Provisional text

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 17 December 2020(1)

Case C-896/19

Repubblika
v
Il-Prim Ministru,
joined party:
WY

(Request for a preliminary ruling from the Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta))

(Reference for a preliminary ruling – Article 2 TEU – EU values – Rule of law – Effective judicial protection – Article 19 TEU – Article 47 of the Charter of Fundamental Rights of the European Union – Judicial independence – Procedure for the appointment of judges – Power of the Prime Minister – Involvement of a judicial appointments committee)

I. Introduction

1. The present reference for a preliminary ruling once again raises important issues relating to the nature of judicial independence. Specifically, the questions posed by the order for reference require the Court to consider the extent to which the guarantees of judicial independence contained in EU law also impact on the system for the appointment of national judges. In particular, does EU law impose any constraints on the appointment of judges by the executive?

2. This reference has been submitted in the context of proceedings, brought in the form of an *actio popularis*, which are currently pending before the Maltese courts. In these proceedings it is contended that the procedure providing for the appointment of judges which is laid down in the Maltese Constitution does not comply, inter alia, with the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

3. This action therefore gives the Court a new opportunity to examine its recent case-law concerning the scope of those provisions and, in particular, to consider their requirements in terms of the independence of the judicial system in the EU legal order.

II. Legal context

A. EU law

1. The EU Treaty

4. Article 2 TEU reads as follows:

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

5. Article 19(1) TEU provides:

‘The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

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

2. The Charter

6. Title VI of the Charter, under the heading ‘Justice’, includes Article 47 thereof, entitled ‘Right to an effective remedy and to a fair trial’, which states as follows:

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. …

…’

B. Maltese law

7. The Constitution of Malta of 1964 (‘the Constitution’) contains, in Chapter VIII, detailed rules relating to the judiciary, including, inter alia, the procedure for the appointment of judges. In 2016 this chapter was reformed, including the introduction of the Judicial Appointments Committee. Although the role of this committee and the procedure for the appointment of judges were substantially amended in July 2020, the rules applicable to the main proceedings are as follows.

8. Article 96 of the Constitution relates to the appointment of the judges of the superior courts. It provides:

‘(1) The judges of the Superior Courts shall be appointed by the President acting in accordance with the advice of the Prime Minister.

(2) A person shall not be qualified to be appointed a judge of the Superior Courts unless for a period of, or periods amounting in the aggregate to, not less than twelve years he has either practised as an advocate in Malta or served as a magistrate in Malta, or has partly so practised and partly so served.

(3) Without prejudice to the provisions of sub-article (4), before the Prime Minister gives his advice in accordance with sub-article (1) in respect of the appointment of a judge of the Superior Courts, (other than the Chief Justice) the evaluation by the Judicial Appointments Committee established by

Article 96A of this Constitution as provided in paragraphs (c), (d) or (e) of sub-article (6) of the said article 96A shall have been made.

(4) Notwithstanding the provisions of sub-article (3), the Prime Minister shall be entitled to elect not to comply with the result of the evaluation referred to in sub-article (3):

Provided that after the Prime Minister shall have availed himself of the power conferred upon him by this sub-article, the Prime Minister or the Minister responsible for justice shall:

(a) publish within five days a declaration in the Gazette announcing the decision to use the said power and giving the reasons which led to the said decision; and

(b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President in accordance with sub-article (1):

Provided further that the provisions of the first proviso to this sub-article shall not apply in the case of appointment to the office of Chief Justice.'

9. Article 96A of the Constitution describes the role of the Judicial Appointments Committee. It is worded in these terms:

'(1) There shall be a Judicial Appointments Committee, hereinafter in this article referred to as "the Committee", which shall be a subcommittee of the Commission for the Administration of Justice established by article 101A of this Constitution and which shall be composed as follows:

(a) the Chief Justice;

(b) the Attorney General;

(c) the Auditor General;

(d) the Commissioner for Administrative Investigations (Ombudsman); and

(e) the President of the Chamber of Advocates:

…

(2) The Committee shall be chaired by the Chief Justice or, in his absence, by the judge who substitutes him in accordance with paragraph (d) of sub-article (3).

(3) (a) A person shall not be qualified to be appointed or to continue to hold office as a member of the Committee if he is a Minister, a Parliamentary Secretary, a Member of the House of Representatives, a member of a local government or an official or a candidate of a political party:

…

(4) In the exercise of their functions the members of the Committee shall act on their individual judgment and shall not be subject to the direction or control of any person or authority.

(5) There shall be a Secretary to the Committee who shall be appointed by the Minister responsible for justice.

(6) The functions of the Committee shall be:

(a) to receive and examine expressions of interest from persons interested in being appointed to the office of judge of the Superior Courts (other than the office of Chief Justice) or of magistrate of the Inferior Courts, except from persons to whom paragraph (e) applies;

(b) to keep a permanent register of expressions of interest mentioned in paragraph (a) and to the acts relative thereto, which register shall be kept secret and shall be accessible only to the members of the Committee, to the Prime Minister and to the Minister responsible for justice;

(c) to conduct interviews and evaluations of candidates for the abovementioned offices in such manner as it deems appropriate and for this purpose to request information from any public authority as it considers to be reasonably required;

(d) to give advice to the Prime Minister through the Minister responsible for justice about its evaluation on the eligibility and merit of the candidates for appointment to the abovementioned offices;

(e) when requested by the Prime Minister, to give advice on the eligibility and merit of persons who already occupy the offices of Attorney General, Auditor General, Commissioner for Administrative Investigations (Ombudsman) or of magistrate of the Inferior Courts to be appointed to an office in the judiciary;

(f) to give advice on appointment to any other judicial office or office in the courts as the Minister responsible for justice may from time to time request:

Provided that the evaluation referred to in paragraph (d) shall be made by not later than sixty days from when the Committee receives the expression of interest and the advice mentioned in paragraphs (e) and (f) shall be given by not later than thirty days from when it was requested, or within such other time limits as the Minister responsible for justice may, with the agreement of the Committee, by order in the Gazette establish.

(7) The proceedings of the Committee shall be confidential and shall be held *in camera* and no member or secretary of the Committee may be called to give evidence before any court or other body with regard to any document received by or any matter discussed or communicated to or by the Committee.

(8) The Committee shall regulate its own procedure and shall be obliged to publish, with the concurrence of the Minister responsible for justice, the criteria on which its evaluations are made.'

10. Article 97 of the Constitution provides:

'(1) Subject to the provisions of this article, a judge of the Superior Courts shall vacate his office when he attains the age of sixty-five years.

(2) A judge of the Superior Courts shall not be removed from his office except by the President upon an address by the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and praying for such removal on the ground of proved inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or proved misbehaviour.

(3) Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the inability or misbehaviour of a judge of the Superior Courts under the provisions of the last preceding sub-article.'

11. Article 100 of the Constitution relates to the appointment of the magistrates of the inferior courts. It establishes a procedure which is similar to the procedure applicable to the judges of the superior courts:

‘(1) Magistrates of the inferior courts shall be appointed by the President acting in accordance with the advice of the Prime Minister.

(2) A person shall not be qualified to be appointed to or to act in the office of magistrate of the inferior courts unless he has practised as an advocate in Malta for a period of, or periods amounting in the aggregate to, not less than seven years.

(3) Subject to the provisions of sub-article (4) of this article, a magistrate of the inferior courts shall vacate his office when he attains the age of sixty-five years.

(4) The provisions of sub-articles (2) and (3) of article 97 of this Constitution shall apply to magistrates of the inferior courts.

