Strengthening the rule of law and the EU pre-accession policy: Repubblika v. Il-Prim Ministru

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***Repubblika v Il-Prim Ministru*: towards strengthening of the rule of law and the EU pre-accession policy**

Case C-896/19, *Repubblika v Il-Prim Ministru*, Judgment of the Court of Justice (Grand Chamber) of 20 April 2021, EU:C:2021:311

1. Introduction

Could Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights serve as yardsticks for verification of legality of procedures applicable to appointment of judges laid down in the Constitution of Malta? If so, was the role of the Prime Minister in the procedure in question compatible with the said provisions of EU law? In case of a ruling confirming incompatibility, how past and future judicial appointments would be affected? These were, in essence, questions submitted to the Court of Justice, as per Article 267 TFEU, by the *Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali* (First Hall of the Civil Court, sitting as a Constitutional Court of Malta).[1] They gave the Court of Justice yet another opportunity to shape its ever-growing volume of jurisprudence on EU values, in particular, the respect for rule of law and independence of judiciary.[2] As it is well-known and documented in the academic literature, the acts of constitutional vandalism in several Member States, especially in Poland and Hungary, have led not only to continuous political dingdongs between the European Commission, some EU capitals and the unruly teenage Member States but also to Article 7 TEU proceedings as well as several high-profile judgments of the Court of Justice and the European Court of Human Rights.[3] Seen from that perspective, readers who suffer from rule of law crisis fatigue may be excused for thinking that the judgment of the Court in *Repubblika* is just another episode in the rule of law saga, merely a footnote case.[4] On the contrary, its importance should not be underestimated. Apart from implications for the system of judicial appointments in Malta, and further clarification as to the scope and meaning of Article 19(1) TEU and Article 47 of the Charter, its true importance lies in the principle of non-regression, which the judges at Kirchberg decided to make a part of their reasoning. The principle in question precludes the EU Member States from adopting national rules which would amount to a regression in compliance with the rule of law standards. It is precisely for this reason that

[1] See Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=246681&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1266268

[2] See, *inter alia*, Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy* ECLI:EU:C:2019:982; Joined Cases C-558/18 and C-563/18 *Miasto Łowicz and Prokurator Generalny zastępowany przez Prokuraturę Krajową, formerly Prokuratura Okręgowa w Płocku v Skarb Państwa – Wojewoda Łódzki and Others* ECLI:EU:C:2020:234; Case C-192/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:924; Case C-619/18 *European Commission v Republic of Poland* ECLI:EU:C:2019:531; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others* ECLI:EU:C:2021:393.

[3] See, *inter alia*, Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021); Laurent Pech, Dimitry Kochenov (eds), *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case* (SIEPS 2021).

[4] Case C-896/18 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311.

Repubblika received attention of the academic commentariat.[5] Building on the existing literature, the present contribution aims at shedding additional light on the Opinion of AG Hogan,[6] judgment of the Grand Chamber, and their joint impact on EU rule of law *acquis* as well as on potential further enlargements of the European Union. It is argued that *Repubblika* is less a proclamation of a brand new principle but more of an important stepping stone in its shaping. As explained in this contribution, it can be considered a derivative of the principle of loyal cooperation laid down in Article 4(3) TEU. Furthermore, traces of the principle of non-regression have been an inherent part of the pre-accession policy for many years now. For the European Commission *Repubblika* serves on a golden plate new weaponry employable in the infringement procedures *vis-à-vis* recalcitrant EU Member States as well as a new addition to the pre-accession toolkit which the European Union should make good use of in the future accession rounds.

2. Facts and legal background of the case

The facts of *Repubblika* are rather straight forward. The applicant – *Repubblika* – is an association aiming at promotion of protection of justice and rule of law in Malta.[7] It submitted *actio popularis* challenging the compatibility of provisions on appointment of judges laid down in the Maltese Constitution with Articles 19(1) TEU, Article 47 of the Charter, and Article 6 of ECHR. It took as one of its primary targets Article 96(4) and Article 100 (5-6) of the Constitution which allow the Prime Minister, before making a recommendation on judicial appointment to the President of Malta, to override the results of evaluation of candidates conducted by the Judicial Appointments Committee.[8] Such decisions, though, are subject to numerous procedural caveats regulated in the Maltese Constitution. As in several other Member States, judicial appointments involve not only the executive or the legislature but also judicial council, which is supposed to be independent and composed of representatives of the judiciary.[9] In case of Malta, the Committee was established after revision of the Constitution in 2006, that is 2 years after accession of that country to the European Union. The Committee is, in technical terms, a subcommittee of the Commission for the Administration of Justice. Its membership comprises of the Chief Justice, the Attorney General, the Auditor General, the Ombudsman, and the President of the Chamber of Advocates. The general rules laid down in Article 96(1-4) of the Constitution for the superior courts, and Article 100 *in fine* of the Constitution for the inferior courts, envisage the following procedure. Judges are appointed by the President of Malta, on recommendation of the Prime Minister based on evaluation of candidates by the Committee. However, as already alluded to, the Prime Minister may proceed with a recommendation without taking into account the results of assessment made by the Committee. Should that scenario materialise, the Prime Minister has to comply with the following requirements. Firstly, the Prime Minister is required to publish in the Malta Government Gazette a decision explaining the reasons behind the use of this procedural vehicle. Secondly, an oral statement to the Parliament is another *conditio sine qua non*. In its application, *Repubblika* argued that the system established by the Constitution was in breach of Article 19(1) TEU, Article 47 of the Charter, and Article 6 ECHR as the discretion granted

[5] See Mathieu Leloup, Dimitry Kochenov, Aleksejs Dimitrovs, 'Opening the door to solving the "Copenhagen dilemma"? All eyes on Repubblika v Il-Prim Ministru' 46 (2021) EL Rev 692. See also multiple blogposts cited therein.
[6] Case C-896/18 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2020:1055, Opinion of AG Hogan.
[7] See further https://repubblika.org
[8] Hereinafter referred to as the Committee.
[9] For a critical assessment see Michal Bobek and David Kosař, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 (2014) German Law Journal 1257.

to the Prime Minister constituted a threat to the judicial independence, as evidenced by allegedly politicised judicial appointments in the recent past.[10] It was also argued that only appointments meeting the requirements outlined in Opinion 940/2018 of the Venice Commission would cut the mustard.[11] Not surprisingly, the Maltese Prime Minister, acting as respondent in the case at hand, argued to the contrary.

