

Independence of Judges and Unitary Judicial Practices – When Do They Become Irreconcilable? An Analysis from the Perspective of the *Hann-Invest* Judgment of the Court of Justice of the European Union

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Abstract

The Hann-Invest judgment, handed down by the Court of Justice of the European Union (CJEU) on July 11, 2024, provides an excellent opportunity to capture the limits to which the mechanisms for the unification of judicial practice can go, from the perspective of the independence of judges. National measures to remedy non-unitary practices must be in line with the requirements stemming from the principle of judicial independence. In this article, we aim to analyse the compatibility with the rules established by the CJEU of three of the national civil procedural mechanisms for the unification of practice, namely the effects of cassation decisions, the judges' evaluation criterion of judgments amended/dismissed/cancelled for imputable reasons and the courts' non-unified practice sessions. The research conducted is descriptive and explanatory, accompanied by critical and comparative analysis. Both the independence of judges and the reduction of non-unitary judicial practices are necessary objectives. The Romanian legal system offers a balanced, though apparently not very efficient, solution to achieve both goals. The non-unitary practice meetings of the courts, as well as the quarterly meetings of the courts of appeal, which are also concerned with judicial practice, lead to the adoption of documents which, although not expressly binding for judges, are nonetheless influential in practice. Judges will most probably tend to align their practice with that adopted at the joint sittings, but this does not affect their independence.

Keywords: *independence of judges, non-unitary practice, cassation decisions, judgments modified/dismissed/cancelled for imputable reasons, non-unitary practice sessions of the courts.*

JEL Classification: K41

1. Introduction

Access to justice is an essential dimension of the rule of law and democracy and a guarantee of due process. One of the restrictions on this fundamental right is *inconsistent judicial practice*. Although it is a constant feature of Romano-Germanic legal systems, divergent or unpredictable solutions by the courts discourage litigants from bringing their cases before the courts.

The desideratum of a uniform judicial practice is well known and has always been laudable. However, the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) have made important clarifications in assessing its impact on legal certainty.

A summary of the ECHR principles on non-unitary judgments can be found in *Albu and Others v. Romania*². Inconsistent practice is an „inherent feature of any legal

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² *Albu and Others v. Romania*, no. 34,796/09 and 63 other applications, May 10, 2012.

system which is based on a network of courts and tribunals of the merits and of appeal having jurisdiction in their respective areas of territorial jurisdiction”³; it may also occur within the same court without constituting a violation of the Convention. Moreover, “the requirements of legal certainty and the protection of the legitimate expectations of the public do not confer a vested right to the consistency of case law”⁴. The development of the latter being inherent in systems of law inconsistent judgments of courts of the last instance may constitute violations of Article 6 § 1 of the Convention. In this case, the Court examines whether there are “deep and persistent divergences” in the case law of the domestic courts, whether domestic law provides mechanisms for remedying inconsistencies, whether the mechanism has been applied and, if so, with what effect”⁵. The large number of litigants who are affected by an inconsistent judicial practice is another element of appreciation, as opposed to isolated cases in which it occurs. Remedying cases of inconsistent practice takes time, so the longer or shorter duration during which it has been maintained is another criterion of appreciation.

The decisive importance seems to be attached to using the existing procedural mechanisms as quickly as possible to eliminate divergences in case law. The ECHR sanctioned the „deep and persistent divergences” that manifested themselves within the supreme court, given that its mission was precisely to unify judicial practice.⁶

The Hann-Invest judgment, delivered by the Court of Justice of the European Union (Grand Chamber), following preliminary references made by the Commercial Court of Appeal of Croatia on July 11, 2024, provides an excellent opportunity to capture the limits to which the mechanisms for the unification of judicial practice can go, from the perspective of the independence of judges. In recent years, the CJEU has handed down several decisions on the content and requirements of the principle of judicial independence⁷, but few would have thought that interference with it could stem from the desire for uniform practice. The case is also interesting for the Advocate General’s view, which is radically different from that of the judges of the Court.