(5) Without prejudice to the provisions of sub-article (6), before the Prime Minister gives his advice in accordance with sub-article (1) in respect of the appointment of a magistrate of the Inferior Courts the evaluation by the Judicial Appointments Committee established by article 96A of this Constitution as provided in paragraph (c), (d) or (e) of sub-article (6) of the said article 96A shall have been made.

(6) Notwithstanding the provisions of sub-article (5), the Prime Minister shall be entitled to elect not to comply with the result of the evaluation referred to in sub-article (5):

Provided that after the Prime Minister shall have availed himself of the power conferred upon him by this sub-article, the Prime Minister or the Minister responsible for justice shall:

(a) publish within five days a declaration in the Gazette announcing the decision to use the said power and giving the reasons which led to the said decision; and

(b) make a statement in the House of Representatives about the said decision explaining the reasons upon which the decision was based by not later than the second sitting of the House to be held after the advice was given to the President in accordance with sub-article (1).’

12. Article 101B of the Constitution relates to the discipline of judges and magistrates. It provides:

‘(1) There shall be a Committee for Judges and Magistrates (hereinafter referred to as “the Committee”) which shall be a subcommittee of the Commission for the Administration of Justice and which shall consist of three members of the judiciary who are not members of the Commission for the Administration of Justice and who shall be elected from amongst judges and magistrates according to regulations issued by the Commission for the Administration of Justice so however that in disciplinary proceedings against a magistrate two of the three members shall be magistrates and in the case of disciplinary proceedings against a judge two of the three members shall be judges.

…

(4) The Committee shall exercise discipline on judges and magistrates in the manner prescribed in this article.

…

(15) In the exercise of their functions the members of the Committee shall act on their own individual judgment and shall not be subject to the direction or control of any other person or authority.

…’

III. The facts of the main proceedings

13. 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 referring court seeking a declaration to the effect that, by reason of the system of appointments of judges (Superior Courts) and magistrates (Inferior Courts) in force at the time this proceedings was commenced, as regulated by Articles 96, 96A and 100 of the Constitution, Malta is in breach of its obligations under the second subparagraph of Article 19(1) TEU in conjunction with Article 47 of the Charter, as well as under Article 39 of the Constitution and under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

14. In a hearing held on 30 October 2019 before the referring court, the applicant clarified that in the present proceedings it was challenging all the judicial appointments which came into effect on 25 April 2019, as well as any other appointment that might be made after that date, unless they are made in accordance with the recommendations outlined in the Opinion No 940/2018 of the European Commission for Democracy through Law ('the Venice Commission') on Constitutional arrangements and separation of Powers and the independence of the judiciary and law enforcement (2) and in accordance with the provisions of Article 19(1) TEU and Article 47 of the Charter.

15. For his part, the Prim Ministru (Prime Minister) ('the defendant') submits that the right to an effective remedy and to a fair trial is respected in Malta. In this context, the appointments that came into effect on 25 April 2019 were made in strict observance of the provisions of the Constitution and in accordance with EU law. The defendant submits that there is no difference between these specific appointments and any other appointment of a member of the judiciary made since the promulgation of the Constitution in 1964, apart from the fact that, unlike the appointments made prior to 2016, candidates are now the subject of an evaluation carried out by the Judicial Appointments Committee established by Article 96A of the Constitution, with regard to their suitability.

16. The defendant also submits that the system for the appointment of members of the judiciary is in conformity with the requirements of Article 19(1) TEU and of Article 47 of the Charter, as interpreted by the Court of Justice. In fact, this system reflects the way in which judges are appointed to the Court of Justice under the first paragraph of Article 253 TFEU, where the opinion delivered by the panel set up under Article 255 is not binding on the final decision taken by the governments of the Member States.

17. The referring court considers that the main issue brought for its evaluation concerns the Prime Minister's discretion, under Articles 96, 96A and 100 of the Constitution, in the appointment of all the members of the judiciary and whether this margin of discretion was improved by the constitutional amendments of 2016. While a number of aspects raised by the present case were addressed by the Court in its judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)* (C-619/18, EU:C:2019:531) ('*Independence of the Supreme Court*'), the referring court considers that this issue should be addressed in the context of an evaluation of the system as a whole, including the right to an effective remedy and to a fair trial in Malta.

18. At the hearing on 27 October 2020, the Court was informed that certain amendments had since been made to the Constitution in July 2020 following recommendations on the system of judicial appointments made by the Venice Commission in its Opinion No 940/2018. These amendments do not, however, affect the subject matter of the present proceedings before the referring court or, for that matter, the present request for a preliminary ruling.

IV. The request for a preliminary ruling and the procedure before the Court

19. It is in those circumstances that, by decision of 25 November 2019, received at the Court on 5 December 2019, the Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Should the second [subparagraph] of Article 19(1) TEU and Article 47 of the [Charter], read separately or together, be considered to be applicable with respect to the legal validity of Articles 96, 96A and 100 of the Constitution of Malta?

(2) If the first question elicits an affirmative answer, should the power of the Prime Minister in the process of the appointment of members of the judiciary in Malta be considered to be in conformity with Article 19(1) TEU and with Article 47 of the [Charter], considered as well in the light of Article 96A of the Constitution, which entered into effect in 2016?

(3) If the power of the Prime Minister is found to be incompatible, should this fact be taken into consideration with regard to future appointments or should it affect previous appointments as well?’

20. Written observations were submitted by Repubblika, the Belgian, Maltese, Netherlands, Polish and Swedish Governments, and by the European Commission. In addition, they presented oral arguments at the hearing on 27 October 2020.

V. Analysis

A. Admissibility of the request for a preliminary ruling

21. In its written observations, the Polish Government submits that the reference for a preliminary ruling is inadmissible in two respects.

22. First, it contends that even if Maltese law were to allow litigants, in the context of an *actio popularis*, to take the initiative in reviewing the abstract conventionality of the rules in force in the national legal order, the referring court would refer its questions to the Court for a preliminary ruling so that, depending on the answer given, it could decide on the abstract conformity of the provisions of Maltese law with EU law.

23. The Polish Government, however, points to the fact that the decision as to the abstract conformity of provisions of national law with EU law falls within the exclusive jurisdiction of the Court under Articles 258 and 259 TFEU and that only the Commission or another Member State can initiate such proceedings. On the contrary, the sole object of the reference for a preliminary ruling is the interpretation of EU law. Consequently, in the light of Articles 258, 259 and 267 TFEU, a national court cannot judge the abstract conformity of national law with EU law on the basis of the interpretation of that law provided in the preliminary ruling procedure, since the Court itself would not consider itself competent to review the conformity of national law in the context of that procedure.

24. The interpretation of EU law provided by the Court in the preliminary ruling procedure cannot therefore be used to resolve a dispute such as that before the referring court and, consequently, it cannot be considered necessary to resolve the main proceedings within the meaning of Article 267 TFEU. The Polish Government submits, in particular, that a contrary interpretation of this provision would be tantamount to circumventing Articles 258 and 259 TFEU and to undermining the exclusive jurisdiction of the Court, the Commission and the Member States provided for in those provisions.

25. In that regard, it is true that 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. Whereas, in an action for failure to fulfil 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. In such proceedings, there must therefore be a connecting factor between that dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court. (3)

26. In the present case, it must be accepted that the dispute in the main proceedings is substantively connected to EU law, in particular to the second subparagraph of Article 19(1) TEU, to which the questions referred relate. The referring court is therefore required to apply that provision in order to determine the substantive solution to be given to this dispute.

