisdiction on Portuguese judges, but still maintaining the admissibility verification of the references, the Court rendered them as two separate legal concepts.[87]

5. THE PRELIMINARY RULING AS AN ABSTRACT CONSTITUTIONAL REVIEW

5.1. Miasto Łowicz - what if the Court took a different approach?

Particularly interesting part of the *Miasto Łowicz* judgement is the paragraph 47 in which the court distinguishes between the preliminary ruling and ruling on an action for failure to fulfill obligations to remind of the different purpose and scope of the two mechanisms. „The infringement procedure allows the Court of justice to review Member States actions under EU law and is the only procedure that empowers the Court of Justice to directly review the validity of Member State law. In all other situations, judicial review of domestic law is performed by domestic courts, not by the Court of Justice. "[88] I consider that this clear cut distinction between the two procedures set out in paragraph 47 of the *Miasto Łowicz* judgement[89] suggests how, if the Court took a different approach and admitted the question, this decision would fall outside of the scope of the preliminary ruling mechanism and constitute an abstract constitutional revision of the national law.

As emphasized above, Article 267 TFEU grants the CJEU jurisdiction to issue preliminary rulings on the interpretation of the Treaties within a specific case.[90] However, when the proposed

[86] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 60.
[87] *Miasto Łowicz, op.cit.*in reference no. 7*,* para. 33, 34, 37, 60.
[88] Ćapeta T, *Infringement procedure*, materials prepared by Tamara Ćapeta for the class Jurisdiction and Role of the European Court of Justice, class 2023/2024.
[89] *Miasto Łowicz, op.cit.*in reference no. 7 para. 47.
[90] Treaty on the Functioning of the European Union, *op.cit.* in reference no 9, Article 267 TFEU.

question's answer cannot effectively resolve the dispute, continuing to provide an interpretation exceeds the authority of a preliminary ruling. This interpretation becomes an abstract assessment of the validity of the national rule rather than a specific interpretation of EU law within the context of the case at hand. Such a deviation undermines the cooperative nature and purpose of the preliminary ruling mechanism, which relies on both parties' ability to utilize each other's actions, transforming it into a tool for revision. This reinforces my consideration that the Courts position in *Miasto Łowicz* suggested that the resolution of general questions regarding Article 19 TEU should be pursued through the infringement procedure. Pursuing them through the Article 267 TFEU mechanism exceeds its purpose and limits.

5.2. The case law in line with the Miasto Łowicz

In the recent case concerning Article 19 TEU rule of law issues, the Court seems to be guided by the logic of the *Miasto Łowicz* judgement. In the case from 2019, A.K., the Court admits the references concerning the independence of the Disciplinary Chamber of the Polish Supreme Court and the NCJ. However, the Court did not make a clear determination on whether those institutions are independent from the executive or not. It left that on the national Courts assessment and provided it with guidance to make that determination. Although in that case, the Court did admit the reference, it was reluctant to deliver a definite interpretation of EU law. In my opinion, that reluctance can be ascribed to the court not being confident that would be within the limits of Article 267. In *Miasto Łowicz*, the CJEU goes further. It acknowledges the rule of law issue and delivers obiter dictum in which it emphasizes the importance of the full discretion of national Courts to refer preliminary references. However, this time more confidently, the court deems the references to be inadmissible. Another case where The Court stayed consistent to this logic is when answering the second and third questions in the case IS. In fact, the Court submitted the second and third questions of a reference to the same admissibility screening such as in *Miasto Łowicz* In the second question, the referring judge asks „whether the principle of judicial independence, enshrined in Article 19 TEU and Article 47 of the Charter precludes the President of the NOJ from appointing the president of a court who is empowered to allocate the cases and commence disciplinary proceedings against judges. In the third question, the referring judge asked whether the principle of judicial independence must be interpreted as precluding a remuneration system where judges receive lower remuneration than prosecutors of the same category.