In a first section, we aim to briefly present the reasoning of the Court of Justice of the European Union in the Hann-Invest case and some of the Advocate General’s observations. In the remaining sections of the article, we will verify the *compatibility with the rules established by the Court in this judgment of three of the national civil procedural mechanisms for the unification of practice*, namely *the effects of cassation decisions* (section 2), *the judges’ assessment criterion of judgments modified/ dismissed/ cancelled for imputable reasons* (section 3) and *the non-unitary practice sessions of the courts* (section 4). The research conducted is descriptive and explanatory, accompanied by critical and comparative analysis.

The relationship between unitary judicial practice and the independence of judges represents a new perspective of analysis on the principle of independence, both from a jurisprudential and a doctrinal point of view. In view of the CJEU, as in our view,

³ *Albu and others*, para. 34.

⁴ *Albu and others*, para. 34.

⁵ *Albu and others*, para. 34.

⁶ *Beian v. Romania* (No. 1), No. 30,658/05, ECHR 2007-V (extracts).

⁷ For an analysis of the concept of „independence of the judiciary” in the case law of the ECHR and CJEU, see Rafael Bustos Gisbert, „Judicial Independence in European Constitutional Law”, *European Constitutional Law Review*, Vol. 18, Issue 4, December 2022, pp. 591–620, DOI: <https://doi.org/10.1017/S1574019622000347>.

national measures to remedy non-unitary practices must comply with the requirements flowing from the principle of judicial independence. The independence of judges also aims to protect them against undue influence from within the court in which they sit and implies that the judges in charge of deciding cases should take the decision to finalise the judgment themselves. Our aim is to look for instruments in the national judicial system that allow the unification of judicial practice and guarantee the independence of judges. One such example can be found in the regulation of non-unified court practice sessions. We have identified problematic aspects in the context of the criterion related to judgments modified/dismissed/cancelled for imputable reasons, used for the professional evaluation of judges.

2. *Hann-Invest*: independence of judges and (or) practice

On July 11, 2024, the Court of Justice of the European Union (Grand Chamber) decided Joined-Case C-554/21, C-622/21 and C-727/21, following preliminary references by the Commercial Court of Appeal of Croatia.

The references for preliminary rulings brought to attention a peculiarity of Croatian judicial procedure, which was likely to undermine the independence of judges. According to the Rules of Procedure of the Courts of that Member State of the Union, judgments delivered in the second instance had to be registered by a judge of that court who was not a member of the panel hearing the case, the latter being considered "closed" only after the completion of that procedure. Therefore, there could be no *res judicata* prior to registration, nor was the judgment communicated to the parties.

The registration of a judgment was not, however, a purely administrative or formal procedure, but only took place if the judge in charge of registering judgments, appointed annually by the president of the court, agreed with the judgment. The parties to the litigation did not know the name and the intervention of the registering judge, and the procedure itself was regulated not by law but by the rules of court organisation.

In the first dispute, the practice of the court concerned was inconsistent. According to the conclusion of the registering judge, the main case should have been re-examined by the competent full court and, if the latter upheld its judgment or refused re-examination, the case would be referred to the Commercial and Other Litigation Division of that court for examination with a view to adopting a 'legal position' on how to deal with cases of this type. „In so doing, the judge responsible for registration would have made the registration of the judgment in the main case referred to conditional on the adoption of a different solution, thereby favouring one of the two divergent trends observed in the case law of that court (...)”⁸

In the second case, the judge responsible for registration justified the referral of the main proceedings back to the competent full court on the ground that there were two judgments of the referring court, which had adopted contrary solutions to the one in the main proceedings, albeit subsequent to the decision referred for registration.

In the third case, there was no mention of any other practice of that court, and the reason for non-registration was the registering judge's disagreement with the decision of the full court. When the case was re-opened, the full court confirmed its

⁸ *Hann-Invest*, joined cases C-554/21, C-622/21, C-727/21, judgment of July 11, 2024, ECLI:EU: C:2024: 594, para. 12.

initial judgment. Subsequently, the case was referred to the Chamber of the Court of First Instance, which adopted a different solution in line with that proposed by the Judge responsible for the register. The main case was referred back to the competent formation of the Court of First Instance for it to rule in accordance with the ‘legal position’ adopted by the Chamber.