27. In that regard, even if Article 267 TFEU does not empower the Court to rule upon the compatibility of provisions of national law with the legal rules of EU law or to apply rules of EU law to a particular case, it is nonetheless the task of the Court to rule on the interpretation of the Treaties and of acts adopted by the EU institutions. That is why, according to settled case-law, the Court may, in the framework of the judicial cooperation provided for by that article and on the basis of the material presented to it, provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions. (4)

28. In addition, I would add that the fact that the action in the main proceedings is an *actio popularis* – in which the applicant does not have to prove a personal interest in the resolution of the litigation – does not prevent the Court from ruling on questions referred for a preliminary ruling. It is sufficient that the proceedings are permitted under national law and that the questions meet an objective need for the purpose of settling the dispute properly brought before the referring court. (5)

29. Accordingly, with regard to the foregoing considerations, I am of the view that there is a real dispute before the referring court and there is no doubt as to the relevance of the questions referred, since they concern the interpretation of provisions of EU law – primary law, in this case – and these questions are precisely the point at issue in the dispute in the main proceedings. It follows therefore that the first argument raised by the Polish Government is not relevant.

30. Second, according to the Polish government, the second subparagraph of Article 19(1) TEU, under which Member States are required to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law, does not alter in any way the substance of the principle of conferral or the extent of the Union's competences. On the contrary, this provision is based on the premiss that, in the absence of Union competence in the organisation of the judicial systems, it is for the Member States to designate courts and tribunals and to provide for appropriate mechanisms for the purpose of procedures designed to safeguard the rights that individuals derive from the Union's legal order. Consequently, no specific rules governing the appointment of judges or the organisation of the courts could be derived from Article 19(1) TEU, interpreted in the light of Article 5 TEU, read in conjunction with Articles 3 and 4 TFEU.

31. As regards Article 47 of the Charter, that government argues that this provision is not applicable in the present case. Repubblika has brought an *actio popularis*, but without availing itself of a subjective right derived from EU law. In addition, contrary to what it is required by Article 51 of the Charter, there is no 'implementation' of EU law by the Member State concerned in the present case since the questions raised in the request for a preliminary ruling concern national procedural issues, the regulation of which is entirely a matter for the Member States.

32. The Polish Government adds that, in any event, there are no common EU law criteria for the appointment of judges on which the Court could rely in assessing the system in force in Malta and that all Member States rely on different systems.

33. These arguments in reality relate to the issue raised by the first question referred by the referring court. I will therefore examine them in my analysis of that first question. Suffice it to say that the second ground of inadmissibility raised by the Polish Government is, in my view, unfounded either. Indeed, while I agree that Article 47 of the Charter is not applicable as such in the main proceedings (as Malta is not thereby 'implementing' Union law within the meaning of Article 51 of the Charter), Article 19 TEU is nonetheless fully applicable and, as such, the interpretation of that provision is likely to be of assistance for the referring court.

34. Consequently, I suggest that the Court should declare the questions referred to be admissible.

B. The first question

35. By its first question, the referring court seeks to establish, in substance, whether the second subparagraph of Article 19(1) TEU and Article 47 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 Constitution.

1. The applicability of Article 19(1) TEU

36. As far as Article 19(1) TEU is concerned, the Court has recently delivered a number of landmark judgments which undoubtedly allow this question to be answered in the affirmative.

37. Indeed, as summarised by the Court in its judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535), it follows from that case-law that 'the independence of the judges of the Member States is of fundamental importance for the EU legal order in various respects. It is informed, first, by the principle of the rule of law, which is one of the values on which, under Article 2 TEU, the Union is founded and which are common to the Member States, and by Article 19 TEU, which gives concrete expression to that value and entrusts shared responsibility for ensuring judicial review within the EU legal order to national courts or tribunals (see, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117, paragraph 32). Second, that independence is a necessary condition if individuals are to be guaranteed, within the scope of EU law, the fundamental right to an independent and impartial tribunal laid down in Article 47 of the Charter, which is of cardinal importance as a guarantee of the protection of all the rights that individuals derive from EU law (see, to that effect, inter alia, judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission*, C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraphs 70 and 71 and the case-law cited). Last, that independence is essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism under Article 267 TFEU, in that that mechanism may be activated only by a body responsible for applying EU law, which satisfies, inter alia, that criterion of independence (see, in particular, judgment of 21 January 2020, *Banco de Santander*, C-274/14, EU:C:2020:17, paragraph 56 and the case-law cited)'. (6)

38. Moreover, it is also clearly established that, as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision applies to the fields covered by EU law, irrespective of whether the Member States are implementing EU law within the meaning of Article 51(1) of the Charter. (7)

39. In that context, 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. (8) 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. (9)

40. This interpretation of the scope of Article 19(1) TEU finds support in the history and context of the integration of this provision in the Treaty. Indeed, Article 19(1) TEU was introduced to emphasise the Member State's duty to guarantee effective judicial protection when such protection cannot be offered directly by the Court, (10) since the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. (11) In the absence, therefore, of effective guarantees of judicial independence, the principle of the effective judicial protection of individuals' rights under EU law would thereby be undermined. (12) One may finally observe that this principle, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR, and which is now reaffirmed by Article 47 of the Charter. (13)

41. In those circumstances, since the appointment procedure at issue in the present case applies to all Maltese judges, it may be assumed that some – if not all – of them will necessarily be called upon to rule on questions relating to the interpretation or application of EU law. This is in itself therefore sufficient to ensure that these judges, appointed in accordance with the procedure laid down in the Constitution, must enjoy sufficient degrees of judicial independence to comply with the requirements of Article 19 TEU.

2. The applicability of Article 47 of the Charter

42. According to the first paragraph of Article 47 of the Charter, 'everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article'. It follows from the judgment of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373), that the applicability of that article is conditional upon the alleged violation of a right or freedom guaranteed by the law of the Union. (14)

43. However, it must be noted that the applicant does not complain of any infringement of its own right to an effective remedy, nor contests the independence of the referring court in the context of its action, nor does it rely on any specific right guaranteed by EU law. In those circumstances, I do not therefore believe that Article 47 of the Charter is applicable as such in the main proceedings.

44. Furthermore, I agree with the view recently expressed by Advocate General Bobek to the effect that it is permissible to carry out an 'abstract review of constitutionality' of a national norm in the light of Article 47 of the Charter where that norm has been adopted in the context of the implementation of EU law within the meaning of Article 51(1) of the Charter. (15) However, since the appointment procedure of national judges is part of the organisation of the judicial system, it falls, as stated above, within the competence of the Member States. In these circumstances, the appointment procedure of judges in Malta does not fulfil the condition of 'implementation' of EU law as laid down in Article 51(1) of the Charter, although, as I have already pointed out, this is not required for Article 19 TEU to apply. (16)

45. Nevertheless, since the obligation imposed on the Member States in the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, *corresponds* to the right to an effective remedy before a tribunal provided for in Article 47 of the Charter, (17) it follows that the obligations of the Member States under Article 19(1) TEU are thus to that extent 'mirrored' by the individual right recognised by Article 47 of the Charter. (18)

46. I therefore fully agree with the statement made by Advocate General Tanchev in his Opinion in Joined Cases *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:2019:551), that 'there is a "*constitutional passarelle"* between the two provisions, and the case-law concerning them inevitably intersects'. (19) Moreover, 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'. (20)

47. In that context, I am of the view that, while Article 47 of the Charter is not, as such, applicable in the main proceedings, Article 19(1) TEU must nevertheless be interpreted *in the light of* Article 47 of the Charter and the case-law relating thereto .

3. Conclusion on the first question

48. Accordingly, in the light of the foregoing considerations, I conclude 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.