It was against this background that the referring court decided to proceed with its request as per Article 267 TFEU. Being aware of importance of the case for past and future appointments to the Maltese judiciary, the *Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali* asked the Court of Justice to proceed under the expedited procedure.[12] This request was not, however, entertained by the judges at Kirchberg. As explained in paras 18-22 of the Judgment, the expedited procedure is available only in cases of 'exceptional urgency' and when 'the sensitive and complex nature of such a procedure does not lend itself easily to the application of such procedure'. While the conditions for use of expedited procedure were not met in the case at hand, the President of the Court opted to give it a priority treatment.[13]

Before attending to the merits of the case, both AG Hogan and the Grand Chamber of the Court of Justice were called to deal with the arguments of the Polish government as to the non-admissibility of the reference for preliminary ruling.[14] A closer look at both arguments put forward by the Polish representatives may easily leave one perplexed and, in turn, question whether this attempt at a legal kerfuffle was caused by ignorance of the law or by opportunism, or – perhaps – a combination of both. Firstly, it was claimed that the Court of Justice under the preliminary ruling procedure has no jurisdiction to decide on compatibility of national laws with EU law. Instead, such matters are considered to be a material for infringement procedures laid down in Articles 258-259 TFEU. Non admissibility was, according to the Polish government, exacerbated by the fact that the Maltese case was *actio popularis*. Not surprisingly, such a nuance shy take on the jurisdiction of the Court impressed neither AG Hogan, nor the Court. Both, in unison, explained the obvious that while the Court cannot openly and directly rule on compatibility issues, it may provide domestic judges with interpretation of EU law in such a fashion, as to allow national courts to follow guidance and to make an assessment themselves. AG Hogan emphasised that the sole fact of domestic proceedings being *actio popularis* did not make the case abstract, thus not fitting the parameters of the preliminary ruling procedure.[15] What mattered instead was the genuine character of the dispute and Article 19(1) TEU being at the heart of it.[16]

Secondly, the Polish Government consequently parroted its unsuccessful mantra that since the European Union does not have the competences to regulate judicial systems of the Member

[10] According to the Summary of the Request for Preliminary Ruling, the action primarily focused on judicial appointments, which became effective on 25 April 2019.
[11] European Commission for Democracy Through Law, Opinion 940/2018 on Constitutional Arrangements and Separation of Powers and the Independence of the Judiciary and Law Enforcement, https://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)028-e
[12] Article 105 of the Rules of Procedure of the Court of Justice.
[13] This option is available under Article 53(3) of the Rules of Procedure of the Court of Justice.
[14] Neither the European Commission, nor the governments of Malta, Belgium, the Netherlands, and Sweden, which submitted observations to the Court, challenged the admissibility of the reference for preliminary ruling.
[15] In accordance with the well-established jurisprudence of the Court of Justice, hypothetical references are not admissible. See, *inter alia*, Case C-83/91 *Wienand Meilicke v ADV/ORGA F. A. Meyer AG*. ECLI:EU:C:1992:332.
[16] Paras 22-29 of the Opinion.

States, no specific rules may be established on the basis of Article 19(1) TEU.[17] Finally, the Polish Government claimed that since the case did not fall within the remit of implementation of EU law, the Charter was not applicable. Since these arguments fell within the scope of the first question submitted by the referring court, they were not matters of admissibility but rather the substance of the case. Therefore, they ended up being attended to in the main part of the Opinion of AG Hogan and of the Judgment.

3. Opinion of Advocate General Hogan

AG Hogan started off by looking at the applicability of Article 19(1) TEU and Article 47 of the Charter to the case at hand and their potential to serve as yardsticks for verification of legality of the Maltese rules on appointment of judges. As far as Article 19(1) TEU was concerned, AG Hogan had no doubts that the provision in question had the first fiddle to play. A quick scan of recent jurisprudence of the Court of Justice was enough to confirm the importance of independent judiciary for application of EU law and the functioning of the preliminary ruling procedure.[18] While the organisation of national systems of judiciary was the competence of the Member States, it had to be utilised in such a fashion as to remain in compliance with Article 19(1) TEU and to ensure 'effective legal protection in the fields covered by Union law.' By the same token, AG Hogan rejected the argumentation of the Polish Government to this end. As far as the potential application of Article 47 of the Charter was concerned, AG Hogan and the Polish Government were, in general terms, on the same page. Since the case at hand did not deal with 'implementation of EU law', the condition laid down in Article 51 of the Charter was not met, hence the Charter as such was not applicable.[19] However, as AG Hogan argued, the inextricable links between Article 19(1) TEU and Article 47 of the Charter meant that in such cases the former should be read in the light of the latter. Having concluded that the case fell within the remit of Article 19(1) TEU, AG Hogan proceeded to the heart of the matter: the question whether the judicial appointments system provided in the Maltese Constitution was permitted or precluded by Article 19(1) TEU. The analysis is lengthy and detailed. It involves exegesis focusing on the application of Article 19(1) TEU, Article 47 of the Charter, and Article 6 ECHR to procedures governing selection of members of judiciaries. Inevitably, AG Hogan looked at the matter at hand also through the lenses of jurisprudence of the Court of Justice and the European Court of Human Rights.[20] In the words of AG Hogan:

> '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.'[21]

[17] For similar arguments submitted in earlier cases by the Polish government and its representatives see, *inter alia*, Case C-619/18 *Commission v. Republic of Poland*, paras 37-41; Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, paras 73-76.
[18] Para 37 of the Opinion.
[19] See, *inter alia*, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105. For a commentary see, *inter alia*, Angela Ward, 'Article 51' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (2nd ed., Hart 2021).
[20] Paras 50-77 of the Opinion.
[21] Para 70 of the Opinion.