The referring court noted that the mechanism for registering judgments was justified by the need to ensure consistency of case law. The ‘legal positions’ adopted in a chamber of a court of a higher court were binding on the judges of that chamber, although in many cases the supreme courts had, in the course of examining appeals brought before them, adopted ‘legal positions’ which differed from those adopted by the courts of the second instance.

The referring court raised the question of the compatibility of the registration mechanism and the binding nature of the legal positions adopted by the chambers of judges with Article 19 para. 1 TEU and Article 47 of the Charter.

After having established its jurisdiction and the admissibility of references for preliminary rulings, the Court, reiterating its familiar reasoning in its judgments on the independence of judges⁹, emphasised that “any national measure or practice which seeks to avoid divergences in case law or to remedy them and thus to ensure the legal certainty inherent in the principle of the rule of law must comply with the requirements deriving from the second subparagraph of Article 19(1) TEU”¹⁰. The independence of judges is also intended to protect them against undue influence from within the court in which they sit and implies that the judges in charge of deciding cases must take the decision to conclude the judgment themselves.

The panels must be constituted on the basis of transparent legal rules known to the litigants, “such as to exclude any unjustified interference in the decision-making process in a given case by persons outside the panel in charge of the case, before whom the parties have been unable to support their arguments”¹¹.

Nor can the organisation of the judicial system be left to the discretion of the judicial authorities, although they must be given some power to interpret the relevant national legislation.

Also, as a matter of principle, the Court reiterated that the trial procedure must comply with the adversarial principle, which means that the parties must be able to discuss all the facts and points of law which are decisive for the outcome of the proceedings.

The Court highlighted elements of interpretation considered useful for the

⁹ Judgment of June 5, 2023, *Commission v. Poland (Independence and Privacy of Judges)*, C-204/21, EU:C:2023:442; Judgment of October 6, 2021, *W. Ż. (Chamber for Extraordinary Review and Public Cases of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798; Judgment of July 15, 2021, *Commission v. Poland (Disciplinary regime of judges)*, C-791/19, EU:C:2021:596; Judgment of November 19, 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, EU:C:2019:982. See also Kees Sterks, *Some reflections on the selection and appointment of judges in European Law, Five Next Steps in Defense of Independent Justice*, Ed. Eleven, Netherlands, 2023; Ingo Keilitz, „Viewing Judicial Independence and Accountability through the ‘Lens’ of Performance Measurement and Management”, *International Journal for Court Administration*, Vol. 9 No. 3, December 2018, ISSN 2156–7964, DOI: 10.18352/ijca.280.

¹⁰ *Hann-Invest*, cit. supra, para. 48.

¹¹ *Hann-Invest*, cit. supra, para. 59.

domestic judge's attention, noting *a priori* that the registering judge is not competent under Croatian law to control the content of a judgment in any way and to prevent it from being formally adopted and notified to the parties if he disagrees with its content. „Thus, although that judge may not substitute his own judgment for the judgment of the panel in charge of the case, he may, in fact, block the registration of the judgment adopted and, in so doing, prevent the finalisation of the decision-making process and the notification of that judgment to the parties, by referring the case back to the panel concerned for re-examination of that judgment in the light of his own legal observations and, in the event of persistent disagreement with the panel concerned, by inviting the President of the relevant Chamber to convene a meeting of the Chamber for the purpose of adopting a ‘legal position’ which will be binding on, inter alia, the same panel”.¹²

However, the practice described above allows the judge in charge of the register to interfere in the settlement of cases, even though that judge does not belong to the trial panel. On the other hand, his power to intervene does not appear to be framed by objective criteria reflecting a particular justification such as to avoid the exercise of a discretionary power¹³. It could refuse registration not only if it found an inconsistent practice, but also if it disagreed with the judgment.

With regard to the ‘legal positions’ adopted by chambers of judges under the Croatian Judicial Organization Act, the Court held that a meeting of a chamber or of the judges of a court could be convened in the event of differences of interpretation between chambers, chambers or judges of the court, and a ‘legal position’ was subsequently adopted, which was binding on all chambers or judges of the chamber or court. Sessions could be convened by the president of the chamber at the request of the judge responsible for the register; and they could be attended, in addition to the judges of the chamber, by „professors of the faculty of law, eminent scientists or experts in a particular field of law”¹⁴. The ‘legal position’ thus adopted was binding on the panel, which delivered the judgment on which the Chamber was convened.