In its reasoning, the Court relies on the *Miasto Łowicz* judgement by recalling that, „as is apparent from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it." It goes on by saying how the national court is only empowered to bring the matter before the court if there is an actual case pending before the court[91] and if there is a connecting factor between that dispute and the provisions of EU law whose interpretation is sought[92] by virtue of which that interpretation is objectively required for the decision to be taken by the referring court.

In that case, the Court does not find that there is a connecting factor between the provisions of EU law to which the second and third questions relate and the dispute in the main proceedings in a way that interpretation would be necessary to apply for the national judge to rule on that dispute.[93] The court followed Advocate General Pikamäe's observation that just because there might be a material connection to t Article 47 of the Charter or with Article 19 TEU, since the case does not concern the judicial independence of the judiciary as a whole, that „is not sufficient to satisfy the criterion of necessity, referred to in Article 267 TFEU".[94] The Court even elaborates on for that to be the case, „it would be necessary for the interpretation of those provisions, as requested in the second and third questions, to be objectively required for the decision on the merits of the main proceedings". The court finally determines how that is not the case. The Court also finds that it is not the scope of the second and third questions that the interpretation of procedural provisions of EU law is necessary for the referring court to apply in order to deliver its judgement. [95]And lastly, The Court did not find that the answer to the references would be capable of providing the referring court with an interpretation of EU law which would allow it to resolve procedural questions of national law before being able to rule on the substance of the dispute before it.[96]

From the case law emerges an evident trend whereby the CJEU in preliminary rulings, acknowledges, at least implicitly, systemic deficiencies but finds itself unable to solve the dispute.

[91] Case C-564/19, *Criminal proceedings against IS* [2021] *ECLI:EU:C:2021:949,* para 141.
[92] *IS op.cit.* in reference no. 91, para, 142.
[93] *IS op.cit.* in reference no. 91, para 143.
[94] *IS op.cit.* in reference no. 91, para 144
[95] *IS op.cit.* in reference no. 91, para 145.
[96] *IS op.cit.* in reference no. 91, para 146.

Such a pattern suggests that the CJEU finds the preliminary ruling mechanism unfit to address systemic rule of law issues within Member States and prefers to remedy the rule of law in such cases through the Infringement procedure.[97]

6. THE IMPLICATION ON THE PROCEDURAL ECONOMY

It is generally acknowledged that the preliminary ruling procedure is long lasting and burdensome for the parties, and should therefore be used sparingly.[98] However, there has been very little serious discussion on the actual procedural implications on the parties, especially when those parties are private. Private parties within the proceedings that are not substantively connected to the rule of law issues, mainly have an interest of a swift resolution of the dispute. However, in certain hypothetical case as such, a national judge might find that certain aspects of its judicial organization are problematic in the context of the second subparagraph of Article 19 TEU and decide to stop the proceedings and propose the references regarding that provision or practice. Since the actual dispute of the parties in that hypothetical case is not substantively connected to that provision, the decision on the examined provision or practice is not objectively necessary for the effective resolution of the case. In circumstances such as those, admitting general rule of law references that do not contribute to the effective resolution of the case represents an unwarranted waste of procedural economy of the parties.

Article 47 proclaims how „Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal."[99] The part of Article 47 that has usually been invoked in the rule of law jurisprudence is the „independent and impartial tribunal",[100] however the fact that the hearing must be resolved, „within a reasonable time"[101] has been consistently

[97] Platon, S. op.cit. in reference no. 54.
[98] Ćapeta T, op.cit. in reference no. 2.
[99] Charter of Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012/391–407 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/391–407 (GA), Article 47.
[100] *Ibid.*
[101] *Ibid.*

overlooked. The fact that procedural economy is often the foreground interest of the parties makes that omission even greater.