C. The second question

49. By its second question, the referring court asks, in substance, whether Article 19 TEU, if necessary, when read in the light of Article 47 of the Charter, 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. This is the fundamental issue raised by this reference.

1. 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

50. As follows from the case-law referred to in my analysis of the first question asked by the referring court, where a judge may rule on questions concerning the application or interpretation of EU law, the Member State concerned must ensure that its judges enjoy sufficient guarantees in relation to independence and meet the essential requirements of effective judicial protection, in accordance with the second subparagraph of Article 19(1) TEU. (21)

51. Furthermore, since the obligation of the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law under Article 19(1) TEU corresponds to the right to an effective remedy before a tribunal provided for in Article 47 of the Charter, (22) it should be noted that Article 52(3) of the Charter states that, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are to be the same as those laid down by the ECHR.

52. As is clear from the Explanations relating to Article 47 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the first and second paragraphs of Article 47 of the Charter correspond to Article 6(1) and Article 13 ECHR.

53. In that respect, it follows from the settled case-law of the European Court of Human Rights that the reason for the introduction of the term ‘established by law’ in the first sentence of Article 6(1) ECHR is to ensure that the organisation of the judicial system does not simply depend on the unrestricted discretion of the executive, but that the establishment of a court system and the appointment of judges are regulated by appropriate legislation. There is therefore no doubt that the right to be judged by a tribunal ‘established by law’ within the meaning of Article 6(1) ECHR encompasses, by its very nature, aspects of the process of appointing judges. (23) In practice, however, the constraints imposed in this regard by national legislation tend to be limited and relate to matters such as eligibility for appointment, promotion within the judicial system and age limits.

54. It is also important to note that, although the principle of the separation of powers between the executive and the judiciary has assumed growing importance in its case-law, the European Court of Human Rights maintains that neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State. Nor does Article 6 ECHR require those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. (24) In this regard, while a large number of Member States have either a Judicial Council – defined as an independent body, established by law or under their national constitution, that seeks to safeguard the independence of the judiciary and of individual judges and thereby to promote the efficient functioning of the judicial system (25) – or, as in the case of Malta and some other countries, a Judicial Appointments Committee, (26) it must be acknowledged that their composition and competences vary considerably. (27)

55. It is important to note, however, 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 – and it is a critical proviso – *once appointed*, they are free from influence or pressure when carrying out their role. (28) There is, however, one exception. As the Court acknowledges in its judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232), Article 19 TEU comes into play where a

particular judge has been invalidly appointed and where that irregularity has been of such gravity that it created a real risk that, in the words of the Court, the executive could thereby undermine the integrity of the appointment process. (29) It follows in turn that there must exist a mechanism whereby an *illegal* judicial appointment – in particular, where the judge in question was legally ineligible for the appointment – can be legally set aside.

56. It may, nonetheless, be said that, with the exception of the specific and unusual case of invalidly appointed judges described in *Simpson*, Article 19(1) TEU is *essentially* forwarding looking in that it is concerned with the protection of judicial independence once the judge has been appointed.

57. In this regard, it would be pointless to deny that politics has played a role – sometimes even a decisive one – in the appointment of judges in many legal systems, including those in many Member States. It is sufficient here to refer to the experience of two of the world's most prominent and influential courts – namely, the US Supreme Court and the German Constitutional Court – nearly all of whose members were associated with particular political parties and political traditions. (30) Politicians and former politicians may even be *ex officio* members of constitutional courts of Member States (as in France (31)) either because of the law governing it (as in the case of the Belgian Constitutional Court (32)), or because they are elected by members of Parliament (as for example in Germany (33) or, as is partially the case, in Italy (34)), or they are often simply traditionally appointed as judges of those courts. Yet there is no doubt that all of these courts have proved to be resolutely independent vis-à-vis the other branches of government.

2. Judgments in Independence of the Supreme Court and AK

58. This brings us directly to the question of what is entailed by the concept of judicial independence. It is now firmly established that the requirement that courts be independent has two aspects to it. The first aspect, which is external in nature, requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or being subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions. The second aspect, which is internal in nature, is linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law. (35)

59. While the issue of judicial impartiality is not directly at issue in this instance, it is nonetheless a concept which is closely related to that of institutional independence. The issue of institutional independence has been consistently examined in a series of decisions both the ECtHR, going back to the landmark judgment of 28 June 1984, *Campbell and Fell v. United Kingdom* (CE:ECHR:1984:0628JUD000781977), and, more recently, by the Court in a series of key rulings commencing perhaps with the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

60. As much of this case-law is consolidated and summed up in the judgments in *Independence of the Supreme Court* and in *AK*, it may be sufficient for present purposes simply to examine the concept of independence as discussed by the Court in those two judgments. I propose to commence with an analysis of the judgment in *AK*.

61. In its judgment in *AK*, the Court explained that:

'123 Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it

(judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 66 and the case-law cited, and of [*Independence of the Supreme Court]*, paragraph 74).

124 Moreover, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive (see, to that effect, judgment of 10 November 2016, *Poltorak*, C-452/16 PPU, EU:C:2016:858, paragraph 35).

125 In that regard, it is necessary that judges are protected from external intervention or pressure liable to jeopardise their independence. The rules set out in paragraph 123 above must, in particular, be such as to preclude not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned (see, to that effect, [*Independence of the Supreme Court*], paragraph 112 and the case-law cited).

…

127 According to settled case-law of the European Court of Human Rights, in order to establish whether a tribunal is "independent" within the meaning of Article 6(1) of the ECHR, regard must be had, inter alia, to the mode of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body at issue presents an appearance of independence (ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144 and the case-law cited), it being added, in that connection, that what is at stake is the confidence which such tribunals must inspire in the public in a democratic society (see, to that effect, ECtHR, 21 June 2011, *Fruni v. Slovakia*, CE:ECHR:2011:0621JUD000801407, § 141).

…

129 As the European Court of Human Rights has repeatedly held, the concepts of independence and objective impartiality are closely linked which generally means that they require joint examination (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 192 and the case-law cited, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 150 and the case-law cited). According to the case-law of the European Court of Human Rights, in deciding whether there is reason to fear that the requirements of independence and objective impartiality are not met in a given case, the perspective of a party to the proceedings is relevant but not decisive. What is decisive is whether such fear can be held to be objectively justified (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, §§ 193 and 194 and the case-law cited, and of 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 147 and 152 and the case-law cited).'

62. In the same judgment, the Court further held that the fact certain judges 'were appointed by the President of the Republic does not give rise to a relationship of subordination of the former to the latter or to doubts as to the former's impartiality, if, once appointed, they are free from influence or pressure when carrying out their role'. (36) The Court nonetheless continued by cautioning that it was '… still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges'. (37) In that perspective, it is important, inter alia, that those conditions and detailed procedural rules are drafted in a way which ensures that judges are protected from external intervention or pressure liable to jeopardise their independence. (38)

63. The Court went to observe that the existence of a Judicial Council (known as the KRS) which advised the Polish President as to the suitability of particular candidates for judicial office helped to make

the process more objective and transparent, provided, however, that 'that body is itself sufficiently independent of the legislature and executive and of the authority to which it is required to deliver such an appointment proposal (see, by analogy, [*Independence of the Supreme Court*], paragraph 116)'. (39) The Court concluded by referring to criteria whereby the referring court could itself assess the independence of the KRS.

64. Similar sentiments were expressed by the Court in its judgment in the *Independence of the Supreme Court* case. It is, however, necessary to examine the background to these proceedings so that the context and import of the comments subsequently made by the Court in *AK* regarding the necessity to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors are properly understood.

