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Effective Judicial Protection: some recent developments – moving to the essence

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Abstract

This article looks briefly into the evolution of the principle of effective judicial protection in EU law and into the relationship between the different manifestations of that principle, which is by now given expression in Article 47 CFR, Article 19 TEU and various provisions of secondary law. Next, it focusses on recent developments in the case law of the Court of Justice of the EU, which concern two central aspects of the principle of effective judicial protection: the compliance with court judgments and the independence of the judiciary. As far as the first topic is concerned, two rather extreme cases addressed the issue what should be done, as a matter of EU law, in situations where a public authority refuses to comply with a final judicial decision. Then the article continues by discussing the independence of the judiciary as a key rationale for the principle of effective protection. In particular, it summarizes the increasingly detailed requirements to be satisfied in order to protect the independence of judges and indicates how an alleged lack of independence should be assessed in a concrete case.

1. Introduction

Ever since its 'discovery' in 1986,[1] the principle of effective judicial protection has expanded enormously in various respects. First, the content of the principle has been elaborated over the years in both the case law of the Court of Justice and in written primary and secondary EU law; by now, it covers a whole panoply of refined rules and 'sub-principles'. Second, the principle does not only apply to the judicial protection offered by national courts, but also to the judicial protection ensured by the Union courts. Third, it became an important yardstick for national procedural, remedial and sometimes substantive law. Fourth, the principle makes inroads into various classical legal disciplines – administrative law, civil law, criminal law and constitutional law.

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1 Case C-222/84 *Johnston* EU:C:1986:206 and Case C-222/86 *Heylens* EU:C:1987:442.

A recent special issue of REALaw[2] has vividly illustrated many of these aspects of the principle, particularly as regards the interplay between its manifestations[3] in a number of specific areas of EU law, such as environmental law, immigration law, public procurement and EU criminal justice. In these – and other – fields, effective judicial protection is elaborated to different degrees of detail in secondary law, but written and unwritten primary law also plays an important part. In Section 2, I will briefly set out the main lines governing these relationships.

Recent case law of the Court of Justice seems to put in the limelight the constitutional dimension of the principle of effective judicial protection. Arguably, primary considerations behind this principle have always been intimately linked to fundamental rights and to the idea of the rule of law.[4] Still, many questions that were raised were primarily of a procedural nature, such as the issue of reasonable time limits, standing rules, rights of the defence, evidential rules and interim relief. These are indeed vital issues for judicial protection and the case law has incited changes in national legal systems. In recent cases, however, the emphasis seems to shift to the core of the right to effective judicial protection and the relationship with the rule of law is brought to the fore more explicitly than ever before.

The very existence of effective judicial protection[5] has been clearly linked to the rule of law and declared to be of the essence of the latter principle.[6] In turn, a part of the essence of the principle of or right to effective judicial protection is, according to the case law, in the first place, the independence of the judiciary.[7] In the second place, a national legal system that allows a judgment of a court to remain ineffective fails to comply with the essential content of the right to

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2 Issue 2019/2.

3 It may be questioned to what extent we may speak of different sources: if the secondary law provisions are considered to be a reaffirmation of Article 47 of the Charter of Fundamental Rights of the European Union, OJ C202/389 [CFR], while Article 47 CFR reaffirms the principle of effective judicial protection, it is submitted that the ultimate source is the principle. cf for instance Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 163 and Case C-752/18, *Deutsche Umwelthilfe* EU:C:2019:1114, para 34.

4 cf S Prechal and R Widdershoven, 'Redefining the relationship between 'Rewe-effectiveness' and Effective Judicial Protection' (2011) 4 Review of European Administrative Law 31.

5 Sometimes slightly different terms are used, like effective judicial review or right to an effective remedy. These differences in wording do not imply difference in substance.

6 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 36, referring to Case C-72/15 *Rosneft* EU:C:2017:236, para 73. See also Case C-362/14 *Schrems* EU:C:2015:650, para 95.