Within the constitutional order, private parties do have a legitimate interests in the justice being rendered by the independent and impartial tribunal and are provided with legal remedies to obtain that goal. However, they may also not be interested in safeguarding national judicial architecture. It seems like in the preliminary ruling proceedings, the parties often times cannot consume the right to be indifferent. It seems like, whether they want it or not, when the judge decides to refer a reference, which is actually a constitutional review, the parties must bear its charges. The position of parties in the preliminary ruling procedure is symbolically significant,[102] but actually weak. The parties can influence the court to propose the reference in their written and oral pleadings.[103] They can in the same way try to deter the judge from proposing it. However, except for the argumentative persuasion, the parties are not empowered with any mechanisms to interfere with the judges' decision on a reference.[104] Therefore, when a judge finds that a certain national provision or practice might be problematic in the context of the Article 19 TEU, even when they have no interest in addressing those issues, the parties cannot stop such reference to be proposed. What is a real life significance of such position is that they are compelled to bear the procedural burden of that reference in the form of lengthiness and costliness of their case.

This means that parties are subject to the patronizing presumption that each citizen is a *vigilantibus iura* citizen who is ardent in evaluating and reconstructing national legal order. What in cases when the parties do not have that interest or cannot afford the time or means to carry that interest? Some people like to radically accept the architectural framework and 'carry on' with their private affairs. However, in such cases, the parties have no choice. If the national judge decides to refer a reference on the general rule of law concert that does not objectively contribute to the resolution of a dispute, the parties are forced to bear the procedural burden of that reference.

The second subparagraph of Article 19 obliges reads "Member States"[105] to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."[106] If the

[102] Ćapeta T, op.cit. in reference no. 2.
[103] *Ibid.*
[104] *Ibid.*
[105] The Treaty on European Union [2020] OJ C 202 7.6.2016, 13, Article 19 (1).
[106] *Ibid.*

obligation is put upon the Member States, the cost of failure to fulfil that obligation should also be put upon on the Member states. However, what often happens if Article 19 TEU issues are being resolved through the preliminary ruling is that the malpractice of the Member States is dismantled "over the backs" of the private parties. That actually seems to be favorable position for a Member State, it gets to fail to fulfill its obligations and it gets to evade the sanctions and trickle them down to the parties of the dispute. The implication of the procedural burdening of the parties is another factor that the Court should take into account when deciding on the admissibility in each particular case to ensure the compliance with Article 47 of the Charter.

7. HANN INVEST - THE PARAMOUNT CASE FOR THE CASE LAW CONSISTENCY ON ADMISISBILITY.

Hann Invest are the joined cases C-554/21, C-622/21, and C-727/21 currently pending before the Grand Chamber of the Court of Justice. In this case the Croatian Commercial Court of Appeal proposed a reference in which it asked whether the Croatian mechanism for ensuring consistency of case law of second-instance national court and the Supreme Court compatible with Article 19(1) TEU.[107] As explained by Nika Bačić Selanec and Davor Petrić, "this mechanism, in short, entails extra-procedural and collective judicial decision-making within the same court (or its specialized sections) on the points of 'abstract 'interpretation of law with binding force in individual disputes; and in the case of disobedience, authorizes 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."[108]

This judgement is much-awaited for several reasons. By answering this reference, the Court will be able to address the rule of law jurisdiction beyond the political context of the 'rule of law backsliding',[109] and will assess the question of judicial independence from an internal

[107] Bačić Selanec N and Petrić D*, Editorial Comment: Internal Judicial Independence in the EU and Ghostes from the Socialist Past:Why the Court of Justice Should Not Follow AG Pickamae in Hann Invest* (2024) 20 CYELP (Online First'), available at: https://www.cyelp.com/index.php/cyelp/article/view/565 (accesed July 10 2024).
[108] *Ibid.*
[109] *Ibid.*

perspective.[110] This means that, judicial independence will be examined with the judicial system, not by examining the external influences, mainly the executive.

In this chapter, I will examine the relevance of this judgement for its importance on the course of case law regarding admissibility criteria in the rule of law cases. The joined cases of Hann Invest tackle the problematic aspects of the admissibility I examine, (1) The case challenges the purpose and limits of the preliminary ruling, (2) and the references overburden the procedural economy of the parties.