65. The *Independence of the Supreme Court* case arose from infringement proceedings initiated by the Commission in which it contended that certain provisions of a Polish law which permitted the President of the Polish Republic to decide whether a particular judge should be allowed to remain in office beyond the normal retirement age infringed the guarantees of judicial independence. The Court stressed that while decisions as to the judicial retirement age were a matter for the Member States, nonetheless where those Member States choose such a mechanism, they were obliged to ensure that judicial independence was not thereby compromised.

66. The Court then went on to say that the fact that 'the President of the Republic is entrusted with the power to decide whether or not to grant any such extension is admittedly not sufficient in itself to conclude that that principle has been undermined. However, it is important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them'. (40)

67. The Court next held that the new legislation governing the Polish Supreme Court did not comply with these requirements inasmuch as the decision to grant such an extension 'is now subject to a decision of the President of the Republic, which is discretionary inasmuch as its adoption is not, as such, governed by any objective and verifiable criterion and for which reasons need not be stated. In addition, any such decision cannot be challenged in court proceedings'. (41)

68. While the Court acknowledged that the Polish National Council of the Judiciary was required to deliver an opinion to the President of the Republic before the latter adopted his or her decision – a process which admittedly helped to contribute to making that procedure more objective – the fact remained that the law did not provide for any mechanism that obliged the opinions of that body to be delivered 'on the basis of criteria which are both objective and relevant and [be] properly reasoned, such as to be appropriate for the purposes of providing objective information upon which that authority can take its decision'. (42)

69. The Court went on to conclude that the nature of this discretionary power conferred on the Polish President to extend the retirement age for specific judges was such 'as to give rise to reasonable doubts, inter alia in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests before them'. (43)

3. The conclusions to be drawn from the decisions in AK and Independence of the Supreme Court

70. What conclusions can be drawn from these two important decisions? It follows from *AK* (and the earlier line of case-law) 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.

71. 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. (44)

72. One must also bear in mind that, in accordance with settled case-law of the Court and of ECtHR, the guarantees of the independence and impartiality of the courts and tribunals of the Member States require rules not only on the appointment of their members, but also as regards the composition of the body, length of service, grounds for withdrawal by, objection to, and dismissal of its members, in order to dispel any reasonable doubt in the minds of litigants as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. (45) Indeed, these criteria are just as important as the procedure of appointment itself because 'the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'. (46)

73. All of this means that judges must enjoy financial autonomy from the executive and the legislature, so that, for example, their salaries are commensurate with the nature of their judicial functions. This also means that these salaries must not be reduced (otherwise than by generally applicable taxation) during their term of office. It is, however, possible for a Member State to reduce the salaries of judges as part of an emergency cost-reduction measure, provided that such reductions apply generally throughout the public service, the reductions are proportionate and the original salary levels are restored once the fiscal crisis justifying this measure has passed. (47)

74. Even more importantly, an essential feature of judicial independence is that judges must also enjoy sufficient protection against dismissal, except in duly justified cases. (48) The decision to dismiss a judge – whether taken by the executive alone or following an impeachment procedure in the legislature – must, in principle, also be capable of being subject to judicial review. Guarantees of judicial independence would otherwise really amount to very little if the executive or the legislature could hide behind an inscrutable silence and plead the non-justiciability of any decision to remove a judge, as the way would then be clear for the removal of a judge otherwise than for good cause. (49)

75. Finally, the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display 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. Rules which define, in particular, both conduct amounting to disciplinary offences and the penalties actually applicable, which provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 of the Charter, in particular the rights of the defence, and which lay down the possibility of bringing legal proceedings challenging the disciplinary bodies' decisions constitute a set of guarantees that are essential for safeguarding the independence of the judiciary. (50)

76. A review of judicial appointment procedures currently in place in the Member States reveals a diversity of approaches and systems of appointment. As I have already stated, there is nothing in either Article 19 TEU or Article 47 of the Charter (or, for that matter, Article 6 ECHR) which seeks to impose uniformity in that regard. One thing, however, is clear: judges are appointed and are not elected. This means that in a Union founded on the values of democracy and the rule of law under Article 2 TEU, judges are not – and cannot be made to be – democratically accountable and nor can they be given any role in policy formation.

77. All of this in turn has implications for judicial independence. The institutional guarantees of which I have spoken are thus designed to ensure that judges will demonstrate the necessary independence from the executive and the legislature, not only in words but also in deeds. Yet over and above the necessary institutional guarantees, perhaps the most critical feature of judicial independence is also the most elusive. As judges enjoy no democratic mandate, it accordingly behoves them to demonstrate independence from their own purely personal policy preferences and subjective political beliefs and in doing so to remain faithful to their solemn commitment dispassionately to apply the law by reference to established legal principles without fear or favour.

4. On the relative importance of an independent body in the procedure for the appointment of judges and the existing guarantees in the Constitution of Malta

78. It is true that, as recognised in the judgment in the *Independence of the Supreme Court* case, the existence of independent bodies such as a national Judicial Council or a Judicial Appointments Committee can assist in ensuring that the judicial appointments procedure (or, as in that case, the extension of a specific judge's term of office) is objective and transparent. As such, the existence of such bodies may be therefore very desirable in themselves. It is nonetheless clear from the decision of the Court in *AK* that their existence is not of the essence of the judicial independence required by a combination of Article 19 TEU and Article 47 of the Charter. I say this even though in *Independence of the Supreme Court* the Court spoke of ensuring that the 'substantive conditions and detailed procedural rules governing the adoption of [appointment] decisions are such that they cannot give rise to reasonable doubts' (51) as to the independence of the specific judges concerned. However, as we have just seen, these comments were were made in relation to an appointment which *extended* the tenure of judicial office and *not* to an actual judicial appointment itself. It must, therefore, be reiterated that Article 19(1) TEU is essentially forward-looking in that it seeks to ensure that judges, once appointed, enjoy sufficient guarantees of judicial independence.

79. In arriving at this conclusion I have not overlooked the fact that in *AK* these words were repeated by the Court (52) in the general context of judicial appointments. However, I do not think that the Court thereby intended, without more, to suggest, for example, that the mere fact that a person who previously had close links with a particular political party or tradition was subsequently appointed a judge was sufficient *in itself* to cast doubt on the independence of that judge for the purposes of Article 19(1) TEU following his or her nomination to that position. To that extent, therefore, I remain to be persuaded that Article 19(1) TEU reaches back, to so speak, to the position which obtained *prior* to the appointment of the judge in question.

80. Nor have I over overlooked the fact that the ECtHR recently found a violation of Article 6(1) ECHR in a case calling into question the lawfulness of a process for appointing judges. (53) It is, however, important to stress that this finding was not because the Minister of Justice had not appointed candidates proposed by the competent independent committee of experts – which was permitted under domestic law. It was rather because she had not sufficiently substantiated her decision to depart from the assessment made by this committee by failing to carry out an independent review of the relevant circumstances of the applicants for these judicial positions and by not providing adequate reasons for her departure from the recommendation of the expert committee, which, as the Icelandic Supreme Court had already held, constituted a breach of Icelandic domestic law. This constituted, according to the ECtHR, grave irregularities which went to the essence of the right to a 'tribunal established by law'. (54)

81. The critical considerations, however, remain whether, viewed objectively, a national judge enjoys sufficient guarantees of institutional independence and protection against removal from office so that – as the Court observed in *AK* – 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.