The CJEU concluded that „the intervention of the Chamber meeting, in fact, permits interference in the final outcome of a case in which a judgment has been deliberated in advance and adopted by the competent full court, but not yet registered and notified, by a group of judges taking part in that Chamber meeting”¹⁵. This power to intervene was not sufficiently framed by objective criteria, the parties were not aware of the ‘position’ of the section, nor could they exercise their procedural rights before it. Such a procedure, through the binding nature of the ‘legal position’ adopted for the panel and the impossibility for the parties to exercise their procedural rights, „is not reconcilable with the requirements inherent in the right to effective judicial protection and a fair trial”.¹⁶

The Advocate General concluded that the Croatian procedural institutions under review complied with the requirements of judicial independence. After evoking the principle that „the internal independence of judges requires that they cannot be subject to directives or pressure from other judges or from those who exercise administrative

¹² *Hann-Invest*, cit. supra, para. 64.

¹³ *Hann-Invest*, cit. supra, para. 68.

¹⁴ *Hann-Invest*, cit. supra, para. 72.

¹⁵ *Hann-Invest*, cit. supra, para. 75.

¹⁶ *Hann-Invest*, cit. supra, para. 79.

responsibilities within the court, such as the president of the court or the president of a section of the court”¹⁷, he proposed that a distinction be drawn between *the interpretation of the rules* and *their application in practice*. The judges of the divisions convened following the refusal to register judgments were limited to the interpretation of legal rules when adopting binding legal positions, positions characterised by their abstract nature and lack of reference to the cases of the original panels. The judges of the division did not replace the appreciation of the judges of those panels.

The same distinction between interpretation and application of legal rules led the magistrate to conclude that the rights of defence and the adversarial principle were not violated (because there was no process of application of the law, but only of interpretation of it).

Furthermore, the Advocate General emphasised the effectiveness of the binding nature of legal positions: „to accept a mechanism which seeks to ensure the consistency of case-law subject to the non-binding nature of the legal position, as the Commission suggests, would be to confer on it a mere incentive character and, therefore, a completely random usefulness”¹⁸. At the same time, in its view, „the intervention of the registering judge contributes to the coherence and effectiveness of a mechanism likely to ensure the unity of the case law of the court concerned”.¹⁹

3. The effects of scrapping decisions

According to Art. 501 para. 1 of the Code of Civil Procedure, the judgment of the court of appeal is binding for the judges of the merits after the cassation, on the issues of law decided. As such, if the court of appeal makes a certain interpretation of the legal texts applicable in the case, the judges of the merits will have to take into account these rulings, without being able to contradict the view of the court of appeal by the solution given. *A ruling on points of law concerns not only the interpretation of legal texts, but also the way in which a claim, an exception or the action as a whole is to be dealt with.* The Court of First Instance cannot call these issues back into question, and even less can it give them a different resolution, because to do so would be to infringe the binding force and res judicata of the judgment of the Court of Appeal. Failure to comply with the above procedural provisions renders the judgment null and void. In the legal literature, it has been said that the judgment of the court of appeal on points of law has the value of a secondary source of law.²⁰

„The provisions of art. 315 of the old Code of Civil Procedure (art. 501 NCPC) leave no room for interpretation, as it is emphasised in the doctrine that the referring

¹⁷ Opinion of Advocate General Priit Pikamae, delivered on October 26, 2023, ECLI:EU:C:2023:816, para. 64 (document is available at <https://curia.europa.eu/juris/document/document.jsf?jsessionid=EC4BE2FD5EC4FA2B3BB9D0864FAA0656?text=&docid=279141&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=3043915>, last accessed 30.09.2024).

¹⁸ Opinion of the Advocate General, cit. supra, para. 69.

¹⁹ Opinion of the Advocate General, cit. supra, para. 86.