With that apt conclusion AG Hogan delved deeper into some aspects of judicial independence, including rules on composition of courts/tribunals, length of service, grounds for and protection from dismissal, in particular disciplinary procedures, financial autonomy of judiciary from the executive and the legislature. It was argued that, in principle, Article 19(1) TEU was forward looking, thus focusing primarily on securing independence of judges upon their appointment.[22] Yet, in certain circumstances it could be employed to verify legality of appointment procedures as such. AG Hogan argued:

> '[…] 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.'[23]

An in-depth analysis of the Maltese rules on judicial appointments, as juxtaposed with key independence indicators established in case-law of the Court of Justice and of the European Court of Human Rights, led AG Hogan to the conclusion that the contested rules did not fall foul of requirements laid down in EU law. AG Hogan emphasised the diversity of solutions envisaged in domestic laws, thus precluding one size fits all approach. For obvious reasons the centre of gravity of his assessment were guarantees of judicial independence applicable *de iure*, however their existence *de facto* was a matter for the referring court to decide.[24] Interestingly, according to AG Hogan the lack of a constitutional provision explicitly guaranteeing independence of judiciary was not handicap as long as guarantees of different aspects of judicial independence were provided.[25]

A few points made by AG Hogan merit further attention. Firstly, unlike the Court of Justice, AG Hogan answered the third question posed by the Maltese court. Bearing in mind the desiderata of legal certainty and respect for *res judicata*, it is not surprising to see AG Hogan advocating against using Article 19(1) TEU (interpreted in the light of Article 47 of the Charter) as a vehicle to call into question judicial appointments made before the judgment in *Repubblika*.[26] Secondly, AG Hogan considered the importance and the formal status of opinions of the Venice Commission. In this respect he followed the footsteps of Opinion of AG Bobek in *Asociația "Forumul Judecătorilor din România"*.[27] Notwithstanding their political importance and legal qualities, from the point of view of EU law, such opinions are merely a useful source of information. What is more, as AG Hogan claimed, the rationale behind opinions of the Venice Commission is 'arriving at an ideal system'.[28] Consequentially, even if the existing Maltese rules on the judicial appointments did not meet all, however desirable, recommendations of the Venice Commission, it did not mean *per se* that they would

[22] Para 56 of the Opinion.
[23] Para 71 of the Opinion.
[24] Para 82, para 95 of the Opinion.
[25] Para 84 of the Opinion.
[26] Paras 96-104 of the Opinion.
[27] Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others* ECLI:EU:C:2020:746, Opinion of AG Bobek.
[28] Para 88 of the Opinion.

be in breach of Article 19(1) TEU.[29] Thirdly, while AG Hogan did not make a reference to the principle of non-regression, he did note that similarly framed procedures for appointment of judges existed at the time of Malta's accession to the European Union. With this in mind, according to AG Hogan, it must have been considered compliant with Copenhagen criteria as Malta was cleared to join the European Union on 1 May 2004.[30] Furthermore, despite expressing some reservations, the European Commission never formally triggered the infraction procedure against Malta.[31]

4. Judgment of the Court of Justice

Unsurprisingly the judgment of the Court of Justice started with the assessment of arguments presented by the Polish Government on inadmissibility of the reference for preliminary ruling. The judges followed the Opinion of AG Hogan by rejecting the first plea (lack of jurisdiction under Article 267 TFEU to assess compatibility of national law with EU law), and by addressing the second plea (the scope of application of Article 19(1) TEU and Article 47 of the Charter) as part of the answer to the first question submitted by the referring court. The judges unequivocally confirmed that while the Court, indeed, had no jurisdiction under Article 267 TFEU to rule directly on compliance of domestic law with EU law, it could provide national courts with interpretation of EU law tailored in such a way as to facilitate such assessment by domestic judges.

Sticking to the well-established desideratum of *jurisprudence constante*, the Court of Justice reiterated the principles established in its previous judgments and applied them to the case at hand.[32] In this respect, the judges were on the same page as AG Hogan. To begin with, the Court emphasised that Article 19(1) TEU applies to 'fields covered by Union law', irrespective of whether the Member States implement EU law or not (which is a pre-requirement for application of Article 47 of the Charter). Thus, the Court ruled, the Maltese judges installed under the contested rules on judicial appointments, may end up applying and interpreting EU law.[33] Since in the given case the applicant - Repubblika was not relying on any rights established in EU law, the scenario did not fall within parameters of implementation of EU law by a Member State. While this precluded the direct application of Article 47 of the Charter, it had to be taken into account bearing in mind its links to Article 19(1) TEU. Here again, the judges and AG Hogan sang from the same music sheet.[34]

Moving on to the second question asked by the referring court, the Court of Justice started with a useful overview of existing jurisprudence on Article 19(1) TEU and independence of judiciary.[35] The judges confirmed, what is now a well-established principle, that while the organisation of judiciary is a domestic competence, it must be exercised in such a fashion as to make it compliant with EU law. With this in mind, the Court found it fitting to elaborate on the relationship between Article 47 of the Charter and Article 19(1) TEU. It concluded:

> 'while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which

[29] Paras 89-92 of the Opinion.
[30] Para 100 of the Opinion.
[31] Ibid.
[32] Paras 35-46 of the Judgment.
[33] Para 38 of the Judgment.
[34] Para 45 of the Judgment.
[35] Paras 51-57 of the Judgment.