7 Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 63 and Case C-619/18 *CommissionvPoland (Independence of the Supreme Court)* EU:C:2019:531 para 58. See, for a broader discussion of the very core of effective judicial protection, K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 German Law Journal 884.

effective judicial protection.[8] The underlying rationale of both findings is, indeed, that a *meaningful* access to justice requires independent courts and compliance with the courts judgments.

In Section 3, I will focus on this – at least from the perspective of the Court of Justice - new phenomenon of non-compliance by the executive branch with national courts judgments and the question of how to respond to this in terms of effective judicial protection.

Section 4 will deal with the independence of the judiciary. Indeed, much has been written about this topic ever since the seminal judgment *Associação Sindical dos Juízes Portugueses* (*Portuguese Judges*). However, instead of concentrating on the constitutional importance of this judgment and the requirement of independence in general, I will discuss the conditions this requirement imposes in an ever more detailed fashion. This latter issue raises the question as to the limits of Europeanisation through the principle of effective judicial protection. I will finish with a brief conclusion.

2. How to handle overlap

As was already observed in the Introduction, effective judicial protection which, as such, is an *unwritten* general principle of EU law, is also increasingly provided for in secondary law, though the detail of elaboration differs: the spectrum moves from some very rudimentary and sometimes not entirely clear provisions, through more robust texts to entire directives aimed at effective protection of certain rights.[9] Furthermore, the principle has been *reaffirmed* as a fundamental right in Article 47 CFR.

Primary law may indeed serve as a standard for review of the validity of secondary law. However, more often than not it guides the interpretation of the secondary law provisions and in this process, primary law may fill the gaps. A good example of this is case C-348/16 *Sacko*.[10]

Directive 2013/32 ('Procedure Directive')[11] provides in Article 46 that the Member States must ensure that applicants have the right to an effective remedy

8 Case C-556/17 *Torubarov* EU:C:2019:626, para 72 and Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114, para 35.

9 cf Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, Article 9 (1), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180/60, Article 46 and Directive 2004/48 of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45.

10 Case C-348/16 *Sacko* EU:C:2017:591.

11 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L180/60.

before a court or tribunal against a number of decisions listed in that article. It also states, *inter alia*, that the Member States 'shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, [...] at least in appeals procedures before a court or tribunal of first instance.'[12] In contrast to the procedures before the competent administrative authorities,[13] this provision is silent on the question of whether a hearing must be held before the court deciding on the appeal against a decision of the administration. In this respect, the Court pointed out that 'the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection'.[14] Next, the Court recalled that that principle comprises various elements, in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented. The right to be heard in any procedure, is inherent to the rights of the defence.[15] Therefore, not hearing an applicant for international protection in an appeal procedure 'constitutes a restriction of the rights of the defence, which form part of the principle of effective judicial protection enshrined in Article 47 of the Charter.'[16]

This case does not only show how primary law functions *vis-à-vis* secondary law (the relevant articles of the Procedure Directive are 'read in the light of Article 47 of the Charter')[17]: it also illustrates the relationship between Article 47 CFR and the principle of effective judicial protection.

While the text of Article 47 CFR explicitly lists various components of effective judicial protection, it implies more: other unwritten requirements, such as the rights of the defence and the principle of equality of arms, are part and parcel of effective judicial protection. This symbiosis between Article 47 CFR and the pre-existing principle of effective judicial protection is, in fact, expressed in the case law with the words that Article 47 CFR *reaffirms* the principle. This points to the continuity between the pre-Charter and post-Charter understanding of effective judicial protection; after all, Article 47 should be interpreted in accordance with the Court's previous case law.[18] However, this new constellation

12 Article 46(3).
13 cf for instance Article 14 of Directive 2013/32, providing for a personal interview.
14 Case C-348/16 *Sacko* EU:C:2017:591, para 31.
15 ibid, paras 32 and 34.
16 ibid, para 37.
17 ibid, para 49.
18 cf, in the CFR, the Preamble of and Article 53, which provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law (...)'.

also means that if, for whatever reason, gaps occur in judicial protection, the unwritten principles will be the fallback option.[19]