²⁰ See Gabriel Boroi (coord.), *Noul Cod de procedură civilă, Comentariu pe articole*, vol. II, Hamangiu, Bucharest, 2016, pp. 174–176; Ioan Leș, *Codul de procedură civilă, Comentariu pe articole*, C.H. Beck, Bucharest, 2022, pp. 862–865; Ioan Leș, Călina Juguștru, *Tratat de drept procesual civil*, vol. II, Universul Juridic, 2020, p. 90-94; Viorel Mihai Ciobanu, Marian Nicolae, *Noul Cod de procedură civilă*, vol. I, Universul Juridic, 2013, p. 1143- 1146.

court is obliged to respect the judgment of the court of appeal, and the manner in which the latter has decided a contentious issue is binding, without the possibility of being contradicted on retrial. (...) Consequently, the manner of interpretation of a particular provision of law or the application of a principle of law, in the circumstances determined by the court of appeal, is binding on the trial court, and the court hearing the case on the merits cannot disregard such an interpretation. The rulings given by the court of appeal may concern matters of substantive law as well as procedural law. So far as the provisions of Article 315 of the old Code of Civil Procedure (Article 501 of the NCPC) are mandatory, it is clear that failure to comply with them renders the judgment void, since in such a situation there is an injury which can only be removed by annulling the act. Given that in the present case, the referring court did not follow the mandatory recommendations of the court of appeal, regarding the application of Article 36 of Law no. 85/2006 (...), it follows that the provisions of Article 315 of the old Code of Civil Procedure (Article 501 NCPC) were violated and, therefore, the judgment must be quashed and the case sent back to the same court for retrial".²¹

The binding effect of cassation decisions on decided points of law is intended to unify the practice of the courts of the cassation court's jurisdiction on the interpretation and resolution of these legal issues. This effect is closely linked to the specific feature of appeals in civil matters, which is that they are an exclusive review of the legality of judicial decisions.

It should be noted that the binding effect will occur when the cassation is ordered in relation to Art. 488 para. 1 points 5 and 8 of the from the Civil Procedure Code (C. pr. civ.)²². According to art. 488 para. 1 point 5 C. pr. civ., the annulment of judgments may be pronounced when the court has violated the rules of procedure by the judgment given, the non-compliance with which entails the sanction of nullity.

The ground for cassation provided by Art. 8 para. (1), point 8 C. pr. civ. refers to the violation of the substantive (material) law, which may cover several aspects: the application of a legal text foreign to the factual situation; the extension of the legal norm beyond the hypotheses to which it applies or the unjustified restriction of the application of its provisions; the legal text corresponding to the factual situation has been given a wrong interpretation. Misinterpretation of the law means that the legal text applicable to the case in question is open to contrary interpretations and, by the judgment under appeal, the court of first instance gave an interpretation which is inconsistent with the actual meaning of the legal text.

Therefore, in civil cases that are in the second procedural cycle following a cassation with a referral back to the first instance or appeal court or with remand to the appeal court, to the extent that the cassation decision settles points of law, we can no longer speak of complete freedom of the panel hearing the merits or the appeal to decide.

On the other hand, for the above restriction of freedom of decision, we are in the presence of objective criteria and safeguards, which make a clear difference in the context of the Hann-Invest case.

First of all, the restrictive effects of cassation decisions for judges adjudicating

²¹ Ploiești Court of Appeal, civil section I, Decision no. 1067/2013, in CACIBJ 2013, III, p. 40.

²² For an analysis of the grounds of cassation, see Gabriel Boroi, Mirela Stancu, *Drept procesual civil*, Hamangiu, Bucharest, 2015, pp. 637–649; Octavia Spineanu-Matei, in G. Boroi (coord.), *Noul Cod de procedură civilă Comentariu pe articole*, vol. I, Hamangiu, Bucharest, 2013, p. 937-943.

in the second procedural cycle derive explicitly from the ‘law’, in the autonomous sense developed by the Court of Justice, namely the Code of Civil Procedure. Secondly, the ‘restriction’ is the result of the deliberation of a panel entrusted with the disposal of the case and before which the parties have had the opportunity to argue their claims in adversarial proceedings. Thirdly, the panels on appeal are constituted on the basis of transparent legal rules which are known to the litigants, and their power to intervene in the proceedings as a whole is framed by objective criteria, i.e. it concerns only the manner of resolving points of law and no other aspects (assessment of the state of facts, administration of evidence, etc.) and is objectively justified.