82. While the assessment of these matters is ultimately a matter for the referring court, it would seem that having regard to the provisions of Articles 97 and 100 of the Constitution, judges do in fact enjoy

considerable protection against removal from office, except in the case of incapacity or misbehaviour. In regard to the protection against removal from office of the judges and magistrates in Malta, the Constitution provides that they must vacate their office when they reach the age of 65 and may not be removed before that age, except by the President upon a motion of the House of Representatives supported by the votes of not less than two-thirds of all the members thereof and based on established inability to perform the functions of his or her office (whether due to physical infirmity or mental infirmity or any other cause) or established misbehaviour. (55)

83. Furthermore, the disciplinary regime applicable under the Constitution seems to provide the necessary guarantees to avoid any risk of it being used as a system for political control of the content of judicial decisions. Indeed, the body which is exclusively competent to exercise discipline over judges and magistrates is a subcommittee of the Commission for the Administration of Justice composed of three members of the judiciary elected from amongst judges and magistrates, who act on their own individual judgment and are not subject to the direction or control of any other person or authority. (56) In addition, Article 101B of the Constitution provides for a procedure which guarantees that the judge or magistrate against whom proceedings are brought has the opportunity to submit observations and to be heard at a hearing, with the assistance of an advocate or a legal procurator. The same provision also defines conduct that constitutes disciplinary offences by reference to the Code of Ethics for Members of the Judiciary and the penalties actually applicable.

84. It is true that, unlike the constitutions of some other Member States, (57) the Maltese Constitution does not contain an express statement to the effect that judges are independent in the discharge of their functions. Nevertheless, the referring court might consider this to be necessarily implied by the terms of Article 97 of the Maltese Constitution. In any event, the absence of such an express guarantee is not in itself fatal if, as would seem to be the case, Maltese judges otherwise enjoy other, strong institutional and constitutional guarantees designed to promote judicial independence.

85. The same holds true so far as financial autonomy is concerned. According to the Maltese Government, judges and magistrates in Malta receive remuneration in line with the highest salary scale in the Maltese civil service, so that the financial autonomy of the Maltese judges does not appear to be threatened. Nor is there any suggestion that these salaries either have been or might be impaired in a manner which would threaten judicial independence.

5. Final remarks on the Venice Commission's Opinion No 940/2018

86. Before concluding on the second question submitted by the referring court, it is necessary to consider the impact of the Venice Commission's Opinion No 940/2018 on the present case. Indeed, a key part of the applicant's case rests on the recommendations contained in this opinion.

87. First, it relies on Opinion No 940/2018 of the Venice Commission in support of its proceedings seeking to establish the invalidity of the contested procedure for judicial appointment by reference to Article 19(1) TEU. In this opinion, the Venice Commission noted 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. (58)

88. While such an opinion of the Venice Commission is obviously of great value when it comes to assessing the validity of a procedure for the appointment of judges with regard to the requirements of effective judicial protection, it cannot, nevertheless, be regarded as dispositive of the question of legality for the purposes of Article 19(1) TEU. As recently observed by Advocate General Bobek, '*As a matter of EU law*, those reports are … a useful source of information'. (59) Indeed, the Venice Commission's analysis is essentially a political one, albeit one informed by a sophisticated legal and political analysis. The Venice Commission's Opinion aims at arriving at an ideal system. It is with this objective in mind that the Venice Commission has made *recommendations* for improving the system for the appointment of judges in force in Malta, which concern, inter alia, the composition of the Judicial Appointments

Committee or the binding force of the proposal it should submit to the President of Malta (rather than to the Prime Minister). (60)

89. As a former member of the Venice Commission pointed out, the standards of action determined by the Venice Commission must also preserve the freedom of choice and scope for discretion for the countries in question. Thus, its opinions cannot be expressed in the form of 'all-or-nothing' rules, even if the flexibility of some standards may be partially corrected by international conventions such as the ECHR when the structure and independence of the judiciary is at stake. (61) As the Venice Commission itself recalled in its Opinion No 940/2018, there is no single 'model' which could ideally comply with the principle of the separation of powers and secure full independence of the judiciary. (62)

90. Second, the proposals of the Judicial Appointments Committee are not binding under the 2016 Constitution and it appears that the appointment decisions would not be regarded as justiciable by the Maltese courts. Indeed, in this respect I note that, as the representative of the Maltese Government confirmed at the hearing, only the *actio popularis* remedy is currently available in Malta. Yet, as Repubblika observed in response, that remedy is simply a means of challenging the constitutionality of a *law* and it is not a procedure whereby the validity of an *individual* judicial appointment can be scrutinised. Should the issue ever arise that an individual judge had been appointed unlawfully, then the Maltese courts would indeed be obliged, by virtue of Article 19(1) TEU, to provide an appropriate remedy to ensure that this appointment could be effectively challenged. Since no question of this appears to have arisen to date in the Maltese courts, it is perhaps unnecessary to consider this further unless and until such an issue ever arises. If, moreover, the Prime Minister were ever to deviate from the proposal of the Judicial Appointments Committee, he or she would be obliged, under the Constitution, to give reasons for his or her choice in a declaration published in the Gazette and to make a statement in the House of Representatives to explain this departure from the recommendation within a specified period of time. (63)

91. Furthermore, Article 96A(4) of the Constitution guarantees that the members of the Judicial Appointments Committee act on their individual judgment and are not subject to the direction or control of any person or authority in the exercise of their functions. In addition, the Judicial Appointments Committee gives its opinions on the basis of criteria established in a decision made public as required by Article 96A(8) of the Constitution (64) and appointments are based on objective criteria – such as experience as an advocate – laid down by the Constitution. (65)

92. In sum, therefore, the Venice Commission's Opinion may be said to reflect recommendations in respect of a more complete system of transparency and a merit-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.

6. Conclusion on the second question

93. Accordingly, in the light of the foregoing considerations, I conclude 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.

94. While Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, 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 financial 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.

95. It is for the national court to ascertain whether these guarantees are in fact in place.

D. The third question

96. By its third question, the referring court asks whether, in the event that the power of the Prime Minister is found to be incompatible with Article 19(1) TEU and Article 47 of the Charter, this fact should be taken into consideration with regard to future appointments or whether it would also affect earlier appointments. That question actually raises the issue of the limitation of the effects in time of the Court's judgment in the event that the referring court should conclude, at the end of its analysis, that the procedure for the appointments of judges at issue in the main proceedings is contrary to Article 19(1) TEU as interpreted by the Court in the forthcoming judgment.

97. In that regard, it should be recalled that, according to settled case-law of the Court, the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to a rule of EU law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the date of its entry into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships which arose and were established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing a dispute relating to the application of that rule before the courts having jurisdiction are satisfied. (66)

98. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict, for any person concerned, the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned acted in good faith and that there is a risk of serious difficulties. (67)

99. The Court has also held that restricting the temporal effects of such an interpretation may be allowed only in the actual judgment ruling upon the interpretation requested. (68) In that regard, it must be observed that this case deals for the first time with the question of whether a national procedure for the appointment of judges is subject to Article 19(1) TEU and, if so, to what extent.