> he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law.'[36]

This, inevitably led to the conclusion that both provisions can be complied with only if the judiciary of a Member State meets the requirements guaranteeing its independence. A brief recap of key independence benchmarks[37] has led the Court to consideration of the established rules in relation to the procedures applicable to judicial appointments in Malta. In this part the Court, building on the argument of AG Hogan, opted to go much further than the Advocate General. The starting point was the same presumption that since Malta was admitted to the European Union on 1 May 2004, it meant that the rules on judicial appointments in place at that time were, in perception of the European Union, in compliance with EU common values. Furthermore, in 2006 when the Maltese Constitution was revised, the Judicial Appointments Committee was established to enhance the democratic credentials of the existing procedure.

The Court emphasised that compliance of national laws with EU values as proclaimed in Article 2 TEU is not only a *conditio sine qua non* for accession to the European Union but also it 'is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State'.[38] At this juncture the Court, building on its previous jurisprudence, elucidated the basic parameters of the principle of non-regression.[39] It ruled as follows:

> 'The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary […]
>
> In that context, the Court has already held, in essence, that the second subparagraph of Article 19(1) TEU must be interpreted as precluding national provisions relating to the organisation of justice which are such as to constitute a reduction, in the Member State concerned, in the protection of the value of the rule of law, in particular the guarantees of judicial independence […]'[40]

The question remained whether the Constitutional reforms introduced by Malta in 2006 constituted such prohibited regression. The analysis conducted by the Court has proven that this was not the case as the introduction of the Committee to the judicial appointment procedure made it 'may, in principle, be such as to contribute to rendering that process more objective, by circumscribing the leeway available to the Prime Minister in the exercise of the power conferred on him or her in that regard'.[41] Furthermore, the Committee itself was procedurally ringfenced from potential influence and pressures coming from the executive and the legislature, thus ticking all relevant boxes in terms of its independence. As to the judicial appointment procedures themselves, the Court was satisfied with the existing rules establishing

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[36] Para 52 of the Judgment.
[37] Paras 53-57 of the Judgment.
[38] Para 63 of the Judgment.
[39] As noted by Leloup, Kochenov, and Domitrovs, the principle of non-regression has been brought to the attention of the Court already in AK case (Joined Cases C-585/18, C-624/18 and C-625/18 *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*) *qua* submission of the EFTA Surveillance Authority. See Leloup, Kochenov, and Domitrovs (n 5) 700.
[40] Paras 64-65 of the Judgment.
[41] Para 66 of the Judgment.

the powers of the Maltese Prime Minister to bypass recommendations of the Committee only exceptionally, and subject to procedural caveats laid down in Articles 96(4) and 100 (5-6) of the Constitution. This led the Court to the conclusion that Article 19(1) TEU did not preclude the Maltese arrangements for the selection of judges. In the light of this, the Court found it unnecessary to answer the third question asked by the referring court.[42]

5. Analysis
5.1. Introduction

The judgment of the Court of Justice in *Repubblika* is important for a number of reasons. Firstly, by calling a spade a spade, it consolidates the incremental evolution of principle of non-regression. Secondly, thanks to *Repubblika*, the principle of non-regression has the potential of becoming an even more prominent item in the EU's pre-accession toolkit where respect for EU values has a leading role to play. Thirdly, it contributes to the step-by-step development of EU rule of law *acquis.* All three implications of *Repubblika* are discussed in turn.

5.2. The principle of non-regression: legal character and scope *ratione materiae* and *ratione personae*

As the starting point it is worth putting the principle of non-regression under the microscope. In the case at hand, the Court of Justice ruled that the Member States are not permitted to adopt national rules governing functioning of judiciary which would amount to regression of rule of law standards. If it were to happen, it would be in breach of Article 19(1) TEU and the values on which the EU is based as per Article 2 TEU. This, in essence, is what the principle of non-regression amounts to. On a closer look, though, there is more than meets the eye.

Firstly, the legal character of the principle of non-regression merits attention. Arguably, it joins the pantheon of judge made general principles of EU law. However, as already argued in the introduction, the principle in question is not as new as one may *prima facie* think. In order to explain this further it is important to consider the relationship between the principle of non-regression and the principle of loyal cooperation, which contemporarily is laid down in Article 4(3) TEU. There is no doubt that it is of foundational importance for the European Union and its legal order. Not surprisingly, a lot of ink has been used to discuss its scope and prominence, and thus it merits no detailed rehearsing here.[43] A reminder is fitting, though, that the principle of loyal co-operation imposes a twofold obligation on the EU Member States. On the one hand, it requires them to take all positive actions necessary to meet the requirements of EU law. On the other hand, it prohibits the Member States from taking steps that could undermine achievement of aims of the European Union. Arguably, it is at the that second juncture where the principle of loyal co-operation and the principle of non-regression meet. As in many other instances in EU law, the first plays the role of *leg generalis*. The latter, therefore, building on Article 4(3) TEU, can be considered as *lex specialis* applicable to rule of law principles enshrined in Articles 2 and 19(1) TEU. Indeed, as the Court of Justice ruled in *Repubblika*, the principle of non-regression establishes a negative obligation to refrain from adopting national provisions undermining independence of judiciary. It is interesting to note, though, that the Court anchored the principle in question in Articles 2 and 19(1) TEU, without mentioning at all the principle of loyal cooperation. Despite this, the inextricable links between the two are

[42] Para 74 of the Judgment.
[43] See, *inter alia*, Marcus Klamert, *The Principle of Loyalty in EU Law* (OUP 2014).

quite clear and in *Repubblika* the Court of Justice by calling a spade a spade has rather contributed to shaping of the principle of non-regression than to its creation from the scratch.