4. Judgments modified/abolished/cancelled for imputable reasons

The notion of ‘judgments modified/declined/cancelled for imputable reasons’ was introduced as a criterion for the evaluation of judges’ work, by Annexe no. 1 to Law no. 303 of November 15, 2022, on the status of judges and prosecutors²³. According to 57 of Law no. 24/2000 on the rules of legislative technique for the drafting of normative acts, the annexes to the law are component parts of the normative act (thus, they have the same value as the law). Instead, the law should contain the mention that the annexe is an integral part of the normative act, which is missing in the case of Law no. 303/2022. In our opinion, this omission does not call into question the legal force of the annexes to the law. In the following, we will only analyse the impact of the criteria on private law.

According to Art. 1 letter b) of the Annexe, the quality of the work performed by judges is assessed, inter alia, on the basis of the number of judgments modified/dismissed/terminated for reasons attributable to them, in accordance with the law. However, *the impact of the criterion has been mitigated since its very introduction*, with the Annexe stating that it will be taken into account only if ‘the index of modification/dismissal/cases of the judge evaluated exceeds the average index of modification/dismissal/cases calculated for courts of the same level of jurisdiction within the same Court of Appeal, depending on the court where the judge evaluated works and the subject matter of the judgment’.²⁴

Secondly, the definition of the attributable ground in relation to modified/decided/cancelled judgments is not fully clear, although the attempt to define it at the legislative level is important. Article 2 para. 4 of the same annexe, the ground is imputable if it consists of an aspect of illegality arising from the infringement or misapplication of substantive and/or procedural rules of law, in respect of which there is uniform practice in the matter. Therefore, the elements relating to the analysis of the factual situation could not constitute imputable grounds and, in order to determine whether or not they constitute imputable grounds, the relevant practice of the higher court must be assessed in order to conclude whether or not it is uniform.

The annexe to the law goes on to give some examples of imputable reasons, the list being illustrative (‘may constitute imputable reasons’): breach of procedural rules, failure to comply with which entails the sanction of nullity; exceeding the powers of the judiciary; total failure to state reasons for the judgment, insertion of contradictory reasons or only of reasons extraneous to the nature of the case; breach of *res judicata*;

²³ The law was published in the Official Gazette No. 1102 of November 16, 2022

²⁴ Art. 2 para. 8 of Annexe no. 1 to Law no. 303 of November 15, 2022.

breach or misapplication of substantive rules of law; disregard or ignorance of the guidance of the courts of judicial review.²⁵

Article 2 para. 5 of the Annexe refers to the Guide for the evaluation of the professional activities of judges, in order to observe the concrete examples that may represent imputable reasons. At present, the Guide constitutes Annexe No. 1 to the Rules on the appraisal of the professional activities of judges, approved by the Decision of the Judges' Section of the SCM No 1290 of June 13, 2024. It includes concrete examples in the following cases:

- violation of procedural rules (failure to comply with the legal provisions regarding the composition of the court; the principle of continuity; public order competence of the courts; capacity, publicity of the court hearing, failure to comply with prohibitive time limits, the right to defence, failure to conduct a judicial inquiry);
- exceeding the powers of the judiciary (application of abrogated legal rules; application of a law before it enters into force; the judge denies any value to a rule that has legal force or creates legal rules that he applies in the case);
- infringement or misapplication of substantive rules of law (application of a legal text extraneous to the factual situation; extension of legal rules beyond the hypothetical cases to which they apply or unjustified restriction of their application; violation of general principles of law; *total* ignorance of the evidence);
- disregarding or ignoring the directions of the court of judicial review (failure to comply with the rulings given on points of law by the court of judicial review, failure to administer evidence ordered by the court of judicial review).

Some of the above examples seem to be (also) a matter of assessing the state of facts, the most clear-cut example being the total disregard of the evidence given. In another case, the guide adds to the provisions of the Code of Civil Procedure without having the legal force of the latter. Although the criterion concerning the evidence ordered by the court of judicial review has its undoubted effectiveness, the formal legal aspect remains, the result being an extension of Art. 501 para. 1 C. pr. civ., organic law, by a normative administrative act²⁶. In these cases, the requirement of a uniform practice of the courts of judicial review cannot be analysed either, as the specificity of the examples logically excludes such an analysis. The issue is the extension of the cases imputable by these examples beyond the definition in the law, an extension realised by an administrative act.