How does a relative newcomer, Article 19 Treaty on the European Union (TEU), fit into this picture? Paragraph 1, second sentence of this Article provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'

Interestingly, the English version uses the terms 'effective legal protection', whilst the French version speaks of 'protection juridictionnelle effective'. Arguably, legal protection is a broader notion than judicial protection;[20] in any case, the Article covers judicial protection.[21]

As the case law has made clear, Article 47 CFR and Article 19(1) TEU have different scopes of application. While the former applies only if the specific case is within the scope of Union law as defined by Article 52(1) CFR,[22] the latter applies to national courts in general in so far as they *may be called upon* to apply or interpret Union law.[23] The precise delimitation and the respective roles these different provisions have to play are matters that need further clarification. However, as far as the content of effective judicial protection is concerned, it seems that the content is the same: Article 19 (1) TEU, second sentence, refers to the general principle of EU law which is now reaffirmed by Article 47 CFR.[24]

3. Effective judicial protection and public authorities

Effective judicial protection concerns, in the first place, the procedure before the courts. However, it has certain implications for the administration. One of these is the obligation to give reasons for the decisions they take, so that the person concerned is enabled to defend his or her rights under the best possible circumstances and may decide, with full knowledge of the relevant facts, whether it is worth applying to the courts.[25] Furthermore, the reasons given are necessary to enable the court to review the legality of the de-

19 cf S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen and others (eds), *Fundamental Rights in International and European Law. Public and Private Law Perspectives* (TMC Asser Press 2015) 143-157.

20 Also many other language versions use expressions broader than 'judicial protection'.

21 cf for instance Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 34.

22 The same holds in principle also for general principles of EU law : see Case C-206/13 *Siragusa* EU:C:2014:126, paras 34-35.

23 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 40 and Case C-619/18 *Commission vPoland (Independence of the Supreme Court)* EU:C:2019:531, para 51.

24 See, for instance, Case C-348/16 *Sacko* EU:C:2017:591 paras 29-30 and Case C-619/18 *Commission vPoland (Independence of the Supreme Court)* EU:C:2019:531, para 49. cf also Joined Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others(Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, paras 114 and 168-169.

25 This has been standard case law ever since Case C-222/86 *Heylens* EU:C:1987:442.

cision at issue. The case law also makes clear that the way in which the evidence was taken in administrative procedure may impact fairness of judicial procedure[26] and that an obligation to exhaust administrative remedies before turning to a court of law constitutes a limitation on the right to effective judicial protection. Still, this limitation may be justified under Article 52(1) CFR.[27]

A quite recent phenomenon brought before the Court of Justice concerns cases where the administration or even the local government refuses to give effect to a national court judgment that relates to EU law.

For instance, in contrast to previous legislation, a new Hungarian law which entered into force on 5 September 2015 prohibits a court from varying an administrative decision on an application for international protection: the court may only annul the decision and the authority competent in matters of asylum must in principle conduct a new procedure. It is then bound by the operative part and by the reasons stated in the court's decision and must proceed accordingly in the new proceedings. However, this is not what happened in the case of Mr. *Torubarov*. While the national court found, as a result of the 'full and *ex nunc* examination',[28] that the applicant for international protection qualified for it and therefore annulled the decision of the Immigration Office, by a new decision this Office rejected again the application. After this had happened two times, the national court turned to the Court of Justice with the question whether, under Article 46(3) of the Procedure Directive in conjunction with Article 47 CFR, the Hungarian courts have the power to vary administrative decisions of the competent asylum authority refusing international protection and whether the courts may grant such protection themselves. In the opinion of the referring court, the national legislation effectively deprives applicants for international protection of an effective judicial remedy, since the courts can do nothing else than annul the decision of the Immigration Office and refer it back for a new decision. If the Office again refuses to follow the court, this game of 'ping-pong'[29] can be prolonged indefinitely, which runs counter to the rights of the applicant.