The next issue worth commenting on is the scope of the principle of non-regression. *Repubblika* and the follow-up case law, seem to imply that the scope *ratione materiae* goes beyond the rules on appointment of judges but rather extends to all values falling under the rule of law umbrella. This surely is a welcome development which will give additional thrust to the commitment to EU values, as laid down in Article 2 TEU, as well as to the obligations stemming from Article 19(1) TEU. Since *Repubblika* is anchored in Article 2 TEU one could also argue that the scope of principle of non-regression covers all EU values listed theirein, which would – apart from the rule of law – also include, e.g. respect for human dignity, freedom, democracy, equality, and human rights. Furthermore, the way in which the Court framed it in *Repubblika* suggests that the principle of non-regression applies to any downgrade of rule of law standards as it appears in domestic legislation of a Member State. This triggers a reasonable question whether it the principle of non-regression would also apply if national law, on the paper, ticked all the rule of law boxes but serious deficiencies existed in its application. While clarification from the Court in this respect is yet to come, arguably, the principle of non-regression extends to both, the law in the statute book and the law in operation. In future, such issues could be potentially raised both in infringement procedures brought by the European Commission as well as references for preliminary ruling submitted by national courts. Furthermore, it is worth considering whether the principle of non-regression is applicable beyond the realms of rule of law and other EU values laid down in Article 2 TEU. Thus far it has been employed by the Court of Justice in four instances, and all of them were rule of law related.[44] In its future case law, the Court is likely to indicate the direction of travel in this respect.

Finally, the scope of application of principle of non-regression *ratione personae* merits a closer look. *Repubblika* may give an impression of an inextricable link between the accession to the European Union and the principle in question. Indeed, the Court of Justice (and, for that matter also AG Hogan) argued that the national rules which were challenged by the applicant survived the pre-accession scrutiny, therefore they must have been compliant with Article 2 TEU when Malta joined the European Union in 2004. While in the context of this case such an approach had merits, in a great scheme of things the limitation of the scope of the principle only to recent EU entrants would have been problematic at many levels. Firstly, it would have undermined the principle of equality of the Member States.[45] Secondly, it would have triggered many additional questions, e.g. for how many years after the accession would it apply and which rule of law standards would serve as a point of reference? A cliché as it may be, the rule of law requirements have developed quite considerably since the six founding Member States created the then European Communities. The way case-law of the Court of Justice is developing shows that the principle of non-regression applies to all EU Member States, and it has been decoupled from 49 TEU. A prime example is case C-791/19 *Commission v Poland*, where the Court of Justice reiterated the key parameters of non-regression without linking it to the accession as

[44] Apart from Repubblika, the principle of non-regression was employed by the Court of Justice in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*; Case C-791/19 *Commission v Poland*, and Case C□157/21 *Republic of Poland v European Parliament and Council of the European Union*, ECLI:EU:C:2022:98.

[45] Lucia Serena Rossi, 'The Principle of Equality Among Member States of the European Union' in Lucia Serena Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017); Monica Claes, 'The equality of the Member States' in Katja Ziegler, Päivi Neuvonen, Violeta Moreno-Lax (eds), *Research Handbook on General Principles of EU Law. Constructing Legal Orders in Europe* (Edward Elgar 2022).

such.[46] Such an approach is perfectly plausible as it ensures the already mentioned equality of Member States. This case also demonstrates the principle of non-regression in operation. The Court of Justice ruled that Poland was in breach of Article 19(1) TEU as the Disciplinary Chamber at the Supreme Court lacked independence. This constituted a regression within the meaning of *Repubblika*.[47] The two judgments put to together may serve as encouragement for the European Commission to rely on the principle of non-regression in future infraction cases. Bearing in mind its constitutional importance, it could be used as an aggravating factor for calculation of financial penalties under Article 260 TFEU, where seriousness of breach is one of coefficients. Still, however, one should not be under the illusion that it would be a magic wand that would solve all rule of law problems. The case of Poland demonstrates that the Member States may go as far in their constitutional vandalism as to refuse to pay penalties imposed by the Court of Justice.[48] Seen from that perspective, the principle of non-regression is a useful addition, but its real effectiveness may - under the circumstances - prove to be limited. At the same time, as argued in the next section, it may prove beneficial for the future development of EU pre-accession policy.

5.3. The evolving role of EU values in the EU pre-accession policy

5.3.1. The basics

Article 49 TEU, which regulates the main parameters of accession to the European Union, makes it crystal clear that only European countries which respect EU values laid down in Article 2 TEU, and which are committed to their promotion, may become Member States of the European Union.[49] Its current wording was introduced by the Treaty of Amsterdam,[50] however compliance with EU values as a pre-condition for EU accession goes back many years. Democratic credentials became a part of the enlargement discourse already in 1980s when Greece, Portugal, and Spain negotiated the terms of accession, and in turn became Member States (respectively in 1981 and 1986).[51] Compliance with EU values evolved into one of the formally written conditions of membership when the European Council adopted the Copenhagen Criteria in 1993.[52] The latter were tailor-made for Central and Eastern European countries, which, at the turn of 1980/1990, after a tectonic political shift, stepped on the path to democracy and market economy.[53] Since then the pre-accession policy has considerably

[46] The Court of Justice also confirmed the existence of the principle of non-regression in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others*, para 162.

