

Debate & Analysis

Supremacy of the Constitution or of EU Law?



KEVIN AQUILINA

A ground breaking decree addressing the nodal point as to which law is supreme, the Constitution of Malta or European Union Law, was delivered on 26 July 2023 by Mr Justice Toni Abela, sitting in the Civil Court, First Hall, in the acts of the garnishee order no. 1070/2023 in the names 'Michael Christian Felsberger et vs TSG Interactive Gaming Europe Ltd'.

It is a great pity that this decree has not been published on the courts of justice electronic portal (ecourts.gov.mt) where court judgments are published, simply because it happens to be a decree, not a judgment. It is also a pity that this decree has not been given adequate publicity in the newspapers bearing in mind its landmark constitutional significance.

From my understanding of the facts, the applicant was seeking to enforce in Malta a foreign judgment delivered in another European Union Member State – Austria – against a locally registered gaming company. The Court, in a decree of 19 July 2023, had declined to enforce that Austrian judgment in Malta against a Maltese registered gaming company. The Court based its decision on article 56A of the Gaming Act, Chapter 583 of the Laws of Malta. This provision is what is referred to in law as an 'ouster clause', that is, a provision enacted by Parliament that expressly prohibits the conferral of jurisdiction upon a court so that the court would not be in



a position to hear that particular type of litigation.

An ouster clause need not be directed only at the judiciary. It could also be directed against independent public officers such as the Auditor General and the Ombudsman. Once an ouster clause is enacted in ordinary law, the court ends up powerless and can do nothing but comply with parliament's will unless the ouster clause is proved to be unconstitutional, or in breach of human rights and EU Law as well as other primary ordinary laws that have precedence over other ordinary laws (such as the Emergency Powers Act or the Diplomatic Privileges and Immunities Act, amongst others). Article 56A was added to the Gaming Act through article 2 of Act No. XXI of 2023, the Gaming (Amendment) Act, 2023. Article 56A reads as follows:

56A. Notwithstanding any provision of the Code of Organization and Civil Procedure or of any other law, as a principle of public policy:

(a) no action shall lie against a licence holder and, or current and, or former officers and, or key persons of a licence holder for matters relating to the provision of a gaming service, or against a player for the receipt of such gaming service, if such action:

(i) conflicts with or undermines the legality of the provision of gaming services in or from Malta by virtue of a licence issued by the Authority, or the legality of any legal or

natural obligation resulting from the provision of such gaming services; and

(ii) relates to an authorised activity which is lawful in terms of the Act and other applicable regulatory instruments; and

(b) The Court shall refuse recognition and, or enforcement in Malta of any foreign judgment and, or decision given upon an action of the type mentioned in sub-article (a).

The Object and Reason of Bill No. 55 of 2 May 2023, that is, the Bill that was subsequently enacted as the Gaming (Amendment) Act, 2023, read as follows: 'The object and reason of this Bill is to codify in law the long-standing public policy of Malta encouraging the establishment of gaming operators in Malta who offer the local and cross-border supply of their services in a manner compliant with local legislation, in an effort to encourage private enterprise in line with article 18 of the Constitution of Malta.'

On 26 July 2023, the Civil Court, following receipt of an application by the applicant Felsberger et delivered a second, more elaborate, decree wherein it stated that once the foreign judgment fell under article 56A aforesaid, that is, the action was against a Maltese gaming licence holder and concerned matters related to the provision of gaming services in Malta, the court was legally debarred from hearing that case. The applicant was basing his re-

quest for the enforcement of the foreign judgment on regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

This regulation is applicable in Malta as part of EU Law. It is also part of Maltese Law. Indeed, rule of court 17 of the Court Practice and Procedure and Good Order Rules, Subsidiary Legislation 12.9, refers to its predecessor, Regulation (EC) No. 44/2001 of 22 December 2000, when it provides for the recognition and enforcement of judgments at EU level. Nevertheless, this rule needs to be updated by the Rule Making Board so that it now refers to Regulation (EU) No 1215/2012 which is the EU regulation that the Civil Court ruled upon. Chief Justice please note before you receive another publicly advertised letter from your newly acquired pen pal (the Prime Minister) to this effect!

What is, however, interesting about this decree is the part concerning the supremacy of the Constitution of Malta over European Union law. The Court noted that, on the one hand, article 95(1) of the Constitution establishes Superior Courts whose jurisdiction is to be regulated by such law that may be in force in Malta, in this instant case, article 56A of the Gaming Act. On the other hand, article 825A of the Code of Organization and Civil Procedure provides that: 'Where regulations of the European

Union provide, with regard to the matters regulated under this title, in any manner different than in this title, the said regulations shall prevail, and the provisions of this Title shall only apply where they are not inconsistent with the provisions of such regulations or in matters not falling within the ambit of such regulations'. The EU regulation in question is 1215/2012 referred to above. The title of the Code of Organization and Civil Procedure in question refers to the enforcement of foreign judgments. As to article 825A, the Court agreed that this provision affirmed the supremacy of European Union Law over Maltese Law. However, the Court noted that Article 6 of the Constitution declared the Constitution to be superior to any other law when it provides that 'if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void'.

The Court argued that when article 6 is analysed, it was clear that when the constitution was amended when Malta was in the process of acceding to the European Union, no reservation was made in relation to the obligations assumed by Malta on accession through the European Union Act, the latter being an ordinary law. Indeed, the Court correctly argued that it should have been in article 6 of the Constitution that a declaration should have been made declaring the Constitution subordinate to European Union Law. Indeed, where European Union Law was to be explicitly saved, this was stated to be so. As examples, the Court quoted articles 46, 50(2)(b), and 56 of the Code of Organization and Civil Procedure.