In chapter 4, I summarized the Courts recent assessment on the admissibility of the questions relating to Article 19. The Court opened the grounds for the approach it took in *Miasto Łowicz* in the judgement of *A.K.* in 2019.[111] It remained consistent to it in another Grand Judgement ruling in the case of IS.[112] This course seemed promising towards finally ensuring consistency and legal certainty on the matter. However, the case law on this matter is far from uniform[113] since the Court also departed from the standing of that line of cases and ruled contrary to it.[114] Given the ununiformed case law, I believe how the Court should stay consistent to its approach in *Miasto Łowicz*, follow the opinion of Advocate General Pikamäe and not admit the proposed references. That standing would be more in spirit with the objective of that mechanism and would avoid the implications of the opposite approach.

The disputes in the main proceedings in case *Hann Invest* do have some substantive connection to EU law on insolvency proceedings, but the referring court did not request the interpretation of that body of law.[115] The referring Court does not seek clarification on the substance of the disputes before it, but to a procedural question, of national law "to be settled by it in *limine litis*, in so far as that question relates to the power of the referring court to rule on those disputes with complete independence within the framework of an internal mechanism which seeks to ensure the consistency of that court's case-law and involves other judicial bodies."[116] The Court's response on the compatibility of this internal mechanism with EU law "will determine whether or not the

[110] *Ibid.*
[111] Platon, S. op.cit. in reference no. 54.
[112] *IS op.cit.* in reference no. 91.
[113] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 42.
[114] *Ibid.*
[115] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 33.
[116] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 34.

referring court is able to depart from the legal positions adopted by the section of judges concerned in relation to the disputes in the main proceedings."[117]

Advocate General Pikamäe finds that to be "a delicate question."[118] I agree with him for two reasons. Firstly, such interpretation is contrary to the spirit of the preliminary ruling mechanism and is therefore closer to the abstract constitutional revision, which falls outside of the scope of Article 267 TEFU. As such, it can eventually only be performed in the infringement procedure. Secondly, admitting these types of references unduly burdens the procedural economy of the parties in the dispute.

Advocate General Pikamäe acknowledges the reluctance of the Court not to provide the referring court with a response and examination of the compatibility of a rule and a practice with the second subparagraph of Article 19.[119] Especially when such a rule can potentially undermine Croatian judicial independence and have a bearing on many other national legal systems. However, that in itself cannot constitute the grounds, or as he refers to them, "underlying grounds",[120] for a decision of admissibility.[121] Just because it seems important to rule on a substance, does not empower the Court to overlook the procedural requirements on admissibility of the references.[122] Therefore, the Courts tendency to conjoin the admissibility to the jurisdiction as far as it is necessary to rule on the substance instead of as far as it is necessary for the referring court to resolve the pending case, should not be upheld.

To demonstrate, the Court did find admissible a reference that concerned the interpretation of Regulation (EC) No 1206/2001 which has previously been found to not have any direct impact on the outcome of the dispute in the main proceedings.[123] Therefore, relying on the current standing of the case law, there are grounds on which the Court could find the references in Hann Invest to be admissible. However, as Advocate General Pikamäe pointed out how, "The transposition of such a decision to the present cases, in conjunction with the Court's interpretation of the second subparagraph of Article 19(1) TEU, in order to hold that it has jurisdiction, would lead to an

[117] *Ibid.*
[118] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 36.
[119] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 41.
[120] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 41.
[121] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 41.
[122] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 40.
[123] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 45.

extensive, not to say unlimited, application of that provision in a field, the organization of justice in the Member States, which is supposed to fall within the jurisdiction of the Member States."[124]

Therefore, there is a legal ground on which references could be found admissible.[125] However, in the spirit and purpose of the preliminary ruling, those references still no not concern an interpretation of EU law objectively needed for the resolution of the disputes in the main proceedings. There is nothing in the particular circumstances of these case that make it more important to rule on the contentious national rule that it would be to do so in any other case. The references are of a general nature, which should render them inadmissible.