[47] Para 112-113 of the Judgment.

[48] The Polish Government has, so far, refused to pay penalties due as per Order of the Vice-President of the Court, Case C□204/21 R *Commission of the European Union v Republic of Poland* ECLI:EU:C:2021:878; Order of the Vice President of the Court, Case C□121/21 R *Czech Republic v Republic of Poland* ECLI:EU:C:2021:752.

[49] For an assessment see, *inter alia*, Friedrich Erlbacher, 'Article 49 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights. A Commentary* (OUP 2019).

[50] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340/1.

[51] This was hardly surprising bearing in mind that all three states were at the time emerging from years of dictatorships and, in case of Greece, military juntas. See further on these two accession rounds. See further, *inter alia*, Loukas Tsoukalis, *The European Community and its Mediterranean Enlargement* (George Allen & Unwin 1981); Dudkley Seers and Constantine Vaitsos (eds), *The Second Enlargement of the EEC. The Integration of Unequal Partners* (Macmillan Press 1982).

[52] European Council, 'Conclusions of the Presidency' 21-22 June 1993, SN 180/1/93 REV 1, page 13.

[53] See, *inter alia*, Alan Mayhew, *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* (CUP 1998); Andrea Ott and Kirstyn Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (T.M.C. Asser Press 2002); Christophe Hillion (ed.), *EU Enlargement. A Legal Approach* (Hart 2004).

developed, in particular as far as compliance with EU values is concerned. It became particularly visible when Bulgaria and Romania, due to slow progress with democratic reforms, failed to join in 2004. While their accession was delayed till 2007, it was clear that the prospect of EU membership was shy of being a magic wand that could provide a quick fix for underlying rule of law issues. At that stage, however, it was too late to introduce any major changes to the procedure governing their *rapprochement*. With this in mind, the European Commission opted for post-accession monitoring mechanism, which – in hindsight – seems to have been hardly successful.[54] In mid 2022, that is 15 years after accession, it has still remained in force in relation to Romania.[55] Fast forward, compliance with EU values has been moved to the centre of pre-accession policy. Firstly, a halfway through model was developed in relation to Croatia and Turkey.[56] Its main feature was increased attention paid to rule of law issues. Secondly, the pre-accession policy has been revamped further for the purposes of future accessions. It is nobody's secret that all current candidate and potential candidate countries suffer from rule of law deficiencies of sorts.[57] In order to appreciate the importance of *Repubblika* it is fitting at this stage of analysis to take a closer look at the main parameters of the current pre-accession policy and the role the respect for EU values plays in it.

To start with, since the commencement of accession talks with Croatia in 2005, the EU values dossier has a dedicated chapter 23 in the membership package. It is, by far, the most important chapter, even before the negotiations start. Rule of law conditionality has now omnipresence as soon as countries express a desire to join the European Union.[58] A good example is Albania, which has been subject to strict rule of law benchmarking at every step of its *rapprochement*, first to obtain the candidate status, and later to receive the green light to start accession negotiations. In the new methodology approved by the European Commission in 2020, chapter 23 belongs to the first cluster of negotiations called fundamentals.[59] It is the first to be opened, and the last to be closed in the membership talks.[60] Furthermore, as evidenced by the pending negotiations with Montenegro and Serbia, chapter 23 is heavily underpinned by opening, midterm, and closing benchmarks aimed at securing reforms necessary in order to comply with EU values laid down in Article 2 TEU. They are outlined in screening reports prepared by the European Commission at the final stages of pre-negotiation phase, and subsequently subject to revisions. All of this aims at making sure that new entrants comply with all rule of law requirements, including independence of judiciary, by at the time of accession at the latest, and

[54] See Adam Łazowski, 'And Then They Were Twenty-Seven...A Legal Appraisal of the Sixth Accession Treaty' (2007) 44 CML Rev, 401; Martina Spernbauer, 'Benchmarking, safeguard clauses and verification mechanisms - what's in a name? Recent developments in pre- and post-accession conditionality and compliance with EU law' 3 (2007) Croatian Yearbook of European Law and Policy 273.

[55] See Commission, 'Report from the Commission to the European Parliament and the Council on Progress in Romania under the Cooperation and Verification Mechanism' COM (2021) 370 final.

[56] On the Croatian experience see, *inter alia*, Mirna Vlašić Feketija and Adam Łazowski, 'The Seventh EU Enlargement and Beyond: Pre-Accession Policy vis-à-vis the Western Balkans Revisited' (2014) 10 Croatian Yearbook of European Law and Policy 1.

[57] The current list of candidate countries includes Serbia, Montenegro, Albania, North Macedonia, Ukraine, and Moldova. The potential candidates are Kosovo, Bosnia and Herzegovina, and Georgia. Turkey is also a candidate country though after changes brought during the last decade Turkey and democracy are no longer on speaking terms. Consequentially, its membership bid, and accession negotiations have stalled completely.

[58] It is also at the heart of the Eastern Partnership, that is the regional dimension of the European Neighbourhood Policy. See, *inter alia*, S. Poli (ed), *The European Neighbourhood Policy – Values and Principles* (Routledge 2016).

[59] Commission, 'Enhancing the accession process - A credible EU perspective for the Western Balkans' COM (2020) 57 final.

