



Press and Information

Court of Justice of the European Union

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Advocate General's Opinion in Case C-896/19
Repubblika v Il-Prim Ministru

Advocate General Hogan : EU Law does not preclude national constitutional provisions under which the executive power or one of its members, such as the Prime Minister, plays a role in the process of the appointment of members of the judiciary

However, Article 19(1) TEU, read in the light of the right to a fair and effective trial under the Charter, is applicable when a national court is assessing the validity of a procedure for the appointment of judges such as that provided for by the Maltese Constitution

Repubblika is an association whose purpose is to promote the protection of justice and the rule of law in Malta. On 25 April 2019, it brought an *actio popularis* before the First Hall Civil Court, Constitutional jurisdiction (the referring court) challenging the system of appointments of judges and magistrates in force at the time the proceedings commenced, as regulated by Constitution of Malta.

By its first question to the Court of Justice, the referring court seeks to establish whether the second subparagraph of Article 19(1) TEU ¹ and Article 47 ² of the Charter must be considered to be applicable when a national court is assessing the validity of a procedure for the appointment of judges such as that provided for by the Maltese Constitution. By its second question, the referring court asks, whether the aforementioned provisions must be interpreted as precluding national legislation under which the executive power, in this case the Prime Minister, enjoys a discretionary and decisive power in the process of the appointment of members of the judiciary. [49] Thirdly, the referring court asks, whether in the case where the power of the Prime Minister is found to be incompatible, this fact should be taken into consideration with regard to future appointments or whether it should also affect previous appointments.

In today's Opinion, Advocate General Gerard Hogan concludes that **the second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter, is applicable when a national court is assessing the validity of a procedure for the appointment of judges** such as that provided for by the Maltese Constitution.

Secondly, he concludes that **Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, does not preclude national constitutional provisions under which the executive power or one of its members, such as the Prime Minister, plays a role in the process of the appointment of members of the judiciary.**

Finally, the Advocate General finds that **the procedure for the appointment of judges at issue in the present case cannot be called into question under Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, in support of claims introduced before the date of the forthcoming judgment.**

On the applicability of Article 19(1) TEU and Article 47 of the Charter

¹ "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

² The right to an effective remedy and to a fair trial.

Advocate General Hogan states that the Court has recently delivered a number of landmark judgments which undoubtedly allow this question to be answered in the affirmative. In the light of these judgments, it is now clear that although the organisation of justice in the Member States falls within the competence of the Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU.³ This obligation applies in particular in relation 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.⁴ Additionally, the Advocate General notes that the Court itself has already ruled that ‘the second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law’.⁵

On the discretionary power in the process of appointment of members of the judiciary

In his general observations on the consequences of Article 19(1) TEU, Article 47 of the Charter and Article 6 ECHR on the procedures for the appointment of judges, Advocate General Hogan notes that the mere fact that judges are appointed by a member of the executive does not in itself give rise to a relationship of subordination of the former to the latter or raise doubts as to the former’s impartiality, if, once appointed, they are free from influence or pressure when carrying out their role. [55] He notes additionally that it would be pointless to deny that politics has played a role in the appointment of judges in many legal systems, including those in many Member States.

The Advocate General concludes that it follows from the decisions in *AK* and *Independence of the Supreme Court* that neither EU law nor, for that matter, the ECHR impose any fixed, *a priori* form of institutional guarantees designed to ensure the independence of judges. What is important, however, is that, first, judges must be free from any relationship of subordination or hierarchical control by either the executive or the legislature and, second, judges must enjoy actual guarantees designed to shield them from such external pressures. In these circumstances, it is only if one of these aspects of the procedure for the appointment of judges were to present a defect of such a kind and of such gravity as to create a real risk that other branches of the State – in particular the executive – could exercise undue discretion via an appointment which was contrary to law, thereby undermining the integrity of the outcome of the appointment process (and thus giving rise in turn to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned), that the appointment procedure in question might be contrary to Article 19(1) TEU.

According to the Advocate General, the critical considerations, remain whether, viewed objectively, a national judge enjoys sufficient guarantees of institutional independence and protection against removal from office so that he or she may exercise their functions in a manner which is wholly autonomous and free from any subordination to a directive or control from either the executive or the legislature. The assessment of these matters is ultimately a matter for the referring court.

Advocate General Hogan notes that the Venice Commission’s [Opinion No 940/2018](#) stated that the constitutional amendments of 2016, which introduced the Judicial Appointments Committee, were a step in the right direction, but fall short of ensuring judicial independence and that further steps were required. According to the Advocate General, the Venice Commission’s Opinion may be said to reflect recommendations in respect of a more complete system of transparency and a merit-

³ Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (Case [C-619/18](#)), see also Press Release No [81/19](#); Judgment of 5 November 2019, *Commission v Poland (Independence of ordinary courts)* (Case [C-192/18](#)), see also Press Release No [134/19](#); Judgment of 19 November 2019, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* ([C-585/18](#), [C-624/18](#) and [C-625/18](#)); see also Press Release No [145/19](#); and Judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* ([C-558/18](#) and [C-563/18](#)), see also Press Release No [35/20](#).

⁴ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* ([C-64/16](#)), see also Press Release No [20/18](#).

⁵ Judgment of 24 June 2019, *Commission v Poland (Independence of the Supreme Court)* (Case [C-619/18](#)), see also Press Release No [81/19](#).

based judicial appointment system. While these may in themselves be desirable recommendations, the fact that the Maltese system does not fully meet these standards does not in itself suggest that Maltese judges do not, both in theory and in fact, enjoy guarantees of independence sufficient to satisfy the requirements of Article 19 TEU.

While Article 19(1) TEU, is not *ex ante* prescriptive either in terms of the particular conditions of appointment or the nature of the particular guarantees enjoyed by judges of the Member States, it does nonetheless require as a minimum that such judges enjoy guarantees of independence. What matters for the purposes of Article 19 TEU is that judges must be free from any relationship of subordination or hierarchical control by either the executive or the legislature. Judges must enjoy fiscal autonomy from the executive and the legislature, so that their salaries are not impaired (otherwise than by generally applicable taxation or generally applicable and proportionate salary reduction measures) during their term of office. It is also important that they enjoy sufficient protection against dismissal, save for just cause and their disciplinary regime must include the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions. It is for the national court to ascertain whether these guarantees are in fact in place.

On the temporal effects of the Court's interpretation

Advocate General Hogan notes that if the referring court were to conclude, on the basis of the Court's judgment, that the procedure of appointment of judges in force in Malta was contrary to Article 19(1) TEU, this would inevitably give rise to serious concerns as regards legal certainty which could affect the functioning of the judicial system as a whole. These difficulties would not only affect the ability of judges to decide on pending cases, but would also have an impact on the ability of the judicial system to address the problem of the backlog of cases facing Malta. Finally, such a decision would be likely to affect the *res judicata* status of cases dealt with by Maltese courts and tribunals in the past.

The Advocate General is therefore of the view that the procedure for the appointment of judges cannot be called into question, in support of claims introduced before the date of the forthcoming judgment.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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