100. In regard to the condition related to good faith, three elements may be emphasised. First, this case is likely to mark an evolution in the interpretation of the scope of Article 19(1) TEU in so far as it concerns a procedure for the appointment of judges and this in the context of relatively recent case-law, initiated with the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117). Second, the appointment system in force before the reform of the Constitution in 2016 was similar to that contested in the main proceedings – with the exception of the involvement of the Judicial Appointments Committee. However, in order to become a member of the European Union, Malta necessarily had to respect the values referred to in Article 2 TEU (69) and fulfil the 'Copenhagen criteria' adopted by the European Council of 21 and 22 June 1993, (70) which imply – by virtue of the political criterion – a strict review in respect of the rule of law and a strong, effective, independent, impartial and accountable judiciary. (71) Third, although the European Commission indicated in its Country Report Malta 2019 (72), with reference to Opinion No 940/2018 of the Venice Commission, that the Maltese justice system faces a number of challenges and that recent reforms have not yet fully ensured the independence of the judiciary, (73) it did not consider it necessary to initiate an action for infringement against Malta on the basis of Article 258 TFEU. (74)

101. These circumstances therefore seem to me to have reasonably led the authorities concerned in Malta to consider that the contested procedure for the appointment of judges was in conformity with EU law. (75)

102. As regards the risk of serious difficulties, it must be noted that, in this situation, the interpretation of EU law given by the Court in the present case concerns the right to an effective remedy and the regularity of the composition of national courts and tribunals.

103. In those circumstances, it is obvious 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. Indeed, these difficulties would not only affect the ability of judges to decide on pending cases, but would also – as rightly pointed out by the Maltese Government in its written observations – 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. However, this principle of *res judicata* is of particular importance, both in the legal order of the European Union and in national legal systems. Indeed, in order to ensure both the stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question. (76)

104. In the light of the forgoing considerations, I am therefore of the view that the answer to the third question referred by the national court should be that the procedure for the appointment of judges 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.

VI. Conclusion

105. Accordingly, in the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali (First Hall of the Civil Court, sitting as a Constitutional Court, Malta) as follows:

(1) The second subparagraph of Article 19(1) TEU, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, 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 Constitution of Malta.

(2) Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights, 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. While Article 19(1) TEU, interpreted in the light of Article 47 of the Charter, 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 financial 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 removal from office, 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.

(3) The procedure for the appointment of judges cannot be called into question under Article 19(1) TEU, interpreted in the light of Article 47 of the Charter of Fundamental Rights, in support of claims introduced before the date of the forthcoming judgment.

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1 Original language: English.

2 CDL-AD(2018)028.

3 See, to that effect, judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraphs 47 and 48).

4 See, to that effect, judgments of 26 January 2010*, Transportes Urbanos y Servicios Generales* (C-118/08, EU:C:2010:39, paragraph 23), and 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, '*AK*', EU:C:2019:982, paragraph 132).

5 See, to that effect, in relation to a declaratory remedy, judgment of 10 December 2018*, Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 31 and the case-law cited).

6 Paragraph 45.

7 See, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 29); *Independence of the Supreme Court*, paragraph 50; and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny (*(C-558/18 and C-563/18, EU:C:2020:234, paragraph 33).

8 See, to that effect, *Independence of the Supreme Court*, paragraph 52; judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924, paragraph 102); *AK*, paragraph 75); and judgment of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 36).

9 See, to that effect, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 40); *Independence of the Supreme Court*, paragraph 51; *AK,* paragraph 83; and of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234, paragraph 34).

10 See, to that effect, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 100 and 101). See also Krajeswki, M., and Ziółkowski, M., 'EU judicial independence decentralized: *A.K.*', *Common Market Law Review*, vol. 57, 2020, pp. 1107-1138, esp. p. 1121.

11 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 36). See also Badet, L., 'À propos de l'article 19 du Traité sur l'Union européenne, pierre angulaire de l'action de l'Union européenne pour la sauvegarde de l'État de droit', *Cahiers de droit européen*, 2020, pp. 57-106, esp. pp. 75 and 76.

12 See, to that effect, Pauliat, H., 'Abaissement de l'âge de la retraite des magistrats: une atteinte à l'indépendance de la justice reconnue en Pologne', *La Semaine Juridique – Édition générale*, numéro 29, 2019, pp. 1424-1428, esp. p. 1427.

13 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 35).

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14 See, to that effect, paragraphs 44 to 52 in comparison to the position developed by Advocate General Wathelet in points 51 to 67 of his Opinion in that case (*Berlioz Investment Fund*, C-682/15, EU:C:2017:2). This was recently clearly confirmed by the Court in its judgment of 6 October 2020, *État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 55).

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15 See, to that effect, Opinion of Advocate General Bobek in *Asociaţia "Forumul Judecătorilor din România", SO and Asociaţia "Forumul Judecătorilor din România" and Asociaţia "Mişcarea pentru Apărarea Statutului Procurorilor"* (C-83/19, C-291/19 and C-355/19, EU:C:2020:746, points 198 to 202, esp. point 201).

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16 See point 38 of the present Opinion.

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17 See, to that effect, judgments of 16 May 2017, *Berlioz Investment Fund* (C-682/15, EU:C:2017:373, paragraph 44); of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraph 30); of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 58); and of 6 October 2020*, État luxembourgeois (Judicial protection against requests for information in tax law)* (C-245/19 and C-246/19, EU:C:2020:795, paragraph 47).

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18 See, to that effect, Hofmann, H.C., 'Article 47 – Specific Provisions (Meaning)', in Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), *The EU Charter of Fundamental Rights – A Commentary*, Hart Publishing, 2014, pp. 1197-1275, esp. n°47.50.

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19 Point 85. See also, García-Valdecasas Dorrego, M.-J., 'El Tribunal de Justicia, centinela de la independencia judicial desde la sentencia Associação Sindical dos Juízes Portugueses (ASJP)', *Revista Epañola de Derecho Europeo*, vol. 72, 2019, pp. 75-96, esp. p. 86.

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20 *Independence of the Supreme Court*, paragraph 54, emphasis added. See also, as an illustration of the use of Article 47 of the Charter to interpret Article 19(1) TEU, judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 40 and 41), and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 53 in conjunction with paragraphs 50 and 52).

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21 See, to that effect, Badet, L., 'À propos de l'article 19 du Traité sur l'Union européenne, pierre angulaire de l'action de l'Union européenne pour la sauvegarde de l'État de droit', *Cahiers de droit européen*, 2020, pp. 57-106, esp. pp. 63, 64 and 72; Bonellli, M., and Claes, M., 'Judicial serendipity: how Portuguese judges came to rescue of the Polish judiciary', *European Constitutional Law Review*, vol. 14, 2018, pp. 622-643, esp. p. 635.

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22 See, to that effect, the case-law cited in footnote 17.

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23 See, to that effect, judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraphs 73 and 74 and the ECtHR's case-law cited).

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24 See, to that effect, *AK,* paragraph 130 and the ECtHR's case-law cited. See, for another recent application of this principle, ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144; and ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, § 215.

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25 Definition of 'council for judiciary' given in point 26 of Recommendation CM/Rec(2010)12 ('Judges: independence, efficiency and responsibilities') adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 ('Recommendation CM/Rec(2010)12').

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26 See generally Caroll McNeill, J., *The Politics of Judicial Selection in Ireland*, Four Courts Press, Dublin, 2016.

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27 See, to that effect, also Bobek, M., and Kosař, D., 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', *German Law Journal*, vol. 19, No 7, 2020, pp. 1257- 1292, esp. pp. 1267 and 1268.

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28 See, to that effect, *AK*, paragraph 133. See also, along the same lines but in relation to the role played by legislative authorities in the process for appointing a judge, judgment of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 54).

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29 See, to that effect, judgment of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75).