The Court held that the right to an effective remedy would be illusory if a Member State's legal system were to allow a final, binding judicial decision to remain inoperative to the detriment of one party.[30] In fact:

'A national law that results in such a situation in practice deprives the applicant for international protection of an effective remedy, within the meaning of

26 Case C-276/01 *Steffensen* EU:C:2003:228.
27 Case C-73/16 *Puškár* EU:C:2017:725.
28 According to Article 46 (3) of Directive 2013/32, referred to above.
29 cf Case C-556/17 *Torubarov* EU:C:2019:339, Opinion of AG Bobek, Introduction.
30 Case C-556/17 *Torubarov* EU:C:2019:626, para 57.

Article 46(3) of Directive 2013/32, and fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter, since the judgment of a court, delivered after an assessment complying with the requirements of Article 46(3) and following which that court decided that the applicant satisfied the conditions laid down by Directive 2011/95 to be granted the status of refugee or person eligible for subsidiary protection, remains ineffective, for lack of any remedy whatsoever by means of which that court may ensure compliance with its judgment.'[31]

The Court continued by recalling its case law, according to which a national court must be able to set aside national provisions that would withhold from it the power to do everything necessary to give full force and effect to directly effective EU law provisions;[32] the Court then concluded by stating that, in order to guarantee an applicant for international protection an effective judicial remedy within the meaning of Article 46(3) of Directive 2013/32 and Article 47 CFR, a national court is required to vary a decision of the administrative body that does not comply with its previous judgment and to substitute its own decision by disapplying, if necessary, the national law that prohibits it from proceeding in that way.

These are indeed far reaching dicta: what the national court is not allowed to do under national law, it is obliged to do as a matter of EU law in order to safeguard effective judicial protection. Indirectly, the judgment also underlines the obligation of the national administration to actually give effect to judicial decisions. This may seem rather obvious but apparently it is not, as the next case also illustrates.

The case of *Deutsche Umwelthilfe*[33] concerned the non-compliance with the obligations flowing from Directive 2008/50,[34] more precisely the very fact that the prescribed limit value for nitrogen dioxide (NO2) had been exceeded, sometimes to a very considerable extent, at numerous locations in Munich. The *Verwaltungsgericht München* (Administrative Court), as well as the *Bayerischer Verwaltungsgerichtshof* (Higher Administrative Court of Bavaria), had threatened the *Land* of Bavaria with financial penalties if it did not take the measures necessary to comply with the limit values set by the Directive 2008/50, including the imposition of traffic bans in respect of certain diesel vehicles in various urban zones. The *Land* of Bavaria at some point paid the penalty, but it still did not comply in full with the terms of the injunction granted against

31 ibid, para 72.

32 Case C-106/77 *Simmenthal* EU:C:1978:49, para 22 and Case C-573/17 *Popławski* EU:C:2019:530, paras 52-62.

33 Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114.

34 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe OJ L152/1.

it by *Bayerischer Verwaltungsgerichtshof*. Instead, representatives of the *Land* of Bavaria, including its Minister-President, publicly stated their intention not to comply with the obligations relating to the imposition of traffic bans. *Deutsche Umwelthilfe* applied for fresh measures, one of these being coercive detention of certain members of the government of Upper Bavaria (Germany) – the Minister for the Environment and Consumer Protection of the *Land* of Bavaria or the Minister-President of that *Land* – provided for by the Code of Civil Procedure. However, the referring court – *Bayerischer Verwaltungsgerichtshof* – observed that, in the case of office holders involved in the exercise of official authority, such a detention was not possible for reasons of constitutional law. The court nevertheless wondered whether the assessment of the legal situation at issue should not be different as a matter of EU law.