It is certain, however, that this criterion is not strictly aimed at bringing the case law of lower courts into line with that of higher courts. Although unitary practice is mentioned as a component of its legal definition, the examples given by the Guide to the Evaluation of Judges' Performance include both situations that have this objective and many other situations that do not concern unitary practice.

Returning to Law 303/2022, the provisions of Art. 6 of Alexa 1 reintroduce the concept of unitary practice, by reasoning which is questionable. Interpreting them, it would follow that the court of judicial review establishes imputable grounds, but not all

²⁵ The mentioned legal provisions are reproduced in the Regulation on the evaluation of the professional activity of judges, approved by the Decision of the Section for Judges of the Superior Council of Magistracy No. 1290 of June 13, 2024.

²⁶ The Guide, being annexed to the Regulation on the evaluation of the professional activity of judges, has the same value as the Regulation (art. 57 of Law no. 24/2000).

of them are taken into account in the judge's assessment, but only those that "concern aspects of manifest illegality arising from the breach or misapplication of substantive and/or procedural rules of law, in respect of which there is a uniform practice in the matter"²⁷

The appeal of the judge concerned by the modification, dissolution or quashing of a judgment shall be dealt with "within the framework of the meetings on the analysis of the practice of the courts of judicial review and the unification of practice, organised at the level of the appropriate division or, where appropriate, of the court of judicial review, if there are no divisions, in the month immediately following the lodging of the appeal". The law establishes a new connection with the concept of "unitary practice", but in respect of certain imputable grounds set out in the guide, the competent division or court carries out a review of the judgment in the light of criteria other than unitary practice. As one author observes, assessing judicial performance can be "a daunting task, fraught with dangers and pitfalls".²⁸

5. Measures to unify court practice

The general assemblies of judges, meeting at the level of each court, have the power to debate matters of law, and therefore also matters of non-unitary practice²⁹. The law is silent as to the documents drawn up on this occasion or their binding/guideline nature. „The President of the High Court of Cassation and Justice may authorise the judges to inform themselves at the courts on matters concerning the correct and uniform application of the law, making known the case law of the High Court of Cassation and Justice, and to note situations which justify proposals for the improvement of the law".³⁰

Measures of unification of practice are found in particular in the Rules of Procedure of the Courts, i.e. at the infra-legislative level. According to Art. 20 para. 1 lit. d, j of the Rules of Procedure of the Courts³¹, the president of the division coordinates the unification of practice at the level of the division and keeps a record of cases of inconsistent application of the law, on the basis of the report drawn up by the delegated judge.

The Regulation provides for the organisation of monthly meetings of judges, aimed at discussing legal issues that have led to different solutions, novel legal issues that may generate inconsistent practice, analysing the practice of the courts of judicial review, new regulations and their interpretation. The opinions expressed by the judges on these issues are recorded in a memorandum.

On a quarterly basis, the courts of appeal organise meetings of their judges and of the courts in their respective districts to discuss issues that have given rise to inconsistent practice. The courts of appeal also prepare quarterly materials containing

²⁷ Article 2 para. 6 of Annex at Law No. 303/2022.

²⁸ Silvio Roberto Vinceti, „Innovating Judicial Performance Evaluations: Toward Academic-Style Peer Review?", *International Journal for Court Administration*, 2024, vol. 15, issue 1. <https://doi.org/10.36745/ijca.576>. The author proposes an academic, peer-review type of evaluation, without the evaluator knowing the identity of the evaluated judge, as an alternative to the traditional systems of evaluating judges.

²⁹ Art. 56 paragraph 1 letter c) of Law no. 304/2022.

³⁰ Art. 29 para. 2 of Law no. 304/2022.

³¹ The Regulation was approved by the Decision of the Section for Judges of the Superior Council of Magistracy No. 3243 of December 22, 2022.

the relevant judgments rendered by them and draw up an annual „Bulletin of case law”, which is published on the courts’ portal.

