Repubblika: Anything new under the Maltese Sun?

The ECJ rules on the system of the appointment of judges in Malta

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By now, the rule of law and the principle of judicial independence are a continuous presence in the ECJ's case law. For the last year or two, at any given moment, there was a case on these issues included in the judicial calendar of the Court. Most often, these cases concerned the situation in Poland or Hungary. The case of *Repubblika*, for a change, concerned Malta.

Background

The case resulted from an *actio popularis* by Repubblika, a Maltese association aiming to promote the protection of justice and the rule of law. The association had initiated the proceedings since it was of the opinion that the Maltese system of the appointment of judges violated the principle of judicial independence enshrined in Union law.

In Malta, judges are appointed by the President on a proposal by the Prime Minister. This system has been in place since the country's origin in 1964. Yet, in 2016, the Constitution was amended and established a judicial appointments committee. This committee is tasked with evaluating the candidates for a judicial position and to advise the Prime Minister on the appointment decision. Nonetheless, the Prime Minister is allowed to deviate from the committee's evaluation, provided that he or she publishes this decision in the country's official Gazette and makes a statement in the House of Representatives explaining the reasons for this decision.

It is essentially that system that Repubblika believed to be at odds with the principle of judicial independence, enshrined in Article 19(1)(2) TEU and Article 47 of the Charter. It argued that the Maltese Constitution granted a discretionary decision-making power to the Prime Minister as to the appointment of judges, which was liable to raise doubts about the independence of those judges. The Maltese court, in turn, brought this issue before the ECJ. It asked the Court 1) whether those two provisions of EU law should be considered to be applicable in a case such as the one pending before it; 2) whether the power of the Prime Minister in judicial appointment proceedings was in conformity with those provisions; and 3) if this was not the case, whether that fact should be taken into consideration with regard to future appointments only, or if it should also affect previous appointments.

The Court's judgment

The question whether Article 19(1)(2) TEU and Article 47 Charter applied was not too difficult to answer. By now, it is undisputed that the former provision applies to all national jurisdictions that may potentially be tasked with interpreting or applying EU law. There was no discussion that this was the case for the Maltese courts and that, as such, they should fulfil the requirements of effective judicial protection. Since the national court asked about the conformity of national legal provisions governing the appointment of judges with EU law, which it alleged were liable to affect their independence, Article 19(1)(2) TEU applied. Article 47 of the Charter, by contrast, did not apply, since Repubblika had not relied on any subjective right stemming from EU law. Nonetheless, the Court reiterated that the latter provision should be taken into considerations when interpreting the former.

As far as the second question was concerned, whether the Maltese appointment system was in conformity with EU law, the Court started off its reasoning by reiterating the fundamental importance of the principle of judicial independence for the EU legal system, as already summarized in the *Land Hessen*judgment. This principle of judicial indepen-

dence presupposes rules, in particular as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that can dispel any reasonable doubt as to the imperviousness of that body to external influences. Nonetheless, the Court has already made clear in its two earlier judgments of*A.K.* and *A.B.*that the mere fact that judges are appointed by a member of the executive, such as the President, does not in itself raise concerns about their independence and impartiality, if, once appointed, they are free from influences and pressures when carrying out their function and if the appointment procedure is such that it cannot give rise to reasonable doubts about the independence of the judges that are appointed.

In the case at hand, the referring judge mainly had doubts about the fact that the Prime Minister had a decisive power in the appointment proceedings and could disregard the opinion offered to him or her by the judicial appointments committee. The Court then pointed out that this committee was only established as a consequence of the 2016 Constitutional reform, and that Malta had therefore acceded to the EU on the basis of the provisions of the Constitution in force prior to that reform. Then, in a novel step, it referred to Article 49 TEU, which provides countries with the possibility to become an EU Member State, and states that the Union is composed of states which have freely and voluntarily committed themselves to respect the common values of Article 2 TEU, the rule of law among them. In particular, it follows from that provision that the Union is composed of Member States which respect these fundamental values. From that, the Court held that compliance by the Member States with these values is a condition for the enjoyment of all the rights deriving from the Treaties and that a State cannot amend its legislation in such a way that would reduce the protection of the value of the rule of law. As such, a Member State is required to ensure that any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules that would undermine the independence of the judiciary.

Turning, then, to the actual question, the Court recalled that the introduction of a body such as the judicial appointments committee may help to render the appointment procedure more objective, by circumscribing the Prime Minister's decision-making power. Yet, this is only the case if that body is itself sufficiently independent of the political branches. In the case at hand, the Court saw no reason to doubt the independence of the committee. On the contrary, it stressed that several provisions of the Constitution offered guarantees for the independence of that body. Furthermore, the Constitution laid down certain requirements that the candidates for a judicial office must satisfy. Moreover, if the Prime Minister would decide to go against the committee's proposal, he had to justify its decision in the official Gazette and in front of Parliament. From this, the Court concluded that the legislative framework, in its entirety, was not such as to give rise to legitimate doubts concerning the independence of the appointed judges.

Commentary

The *Republikka* case is an excellent example of just how much the reach of the ECJ has increased ever since its judgment in *ASJP*. Essentially, every national court can, pure and simple, enquire the Court about any aspect of the domestic judicial organisation, even when this aspect stems from the constitution. Whereas this case concerned the system of the appointment of judges, earlier judgments have made clear that the same would hold equally true for judicial tenure, or the discipline, promotion or dismissal of judges. By now, the Court is headed on a path which may prove difficult to leave, where it will be asked – not unlike the ECtHR – to assess increasingly nuanced and ancillary aspects of the domestic judicial organisation against the principle of effective judicial protection, enshrined in Article 19(1)(2) TEU and Article 47 of the Charter. As a matter of fact, this can already be seen from the cases that are now pending before the Court. As such, it will provide an increasingly intricate image of what the domestic judicial organisation – and by extension the national system of separation of powers – may look like.

As far as the content of the principle of judicial independence is concerned, the *Repubblika* judgment

does not add all that much. It confirms the rather reticent stance of the Court in cases where the domestic system of judicial appointments is concerned, steering clear of imposing institutional requirements and applying a test of appearance of independence instead. This could also be seen in the opinion of Advocate General Hogan, who essentially did little more than apply the principles that could then be found in the Court's case law.

In this regard, it is striking that the Court spends so many of its considerations as a run-up, only to conclude that the Maltese system is in conformity with Article 19(1)(2) TEU in six short paragraphs. Especially the Court's reliance on Article 49 TEU and its connection to Article 2 TEU is notable, as it would appear that the Court could easily have come to the same conclusion without this provision. When reading the judgment, one cannot shake off the impression that the Court has used this case to introduce a new principle that will mainly prove its importance in later cases. After Article 2 TEU, Article 19(1)(2) TEU, Article 47 of the Charter and Article 267 TFEU, the Court has now added Article 49 TEU to the list of provisions of EU law that are invoked in the fight against rule of law backsliding. May we predict that this basic principle will be relied on in many future cases?

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