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30 This has also been true for certain other legal/judicial systems as well. See, for example, Caroll McNeill, J., *The Politics of Judicial Selection in Ireland*, Four Courts Press, Dublin,, 2016, pp. 107 to 110. In previous generations party politics played a huge role in the British system of judicial appointments. Thus, writing to his Lord Chancellor Halsbury in September 1897, the then British Prime Minister (the Earl of Salisbury) spoke frankly of the 'unwritten law of our party system … that party claims should always weigh very heavily in the disposal of the highest legal appointments … Perhaps it is not an ideal system – some day no doubt [senior judges] will be appointed by competitive examination in the Law Reports, but it is our system for the present …' (Heuston, R., *Lives of the Lord Chancellors 1885-1940*, Oxford, 1964, p. 52).

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31 According to Article 56(2) of the Constitution of France, former Presidents of the Republic are members of the Conseil constitutionnel (Constitutional Council) for life.

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32 In accordance with Article 34(1) and (2) of the Special Law of 6 January 1989 on the Constitutional Court, half of the judges must, in order to be appointed to the Constitutional Court, have been member of the Senate, the House of Representatives or a Community or Regional Parliament for at least five years.

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33 According to Article 94 of the Grundgesetz (Basic Law), half the members of the Federal Constitutional Court shall be elected by the Bundestag and half by the Bundesrat. They may not be members of the Bundestag, of the Bundesrat, of the Federal Government or of any of the corresponding bodies of a *Land*.

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34 Under Article 135 of the Constitution of Italy, the Constitutional Court shall be composed of fifteen judges, a third nominated by the President of the Republic, a third by Parliament in joint sitting and a third by

the ordinary and administrative supreme Courts.

35 See, to that effect, judgment of 19 September 2006, *Wilson* (C-506/04, EU:C:2006:587, paragraphs 49 to 52); and *AK,* paragraphs 121 and 122, and the case-law cited.

36 Paragraph 133.

37 Paragraph 134.

38 See, to that effect, paragraph 135 which refers to paragraph 125 quoted above.

39 Paragraph 138.

40 Paragraph 111.

41 Paragraph 114.

42 Paragraph 116.

43 Paragraph 118.

44 See, to that effect, judgment of 26 March 2020, *Review Simpson and HG v Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 75).

45 See, to that effect, judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 66); of 24 June 2019, *Independence of the Supreme Court*, paragraph 74); of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924, paragraph 111); *AK,* paragraph 123; of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraph 63) ; of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 71); and of 9 July 2020, *Land Hessen* (C-272/19, EU:C:2020:535, paragraph 52). For the ECtHR case-law, see ECtHR, 18 October 2018, *Thiam v. France*, CE:ECHR:2018:1018JUD008001812, § 59, and 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, § 144.

46 Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 48). See also, to that effect, *Independence of the Supreme Court*, paragraph 58; of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)* (C-192/18, EU:C:2019:924, paragraph 106); *AK*, paragraph 120; and of 26 March 2020, *Review Simpson and HG* v *Council and Commission* (C-542/18 RX-II and C-543/18 RX-II, EU:C:2020:232, paragraph 71).

47 See, to that effect, judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraphs 45 to 51).

48 See, to that effect, *Independence of the Supreme Court*, paragraph 76; and judgment of 21 January 2020, *Banco de Santander* (C-274/14, EU:C:2020:17, paragraphs 58 to 60).

49 See, by analogy, *Independence of the Supreme Court*, paragraph 114; ECtHR, 23 June 2016, *Baka v. Hungary*, CE:ECHR:2016:0623JUD002026112, § 121, and ECtHR, 6 November 2018, *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, §§ 212 to 214.

50 See, to that effect, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 67).

51 Paragraph 111.

52 See, to that effect, *AK*, paragraph 134.

53 See ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418.

54 ECtHR, 1 December 2020, *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR: 2020:1201JUD002637418, §§ 254 and 263 to 267. For the sake of completeness, it should be noted that the ECtHR also found that the Parliament had breached the applicable voting rules in respect of the appointment procedure in question (see § 271).

55 See Article 97(1) and (2) of the Constitution for judges of the Superior Courts and Article 100(3) and (4) of the Constitution for magistrates of the Inferior Courts.

56 See Article 101B(1) and (15) of the Constitution.

57 See, for example, Article 97(1) of the German Basic Law 1949, Article 104(1) of the Constitution of Italy, Article 203 of the Constitution of Portugal and Article 35.4.1 of the Constitution of Ireland 1937.

58 Opinion No 940/2018, point 43.

59 Opinion of Advocate General Bobek in *Asociaţia "Forumul Judecătorilor din România", SO and Asociaţia "Forumul Judecătorilor din România" and Asociaţia "Mişcarea pentru Apărarea Statutului Procurorilor"* (C-83/19, C-291/19 and C-355/19, EU:C:2020:746, point 170).

60 Opinion No 940/2018, point 44.

61 See, to that effect, Bartole, S., 'Final remarks: the role of the Venice Commission', *Review of Central and East European Law*, vol. 3, 2000, pp. 351-363, esp. p. 355.

62 Opinion No 940/2018, point 30.

63 See Article 96(4) of the Constitution for judges of the Superior Courts and Article 100(6) of the Constitution for magistrates of the Inferior Courts.

64 According to Article 96A(8) of the Constitution, the Judicial Appointments Committee 'shall regulate its own procedure and shall be obliged to publish, with the concurrence of the Minister responsible for justice, the criteria on which its evaluations are made'. These criteria are available on the website of the Minister for Justice (https://justice.gov.mt/en/justice/Pages/criteria-for-appointment-to-the-judiciary.aspx).

65 See Article 96(2) of the Constitution for judges of the Superior Courts and Article 100(2) of the Constitution for magistrates of the Inferior Courts.

66 See, to that effect, judgments of 14 April 2015, *Manea* (C-76/14, EU:C:2015:216, paragraph 53 and the case-law cited), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 54).

67 See, to that effect, judgments of 14 April 2015, *Manea* (C-76/14, EU:C:2015:216, paragraph 54), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 56).

68 See, to that effect, judgments of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 36), and of 23 April 2020, *Herst* (C-401/18, EU:C:2020:295, paragraph 57).

69 Article 49 TEU.

70 Conclusions of the Presidency, European Council in Copenhagen (21 and 22 June 1993).

71 See, to that effect, Lazarova-Déchaux, G., 'L'exigence de qualité de la justice dans la nouvelle stratégie d'élargissement de l'Union européenne', *Revue du droit public*, No 3, 2015, pp. 729 to 759, esp. p. 731 and 737; Bobek, M., and Kosař, D., 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', *German Law Journal*, vol. 19, No 7, 2020, pp. 1257 to 1292, esp. p. 1275. The requirement for 'democratic institutions and *independent judicial ... authorities*' clearly appears in the Commission's 'Agenda 2000 – Vol. I: For a stronger and wider Union' (COM(2000) 97 final) (p. 43 of the English version; emphasis added).

72 SWD(2019) 1017 final.

73 See, to that effect, Title 3.4.3. Governance/Institutions quality, p. 40.

74 I also note that, in the chapter on Malta in the Commission's 2020 Rule of law report – The rule of law situation in the European Union, the Commission states, in relation to the judicial system in Malta, that the Maltese Government submitted a series of proposals for reforms, including as regards the system of judicial appointments, which contribute to strengthening judicial independence (2020 Rule of law report. Country Chapter on the rule of law situation in Malta (SWD (2020) 317 final, p. 2).

75 See, to that effect (on the impact of the absence of action for infringement of EU law when assessing the good faith of a Member State), judgment of 8 April 1976, *Defrenne* (43/75, EU:C:1976:56, paragraph 73).

76 See, to that effect, judgments of 6 October 2015, *Târşia* (C-69/14, EU:C:2015:662, paragraph 28), and of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 52 and the case-law cited).