The presidents of the courts designate the judges in charge of analysing the practice of the courts for judicial review and unification of practice. They are required to draw up a monthly report on the relevant legal issues arising in the resolution of cases, „highlighting the non-unified practice of both their own court and the higher court, if any”.³²

It should be noted that the abovementioned normative provisions do not make the documents drawn up at the non-unitary practice sessions binding for the judges of the division or the judges of the courts of the district courts of appeal. But such a character may implicitly result from the regulation of the criterion of professional evaluation of judgments modified/deceased/cancelled for imputable reasons. Beyond this aspect, the judges will most probably tend to align their practice on that of the joint sittings, but this does not affect their independence.

Discussions in hearings on points of law, which have given rise to non-uniform practices, take place outside specific cases and more often than not after they have been settled, possibly even definitively. The conclusions of these hearings seem rather like „soft-law” instruments for the standardisation of practice, the result of legal debates in which only the judges take part and which remain without impact on cases already settled.

6. Conclusions

According to the Code of Civil Procedure, the judgment of the court of appeal is binding on the judges of the merits after the cassation, on the points of law decided. Therefore, in cases which are in the second procedural cycle following a cassation with reference back to the first instance or to the court of appeal or with remand to the court of appeal, insofar as issues of law are settled by the cassation decision, we can no longer speak of complete freedom of the panel hearing the merits or the appeal to decide.

The restrictive effects of cassation decisions for judges adjudicating in the second procedural cycle derive explicitly from the ”law”, namely the Code of Civil Procedure. The ”restriction” is the result of the deliberation of a panel entrusted with the disposal of the case and before which the parties have had the opportunity to argue their claims in adversarial proceedings. Panels on appeal are constituted on the basis of transparent legal rules; their power to intervene in the proceedings as a whole is framed by objective criteria and has a relevant justification. All these safeguards make a clear difference in the context of the *Hann-Invest* case.

As the documents drawn up at the non-unitary practice meetings of the courts are not explicitly binding on the judges and do not relate to cases already decided, their independence is not affected. On the other hand, judges will most likely tend to align their practice on that adopted in joint sittings, which is why unitary practice is to the advantage of discussions in the hearings on the points of law that have given rise to inconsistent practices take place outside specific cases. Rather, the conclusions of these sessions appear to be „soft-law” instruments for the standardisation of practice, the result

³² Art. 29 of the Rules of Procedure of the Courts approved by the Decision of the Section for Judges of the Superior Council of Magistracy No. 3243 of December 22, 2022.

of legal debates in which only the judges participate and which remain without impact on cases already settled.

More problematic is the criterion for the evaluation of the professional activity of judges, consisting in the judgments modified/dismissed/cancelled for imputable reasons, introduced by Law no. 303 of November 15, 2022, on the status of judges and prosecutors.

On the one hand, the Guide for the evaluation of the judges' work includes concrete examples of imputable cases, which concern the state of facts in the case files, whereas the definition in the law limits the criterion to aspects of illegality, for which there is a uniform practice in the matter. The Guide, an administrative act, extends the scope of an organic law by providing for the non-administration of evidence ordered by the court of judicial review as a chargeable ground³³. Although the unitary practice is part of the legal definition of imputable motive, the examples given by the Guide include both situations that have this objective and many other situations that do not concern the unitary practice. In the latter case, the department or court competent to hear the appeal of the judge concerned by the modification, dissolution or quashing of a judgment reviews the judgment in the light of criteria other than uniform practice. Another insufficiently defined aspect relates to the way in which the guidelines of the courts of judicial review are presented. Where and in what form can they be found in their entirety?

Although this assessment criterion may raise questions as to the independence of the judges, there are also a number of distinguishing features in relation to the *Hann-Invest* case. Thus, the mechanism in itself is not such as to call into question the judgments delivered in that case, which produce their general and specific effects with regard to the parties. The parties have been able to exercise their procedural rights and the judge concerned has a *sui generis* remedy with regard to the application of the criterion.

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³³ According to Art. 501 para. 1 of the Code of Civil Procedure, the judgment of the court of appeal is binding for the judges of the merits after the cassation, only on the issues of law decided.

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