Another factor that can support such standing is the consideration of the procedural economy of the parties, especially because of the subject matter of the pending cases. The appeals pending before the Croatian Commercial Court of Appeals concern orders dismissing the application for Financijska Agencija for reimbursement of the costs of its involvement in insolvency proceedings and an order dismissing the application of the appellant in the main proceedings to open court-supervised administrative proceedings.[126] The timeline of the case is like this: Request for a preliminary ruling from the Croatian Commercial Court of appeals was lodged on 8 September 2021.[127] Advocate General Pikamäe delivered his opinion on 26 October 2023.[128] In the Judicial calendar of the Court of Justice webpage, it is stated that the oral hearings for the case is scheduled in front of the Grand Chamber on Thursday 11 July 2024 at 09:30.[129] That sets the order for a reference and the ruling on a reference 34 months apart. That means that for the 2 years and 9 months the proceedings of the parties are stopped and awaiting for the decision on Principles of Community law, in the case concerning insolvency and administrative proceedings. If Croatian judiciary has failed to fulfil its obligations under Article 19 TFEU by reinforcing this internal

[124] *Ibid.*
[125] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 44.
[126] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38, para 10
[127] Request for a preliminary ruling from the Visoki trgovački sud Republike Hrvatske (Croatia) lodged on 8 September 2021 — Financijska agencija v HANN-INVEST d.o.o. (Case C-554/21), Official Journal of the European Union, 7.6.2022, C 222/7, available at https://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62021CN0554:EN:PDF (accessed 10 July 2024).
[128] Opinion of Advocate General Pikamäe in *Hann-Invest, op.cit* in reference no. 38.
[129] Court of Justice of The European Union, Case-law, Judicial calendar, available at: https://curia.europa.eu/jcms/jcms/Jo1_6581/en/?juridictionC=C&dateDebut=01/07/2024&juridictionT=T&tri=juridiction (accesed July 10 2024).

procedural mechanism, should the private parties wait 2 years and 9 months for their legal situation to be resolved in order for the Court of Justice to decide on that? To me, it would be more in light with the principle of procedural economy granted to the parties by Article 47 of the Charter[130] for these types of reviews to be inspected without the involvement of private parties. That is especially the case when the answer to a reference cannot effectively contribute to the resolution of their legal position which is unrelated to the rule of law review and is burdened and delayed in resolution.

8. CONCLUSION

After the *Portuguese Judges*, the rule of law case law often developed contrary to the purpose and spirit of the preliminary ruling procedure. That is because Article 19 TEU methodology oftentimes uses jurisdiction or the ruling on the substance as the basis for admissibility. However, admissibility is a procedural requirement not grounded on the importance of the ruling on substance, but on the necessity or possibility of the referring court to utilize the ruling to effectively resolve the case pending before it. When those criteria are not being met, the preliminary ruling fails to preserve its purpose as a cooperative judicial mechanism. When there is no substantial or procedural connection between the interpreted EU provision and ruling on the case, such interpretation loses the quality of a dialogue and elevates to the abstract constitutional revision of the laws of a Member State. That process has a further implication that it often unduly burdens the procedural economy of the parties, as the resolution of their legal situations are often being delayed for months and years only for the preliminary ruling to take real effect on the national judicial architecture and not the legal position of the parties. In light of that, I consider how in its assessment of admissibility, the Court should reinforce it as a tool of cooperation rather than as a tool for revision. Given the inconsistency of the case law on the matter, the upcoming judgment in *Hann Invest* is an opportunity for the Court of Justice to appropriate to its standing in *Miasto Łowicz* This is not only important for the preservation of the spirit and purpose of the preliminary ruling mechanism, but also for the need of legal certainty dependent on a court acting as something more than an oracle.

[130] The Charter of Fundamental Rights of the European Union, op.cit. in refrence no. 99, Article 47.

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