The Court of Justice relied indeed on *Torubarov* and found that where under national legislation a judgment of a court remains ineffective because that court does not have any means of securing observance of the judgment, this legislation fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 CFR.[35] In this respect the Court also pointed out that, according to the case law of the European Court of Human Rights relating to Article 6(1) of the ECHR, the fact that the public authorities do not comply with a final, enforceable judicial decision deprives that provision of all useful effect.[36] The Court added that '[t]he right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health.'[37]

Next, the Court recalled the obligation of consistent interpretation and, if that would not be possible, the obligation to set aside any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before that national court, the two avenues the national court can follow in order to give effect to the findings of the Court of Justice. However, the Court also recalled the limits of effective judicial protection: the right to effective judicial protection is not an absolute right and, as Article 52(1) CFR makes clear, it may be restricted, in particular in order to protect the rights and freedoms of others. A measure such as coercive detention entails a limitation on the right to liberty, guaranteed by Article 6 CFR. The Court looked into the limitation under Article 51(1) CFR. While various elements of the examination of the limitation – pertaining in particular to the interpretation of national law – had still to be determined by the referring court, the Court of Justice held that if the referring court were to conclude that, in the context of the balancing exercise between the right to effective remedy and the right to liberty, the limitation on

35 Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114, para 35.
36 ibid, para 37 with reference to *Hornsby v Greece* App no 18357/91 (ECtHR, 19 March 1997), paras 41 and 45.
37 ibid, para 38.

the latter resulting from coercive detention complies with Article 52(1) CFR, EU law would not merely authorise but *require* recourse to such a measure.[38]

These two cases illustrate that actions in court, the Court of Justice included, may provide some relief in cases where recalcitrant public authorities refuse to give effect to earlier judgements. In any case, from the point of view of the rule of law, one of the values 'which are common to the Member States in a society in which, inter alia, justice prevails',[39] it is distressing that judicial interference in such situations is apparently necessary.

4. Independence of the judiciary

The question of the independence of the judiciary is not entirely new. Already in 2006, in *Wilson*,[40] the Court had to interpret the concept of 'remedy before a court or tribunal' provided for in Article 9 of Directive 98/5,[41] which concerned the independence of the body called upon to hear appeals against decisions refusing registration with the Luxembourg Bar. Furthermore, the requirement of independence comes to the fore on a regular basis in relation to the question whether a certain body qualifies as a court or tribunal in the sense of Article 267 TFEU. The requirement that such a body be independent and impartial appeared in the case law of the Court in 1987[42] and has in principle been applied ever since.[43] As a recent judgment confirms, the notion of independence is essentially the same in the context of the principle of effective judicial protection or Article 47 CFR as it is in Article 267 TFEU.[44] It is, however, striking that only recently the independence of the judiciary has gained much more interest than ever before, with as a starting point the *Portuguese Judges*

38 Finally, the Court also recalled the option of state liability as a remedy for breaches of EU law which applies irrespective whichever public authority is responsible for the breach.

39 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 30.

40 Case C-506/04 *Wilson* EU:C:2006:587.

41 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L77/36.

42 Case C-14/86 *Pretore di Salò* EU:C:1987:275, para 7.

43 See, for instance, Case C-222/13 *TDC* EU:C:2014:2265.

44 Case C-274/14 *Banco de Santander* EU:C:2020:17. Moreover, since Article 47 and therefore also the problem of independence of the judiciary, corresponds to Article 6 ECHR, the Court may also rely on the case law of the ECtHR. In any case, the interpretation by the Court of Justice may not fall below the level of protection established in Article 6 ECHR, as interpreted by the ECtHR. cf Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 118.

case.[45] Meanwhile, it has also been 'upgraded' to the status of principle of judicial independence[46].

The requirement that courts be independent forms part of the essence of the right to effective judicial protection, it is inherent in the task of adjudication and it has two aspects. The first is an *external* one, meaning that the body is protected against external intervention or pressure liable to impair the independent judgment of its members as regards proceedings before them. This implies that the body (or its members) should not be subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever;[47] not only any direct influence should be avoided, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned.[48] Furthermore, in accordance with the principle of the separation of powers, the independence of the judiciary must, in particular, be ensured in relation to the legislature and the executive.[49]

The second aspect is *internal* and is very closely linked to impartiality. It seeks to ensure an equal distance of the body (and its individual members) from the parties to the proceedings and their respective interests; what is required is objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[50]

What these rather general and abstract requirements mean has been subsequently translated into more concrete standards. Guarantees of independence and impartiality require more specific rules as to the composition of the body concerned and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members. These rules must be such as to 'dispel any reasonable doubt in the minds of individuals as to the imperviousness'[51] of that body to external factors and its neutrality with respect to the interests before it. In other words, an appearance of a lack of independence must be avoided.