[60] See further on the new methodology Uroš Ćemalović, 'One Step Forward, Two Steps Back: The EU and the Western Balkans After the Adoption of the New Enlargement Methodology and the Conclusions of the Zagreb Summit' 16 (2020) Croatian Yearbook of European Law and Policy 179.

that newly introduced reforms are bullet proof.[61] The rationale behind the recent reforms of the pre-accession policy has been also to remedy, what Dimitry Kochenov called, a failure of conditionality in the recent accession rounds.[62] This is elaborated further in turn.

5.3.2. Why Repubblika case matters in the pre-accession context?

When it comes to pre-accession policy, the judgment in *Repubblika* matters for several reasons. First, it fills a very important gap, allowing the European Commission to use the principle of non-regression in infringement cases against recalcitrant new Member States which cannot resist the temptation to dismantle pre-accession reforms once they join the European Union. Second, with the principle of non-regression fully on board, the EU has likely received a more efficient instrument in its pre-accession toolkit. As far as the first is concerned, the judgment in question definitely contributes to solving, what academic commentators called, the 'Copenhagen dilemma'.[63] The truth of the matter is that during accession talks the European Communities, and subsequently the European Union, have been free to shape the rule of law conditionality in all shapes and forms. However, until recent rule of law related jurisprudence of the Court of Justice, as of the date of accession the newcomers were allowed to swap the music sheets from the Beethoven's 'Ode to Joy' to Cole Porter's 'Anything Goes'. Put differently, the common wisdom was that rule of law infringements could be tackled as part of the pre-accession policy, but the European Union lacked functioning apparatus to enforce compliance with EU values when candidate countries were becoming the Member States. Article 7 TEU procedure, due to its predominant political flavours and leading role played by the Council/European Council, was doomed to fail from the start. The on-going saga with Article 7 TEU proceedings against Poland and Hungary are evidence enough in this respect.[64] For many years the big unknown was whether the preliminary ruling and the infringement procedures could be employed to tackle rule of law deficiencies. As it is well-known, addition of Article 19(1) TEU by the Treaty of Lisbon, which was followed by the judgment in *Associação Sindical dos Juízes Portugueses* were breaking points. The latter case was, to paraphrase the words of Bonelli and Claes, a truly serendipitous judicial moment which opened a lot of doors.[65] With other cases that have followed it became clear that 'Anything Goes' was no more. The judgment in *Repubblika* and the recognition of principle of non-regression is an important milestone in this respect. However, also in the pre-accession context, it is not as big a novelty as it may *prima facie* look like.

To start with, all EU newcomers have the obligation to comply with EU law in its entirety, sans selected acts of EU secondary legislation which are covered by transitional arrangements.[66] In

[61] See further, *inter alia*, Leposava Ognjanoska, 'Promoting the Rule of Law in the EU Enlargement Policy: A Twofold Challenge' 17 (2021) Croatian Yearbook of European Law and Policy 237.
[62] Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).
[63] See Mathieu Leloup, Dimitry Kochenov, Aleksejs Dimitrovs (n 5) 702-703.
[64] See further, *inter alia*, Dimitry Vladimirovich Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski, Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Springer 2021).
[65] Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de* Contas ECLI:EU:C:2018:117. See further Matteo Bonelli, Monica Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, AssociacAo Sindical dos Juizes Portugueses' 14 (2018) EU Const. 622.
[66] See further Adam Łazowski, 'Permanent Derogations and Transitional Arrangements for New Member States of the European Union: Accession Condictiones Sine Quibus Non' in Diane Fromage (ed), *(Re-)defining Membership: Differentiation in and outside the European Union* (OUP 2023) forthcoming.

accordance with the principle of immediate effect, EU *acquis* starts to apply to new Member States as of the date of accession.[67] This also means that from the date of entry the principle of loyal co-operation applies. Consequentially, new Member States are not permitted to regress on their EU law commitments and, should that happen, the European Commission can step in with the infringement procedures. Furthermore, in the three most recent enlargement rounds the Acts on Conditions of Accession, forming an inherent part of the Accession Treaties, contained safeguard clauses which could have been triggered should newcomers failed to comply with their commitments.[68] In relation to non-regression principle, the JHA safeguard clauses are particularly noteworthy as one can detect traces of the principle in question in their design. For instance, Article 39 of the Act on Conditions of Accession of Croatia, allowed the European Union to trigger - within the first 3 years of Croatia's membership - the safeguard clause and impose measures, including suspension of selected pieces of EU *acquis*, should there be 'serious shortcomings or any imminent risk of such shortcomings' in transposition or implementation EU *acquis* on Area of Freedom, Security, and Justice.[69] Arguably, a regression on rule of law commitments could have been the catalyst for triggering of the safeguard clause. For instance, undermining the independence of judiciary would have had affected the application of EU criminal law mutual recognition instruments, which – as is well-known – are hinged upon mutual trust.[70]

As alluded to earlier, the principle of non-regression may have also future implications for the pre-accession policy. Firstly, it strengthens the authority and the legitimacy of the European Commission to design and enforce rule of law conditionality. Traces of principle of non-regression are clearly visible in recently adopted negotiation frameworks for membership talks with Albania and North Macedonia. In both instances, regression of rule of law reforms may

[67] See further Saulius Lukas Kalėda, 'Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?' (2004) 10 ELJ 102.

[68] Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union [2013] OJ L236/17; Treaty between the Kingdom of Belgium, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Bulgaria and Romania, concerning the accession of the Republic of Bulgaria and Romania to the European Union [2005] OJ L157/11; Treaty between the Kingdom of Belgium, the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Hungary, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Republic of Croatia concerning the accession of the Republic of Croatia to the European Union [2012] OJ L 112/10.

be the catalyst for triggering suspension of accession negotiations.[71] Secondly, the principle of non-regression should find its codification in future accession treaties. It would equip with European Commission with additional weaponry to challenge - with safeguard clauses or the infringement procedures - rule of law 'reforms' the Polish or Hungarian style in future Member State. Above all, now that the principle has been fully articulated and the EU has adequate procedural apparatus, a combination of it all may have a deterrent effect.