The Court, therefore, concluded that where there is a conflict between the fundamental law of Malta – the Constitution – and the European Union Act – an ordinary law – it was the former that has the upper hand. Indeed, in this case, the conflict was between article 56A of the Gaming Law that was giving effect to article 95(1) of the Constitution, on the one hand, and EU regulation 1215/2012 that was being given effect through the European Union Act, on the other hand. Article 56A – that enjoyed the protection of the Constitution – was therefore not subject to the EU regulation precisely because of the supremacy of the Constitution.

Continues on page 16 »

Supremacy of the Constitution or of EU Law?

Continued from page 10 »



KEVIN AQUILINA

From a Maltese constitutional perspective, I fully agree with the Court's motivation of its decree bearing in mind also that the Civil Court was seized only of a garnishee order, not of a constitutional matter. Hence, the Civil Court, First Hall, was incompetent to determine in its decree whether article 56A of the Gaming Act was or not in conformity with article 65(1) of the Constitution that requires the Parliament of Malta to enact laws that are in full compliance with the treaty of accession to the European Union. Article 65(1) reads as follows: '65. (1) Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Malta in conformity with full respect for human rights, generally accepted principles of international law and Malta's international and regional obligations in particular those assumed by the treaty of accession to the European Union signed in Athens on the 16th April, 2003'.

Of course, the Court did not consider this point in its decree, possibly because it might not have

been raised by the parties. Once it was not raised, it would have been unfair to the parties were the court to raise it itself *ex officio* and decide thereupon without allowing the parties to at least make submissions thereupon. Yet this provision as evidenced by the words: 'Subject to the provisions of this Constitution', still subjects EU Law to the other provisions of the Constitution, including – of course – the supremacy provision in article 6 thereof. Hence, although Parliament is obliged to enact laws in conformity with EU Law, this obligation ceases where EU Law contravenes any provision of the Constitution. In the instant case, it was article 95(1) of the Constitution that EU Law was breaching.

Nevertheless, the problem is that from the perspective of EU Law, the latter considers itself to be superior to all national laws of EU Member States, whether they are the Constitution or ordinary laws of those EU Member States. Hence, whilst the Maltese court – correctly – affirmed in its decree the Constitution's supremacy – the Court of Justice of the European Union – in terms of EU Law and the case law of the said European Union court would correctly also affirm the supremacy of EU Law over Maltese Law. The result is a Catch-22 situation.

The solution clearly lies in the

guidance given by the Civil Court, that is, an amendment needs to be made to article 6 of the Constitution to the effect that until such period as Malta continues to be a member of the European Union, it is EU Law that should prevail over the provisions of the Constitution. Of course, this amendment to article 6 of the Constitution could not have been done in 2003 – prior to acceding to the European Union, as such amendment requires a two-thirds majority vote in the House of Representatives. At that time, the Labour Party did not favour EU accession as it had its own vision for Malta based on a partnership with the EU instead of full membership. Now that the Labour Party has changed its policy in relation to the EU, there should be no obstacle for Parliament – through a two-thirds majority – to amend article 6 of the Constitution. However, if the Constitution is so amended, the protectionist measure of article 56A of the Gaming Act would need revisiting as well. But this will take quite some time to materialise until the Court of Justice of the European Union pronounces itself on the matter and Malta comes along to change the Constitution.

As a matter of fact, the Republic of Cyprus has addressed this matter in its Constitution. Article 179 of the Constitution of Cyprus, its supremacy provision, was

amended on the following lines following EU accession: '1. Subject to the provisions of Article 1A, this Constitution shall be the supreme law of the Republic. 2. No law or decision of the House of Representatives or of any of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or any administrative function shall in any way be repugnant to, or inconsistent with, any of the provisions of this Constitution or any obligation imposed on the Republic as a result of its participation as a member state of the European Union'. Article 1A, also introduced in the Cypriot Constitution because of EU accession, reads as follows: 'No provision of the Constitution shall be deemed to annul laws enacted, acts done or measures taken by the Republic which become necessary by reason of its obligations as a member state of the European Union, nor does it prevent Regulations, Directives or other acts or binding measures of a legislative character, adopted by the European Union or the European Communities or by their institutions or competent bodies thereof on the basis of the Treaties establishing the European Communities or the Treaty of the European Union, from having legal effect in the Republic'.

A distinction must be drawn between supremacy of the Constitution versus an ordinary law (as was the case above) and supremacy of an Act of Parliament over a subsidiary law. In the latter case, it is the act of Parliament that prevails over the subsidiary law (that could be for instance a regulation, rule, order, bye-law, etc.). This was held, for example, in the Civil Court, First Hall, judgment delivered on 20 July 1988 by Mr Justice Victor Borg Costanzi in 'Louis F. Cassar and Christian Holland in their name and on behalf of and in representation of the Association Youth for the Environment v. The Hon. Prime Minister and Minister of the Interior'. In that case the court correctly annulled a Legal Notice that went contrary to the provisions of the parent act, the Code of Police Laws, under which the Legal Notice was made.

Finally, the above 26 July 2023 decree was followed in a more recent court decree of 8 August 2023, delivered by Mr Justice Francesco Depasquale sitting in the Civil Court, First Hall, in the acts of the garnishee order number 829/2023, in the names 'Jasmin Buchegger v Rabbit Entertainment Limited'.

Kevin Aquilina is Professor of Law at the Faculty of Laws, University of Malta