In relation to guarantees against removal from office, the Court has formulated the principle of irremovability[52]: judges may remain in their position

45 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.
46 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 27 and Case C-619/18 *Commissionv Poland (Independence of the Supreme Court)* EU:C:2019:531, para 92.
47 Case C-216/18 *PPU –Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 63.
48 Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others(Independence of the Disciplinary Chamber of the Supreme Court)* EU:C:2019:982, para 125.
49 ibid, para 124.
50 See, for instance Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 65.
51 Case C-619/18 *CommissionvPoland (Independence of the Supreme Court)* EU:C:2019:531, para 74.
52 ibid, para 76.

provided that they have not reached the obligatory retirement age or until the expiry of their mandate (where that mandate is for a fixed term). The principle is however not absolute; strict exceptions are allowed, but these must be warranted by legitimate and compelling grounds and subject to the principle of proportionality. This implies that dismissals of members of the jurisdictional body must be determined by express legislative provisions, which go beyond 'normal' administrative or employment law standards.[53] Moreover, it is widely accepted that the only reason for removal may be incapacity to carry out their duties or a serious breach of their obligations by the judges concerned.[54]

The latter point leads to another set of specific guarantees, namely those relating to disciplinary procedures. These guarantees must prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions. There must be a clear definition of conduct amounting to disciplinary offences and the penalties applicable; the rules must provide for the involvement of an independent body in accordance with a procedure which fully safeguards the rights enshrined in Articles 47 and 48 CFR, in particular the rights of the defence and for the possibility of bringing legal proceedings in which the disciplinary bodies' decisions can be challenged.[55] This implies a guarantee of not being exposed to disciplinary measures for making a reference for a preliminary ruling to the Court of Justice.[56]

As the case law illustrates, lowering the retirement age of judges may raise concerns from the perspective of the principle of irremovability.[57] As such, it does not mean that the retirement age cannot be changed. Even so, in accordance with what has been said above, also the lowering of the retirement age must be justified by a legitimate objective, it must be proportionate in the light of that objective and it may not give rise to reasonable doubts in the minds of individuals as to the lack of independence of the courts. Furthermore, and in any case, lowering the age limit for retirement must be accompanied by adequate transitional measures which protect the legitimate expectations of the persons concerned.[58]

Unsurprisingly, the composition of a judicial body and the mode of appointment of its members have to meet comparable requirements: the conditions and the procedural rules governing the adoption of appointment decisions must be drafted in a way which guarantees that judges are protected from external

53 Case C-222/13 *TDC* EU:C:2014:2265, paras 32 and 35.
54 Case C-619/18 *CommissionvPoland (Independence of the Supreme Court)* EU:C:2019:531, para 76.
55 Case C-216/18 *PPU – Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, para 67
56 Case C-8/19 *PPU* EU:C:2019:110, para 47.
57 Case C-286/12 *CommissionvHungary* EU:C:2012:687, Case C-619/18 *CommissionvPoland (Independence of the Supreme Court)* EU:C:2019:531 and Case C-192/18 *CommissionvPoland (Independence of the ordinary courts)* EU:C:2019:924.
58 Case C-619/18 *CommissionvPoland (Independence of the Supreme Court)* EU:C:2019:531, para 91.

intervention or pressure liable to jeopardise their independence. In particular, they must 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'.[59]

Another strand of the case law concerns the powers vested in officials or institutions in relation to the nomination of judges, their career progress and the ending of the career. While some discretion can be left to these bodies, the substantive conditions and detailed procedural rules governing the adoption of such decisions must – again – be 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.[60] This means, *inter alia*, that objective and verifiable criteria should be provided to be applied in the respective procedures and decision-making processes, as well as the obligation to state reasons, in particular by making reference to those criteria. The possibility to challenge the decisions at issue in court proceedings – which should at the very least include an examination of whether there was no *ultra vires* or improper exercise of authority, error of law or manifest error of assessment – can be equally important.[61]