5.4. Once again onto independence of judiciary: another brick in the wall?

Last but not least, as already alluded to, *Repubblika* adds to the growing volume of jurisprudence on EU values, in particular the respect for the rule of law and independence of judiciary. The objection to admissibility raised by the Polish government, gave the Court yet another opportunity to reiterate some fundamentals. It is now quite clear that setting up of domestic judiciary is a competence of the Member States. Yet, along the same principles which apply in other areas, such domestic competence must be exercised in a fashion compatible with EU law and its general principles. This approach to interaction between national and EU competence is now very well established in the realms of Internal Market. For instance, requirements which need to be complied with in order to create pharmacies or gambling outlets are a matter of domestic law. At the same time, however, any conditions which need to be complied with as per national law must be compatible with key principles underpinning the right of establishment and the free movement of services.[72] In a similar fashion, taxation of dividends, which is a matter regulated exclusively in domestic law, must remain compatible with free movement of capital. So, the Member States have the freedom to regulate the level of taxation, yet the tax rates cannot, as a general rule, be discriminatory.[73] As one would expect, in relation to the domestic competence to set up the judiciary and the limits thereto, the Court has been consistent throughout. Sadly, the Polish government keeps on challenging the Court's approach, even though such overtures as made in *Repubblika* are doomed to fail.[74]

The Court also took this opportunity to reiterate the key ingredients of independent judiciary, existence of which is a *conditio sine qua non* for compliance with the requirements of Article 19(1) TEU. In this respect, *Repubblika* does not add much new, however it cements the existing jurisprudence. It is interesting that unlike AG Hogan, the Court did not find it fitting to discuss the status of opinions of the Venice Commission in EU law and their relevance in assessing independence of judiciary of the Member States. The Court acknowledged, however, the recent

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[69] For a commentary see Adam Łazowski, 'EU do not worry, Croatia is behind you: A Commentary on the Seventh Accession Treaty' (2012) 8 Croatian Yearbook of European Law & Policy 1.

[70] See, *inter alia*, Valsamis Mitsilegas, *EU Criminal Law* (2nd ed., Hart 2022).

[71] General EU Position on Accession Negotiations with Albania, para 14; General EU Position on Accession Negotiations with North Macedonia, para 14. Both documents on file with the Author.

[72] See, *inter alia*, Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International Ltd v Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* ECLI:EU:C:2009:519; Case C-46/98 *Carmen Media Group Ltd v Land Schleswig-Holstein and Innenminister des Landes Schleswig-Holstein* ECLI:EU:C:2010:505; Joined cases C-570/07 and C-571/07 *José Manuel Blanco Pérez and María del Pilar Chao Gómez v Consejería de Salud y Servicios Sanitarios (C-570/07) and Principado de Asturias (C-571/07)* ECLI:EU:C:2010:300; Case C-531/06 *Commission of the European Communities v Italian Republic* ECLI:EU:C:2009:315.

[73] See, *inter alia*, Case C-35/98 *Staatssecretaris van Financiën and B.G.M. Verkooijen* ECLI:EU:C:2000:294; Case C-292/04 *Wienand Meilicke, Heidi Christa Weyde and Marina Stöffler v Finanzamt Bonn-Innenstadt* ECLI:EU:C:2007:132. See also Commission, 'Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Dividend taxation of individuals in the Internal Market' COM (2003) 810.

[74] See examples in footnote 17 above.

reforms of the *modus operandi* applicable to judicial appointments in Malta, which go in the direction outlined by the Venice Commission.[75] The judgment in question allowed the Court of Justice to look into compliance of the Maltese law with EU *acquis*. Of course, under the preliminary ruling procedure, the Court could not directly rule on matters of compatibility. Thus, the answer of the Court is framed accordingly as interpretation of Article 19(1) TEU, allowing the referring court to apply the conclusions to the facts of the case. While the Court of Justice ruled that the Maltese provisions *per se* did not seem to fall foul of Article 19(1) TEU, it was for the *Qorti Ċivili Prim'Awla – Ġurisdizzjoni Kostituzzjonali* to check whether compliance *de iure* also translated into compliance *de facto*. Alas, it was deprived of this possibility as Repubblika, following the judgment of the Court of Justice, withdrew its application. Thus, the case was removed from the docket of the Maltese court without any further ado.[76]

6. Conclusions

Repubblika is without a doubt an important decision of the Court of Justice. As argued in the present contribution, it is a useful addition to the existing legal framework, including the rule of law jurisprudence of the Court of Justice. However, its real importance lies in the consolidation of the principle of non-regression in relation to the rule of law, including the standards of independence of judiciary. The future will tell to what extent the principle of non-regression will play a role in the infringement procedures, or even Article 7 TEU proceedings. While one swallow does not make the summer, the application of the principle of non-regression in case C-791/19 *Commission v Poland* shows its potential, and by the same token, emphasises the importance of *Repubblika.* It is now up to the European Commission, and the Court of Justice, to make further use of it. The principle of non-regression is also likely to serve as an important contribution to the pre-accession policy. It will allow the European Commission to give extra thrust to conditionality and benchmarking. Building on the existing practice, it would be a welcome development if the principle in question were to be codified in the future accession treaties to have a firm standing in EU primary law.

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[75] Para 24 of the Judgment. On substance of these reforms see further Commission, '2020 Rule of Law Report Country Chapter on the rule of law situation in Malta' SWD (2020) 317 final.

[76] I am grateful to Dr. Ivan Sammut for his advice on the matter.

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