In so far as bodies such as a Council for the Judiciary[62] are involved in the decision making processes, the Court admitted that their role may certainly contribute to the objectivity of the procedures. However, the proviso is that the body itself is independent of the legislative and executive authorities and, in so far as the body advises another authority or makes appointment (or other) proposals, it should also be independent of the authority which it assists.[63]

Finally, another aspect that has been touched upon in the case law is the level of remuneration. This must be commensurate with the importance of the function the persons, i.e. the judges, carry out.[64]

What we see happen in this 'independence of the judiciary' litigation is that a general principle is given more precise substance in concrete cases and is

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59 Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 135.

60 Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 111.

61 Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 114 and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 145.

62 While their organisation and competencies may differ, the Council for the Judiciary organisations are responsible for the support of the judiciary in the independent delivery of justice. They may be competent with regard to the recruitment of judges, career decisions and disciplinary actions. See, as to the appointment of members of these Councils: Commission, 'the 2019 EU Justice Scoreboard' (Communication) COM(2019) 198 final, 49-50.

63 Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, para 116 and Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 138.

64 Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117, para 45.

refined so that it goes increasingly into details. Although the organisation of justice in the Member States falls within the competence of those Member States, when exercising that competence, the Member States must comply with their obligations under EU law. This is, as such, not a new phenomenon.[65] The fact is, however, that the web of redlines for the Member States is getting dense. This begs the following question: to what extent can findings in one case, as a general standard, be transposed to other cases?

An issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another.[66] There should certainly not be 'one-size-fits all solutions'; space should be left to the Member States to make their choices.[67] However, what matters is a concrete and global assessment and this in two respects.

In the first place, the various elements to be taken into account in the assessment should not be considered in isolation but placed in the broader context. It might be that, when considered separately, the elements would not seem objectionable, whereas their cumulated effect may point to a lack of independence.[68] It might also be the other way round: while certain rules or practices might be questionable from the perspective of independence when taken separately, they might, in the bigger picture, be outweighed by other factors in the system. So, while for instance certain modes of appointment of judges may not be objectionable *per se*, they may become problematic when taking place upon a recommendation of a body which is itself not independent, or when they occur in a system with serious structural deficiencies.

In the second place, an overall assessment requires not only a close scrutiny of the rules alone, but also of the way they are applied and how this application works out. Obviously, perfectly neutral or even laudable rules may, depending

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65 Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 115. cf also for instance Case C-438/05 *Viking* EU:C:2007:772, para 40.

66 cf J Bell, 'Judicial Cultures and Judicial Independence' (2001) 4 Cambridge Yearbook of European Legal Studies 47.

67 cf in comparable sense case law of the ECtHR, according to which '... 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 requires those States to comply with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met (see, inter alia, ECtHR, 6 May 2003, *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, § 193 and the case-law cited; 9 November 2006, *Sacilor Lorminesv. France*, CE:ECHR:2006:1109JUD006541101, § 59; and 18 October 2018, *Thiamv. France*, CE:ECHR:2018:1018JUD0080018l2, § 62 and the case-law cited)' cited in Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 130.

68 See, to this effect, Joined Cases C-585/18, C-624/18 and C-625/18 *A.K. and Others* (*Independence of the Disciplinary Chamber of the Supreme Court*) EU:C:2019:982, para 152.

on the circumstances, be used in a less laudable fashion and impair the independence of the judiciary. Likewise, the reasons and objectives to justify the measures play an important role in this assessment, although sometimes it might be difficult to distinguish between the alleged and real reasons. Here, once again, the context is crucial. For instance, in Poland, the alleged goal of the reform of the retirement age of serving judges of the Supreme Court was to standardise the retirement age of those judges with that applicable to all workers and to improve the age balance among senior members of that court. These are, as such, legitimate objectives of employment policy. However, the documents submitted to the Court contained information that gave rise to serious doubts as to whether the reform genuinely sought such legitimate objectives and was not made with the aim of side-lining a certain group of judges of that Supreme Court. The arguments brought forward by Poland did not dispel these doubts.[69]

5. Conclusion

The proliferation of different manifestations of effective judicial protection and their subtle interplay may not be easy to grasp, but they often have considerable effects. As regards the different manifestations, the *Sacko* case has illustrated the use of three – secondary EU law, Article 47 CFR and the principle of effective judicial protection. In other cases, we see a combination of secondary EU law and Article 47 CFR,[70] Article 47 CFR only[71] or Article 19 TEU[72]. In all those cases, the principle of effective judicial protection played a central role in the reasoning of the Court. While the *Banco de Santander* case,[73] which was as such not discussed in the present contribution, focused directly on the principle of independence, it built indeed upon the recent case law about judicial independence in the context of effective judicial protection. Unlike the other cases, this case concerned the interpretation of Article 267 TFEU, which implies, concerning the question whether a body is to be considered as a 'court or tribunal', that the principle of independence must be satisfied.

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69 Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531, paras 80-96. cf also Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924, paras 126-131.

70 Torubarov was decided on basis of Article 46 of Directive 2013/32 and Article 47 CFR; the *AK-case (Independence of the Disciplinary Chamber of the Supreme Court*) was about interpretation of Article 9 of Directive 2000/78 and Article 47 CFR.

71 Case C-752/18 *Deutsche Umwelthilfe* EU:C:2019:1114 and LM (in the context of EAW FD)

72 Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531 and Case C-192/18 *Commission v Poland (Independence of the ordinary courts)* EU:C:2019:924.

73 Case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17.

It would seem that bringing to life the effective judicial protection enshrined in Article 19 TEU in the *Portuguese Judges* case, in combination with serious problems regarding the independence of the judiciary reported in certain Member States, adds a new and crucial dimension to the already rich case law about the principle of effective judicial protection.

Recent case law of the Court has brought into light some aspects of the essence of the right to effective judicial protection in two respects: both the compliance with court judgments and the independence of the judiciary belong to the very core of effective judicial protection.

Under Article 52 (1) CFR, limitations of fundamental rights cannot affect the essence of a right – the essence is in this sense absolute. However, the conditions and requirements that guarantee independence, for instance, are not absolute. The discussion in the present contribution has shown that a principle like the irremovabilty of judges can be limited for legitimate purposes and provided that proportionality is observed. Comparable considerations hold true in relation to the obligation to comply with judicial decisions. There must be compliance, but the way to realize it may imply that the right to effective judicial protection may be balanced against other fundamental rights.

In a system governed by the rule of law, it is not only widely accepted but the very essence of such a system that the executive complies with judicial decisions. The appropriate way to deal with dissatisfaction with judicial decisions is to change the applicable rules through a democratic process, while respecting other – international or EU – obligations entered into. In order to avoid the right to effective judicial protection from being deprived of all useful effect by the very fact that a public authority refuses to comply with a final judicial decision, EU law may oblige national courts to set aside national rules or national case law that precludes the court in the case before it from guaranteeing that the protection is effective. In any case, this new line of case law applies only in rather extreme situations where the executive has persistently refused to comply with judicial decisions.

While attacks on the judiciary are usually blunt, tampering with their independence is often subtle and not easy to identify. Recent case law of the Court of Justice provides rather detailed requirements to be satisfied in order to protect the independence of judges in various respects. The requirements pertain to the removal of judges, the disciplinary regime applicable to them, their appointment and the discretionary powers of officials or institutions involved in nomination of judges, their career progress and the ending of the career. These powers must be clearly and strictly circumscribed; the ultimate overall test is that an appearance of a lack of independence must be avoided.

This case law has sparked debates about independence of the judiciary in various Member States, as *inter alia* the references to the Court of Justice illustrate. The assessment of the lack of independence is a delicate and contextual exercise: it should not consider the relevant elements in isolation, and while it should start with the examination as to whether the rules as such are 'independ-

ence-proof', an assessment of their actual application and the effects they produce – alone or in combination – is crucial.