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Effective Judicial Protection. Landmarks of Recent Case Law of the Court of Justice of the European Union

Constanta MATUSESCU^{1*}, Steluta IONESCU²

Abstract

The principle of effective judicial protection, established by jurisprudence as one of the constitutive elements of a rule of law at the level of the European Union, is now enshrined in the primary law of the Union both as an obligation for the Member States (Article 19(1) paragraph 2 of the Treaty of the European Union), and as a right guaranteed to individuals (Article 47 of the Charter of Fundamental Rights). The article will mainly analyze the obligation for Member States to "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law", trying to identify, on the basis of the case-law of the Court of Justice of the European Union, the content of this obligation and its main implications in the internal legal systems of the Member States. The analysis of the various meanings of effective judicial protection requires the analysis of its relationship with other principles of Union law, as well as with the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights. Will be highlighted the autonomous dimension recognized by the case-law to the obligation laid down in Article 19(1) paragraph 2 TEU to guarantee the functioning of the decentralized system for the protection of EU rights via the preliminary reference procedure and it is assessed that it may impose certain obligations on Member States even if they do not implement or act within the scope of EU law in the strict sense.

Keywords: *EU law; remedies; procedural autonomy; effectiveness; effective judicial protection.*

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1. Introduction

The conferring of a right must be accompanied by effective judicial remedies and adequate procedures to ensure its effectiveness (*ubi ius ibi remedium*) in the absence of which the right in question would remain a mere statement of principles, its observance being to the goodwill of the public authorities. The existence of an effective judicial protection of fundamental right, essentially consisting of access to an effective remedy before a court and a due process, it appears as an essential element of the "rule of law".

At EU level, this rule has a particular connotation derived from the fact that, unless the jurisdiction is expressly given to the Court of Justice of the European Union (CJEU), the protection of the rights conferred on individuals by Union law is, in principle, ensured by national courts of the Member States. The application of Union law in national courts is governed by the principle of national procedural autonomy, which recognizes the competence of the Member States to determine legal remedies. However, the presumption of national competence to determine the remedies and procedural conditions and rules for implementing EU law is subject to limits resulting from the need not to undermine the effectiveness and uniform application of Union law, thereby calling into question the principles of primacy and direct effect on which the entire EU legal order is founded. Thus, a constant and extremely abundant case law of the CJEU [1], starting with the judgment *Rewe*³, establishes that the procedural rules applicable to actions intended to ensure the full protection of the rights conferred on individuals by European Union law must not be less favorable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise the rights conferred by the legal order of the Union (principle of effectiveness)⁴.

In addition to limiting Member States' procedural autonomy stemming from the principles of equivalence and effectiveness, the CJEU has, since the 1980s, enshrined the principle of effective judicial protection as one of the constitutive elements of a community based on the rule of law, which the EU (at the time the European Community) ought to respect [2]. Thus, with regard to the requirements that national procedural rules must meet in order to ensure the protection of the rights conferred on individuals by EU law, the Court has held that "the requirement of judicial control [...] reflects a general principle of law which underlies the constitutional

³ Judgment of 16 December 1976, *Rewe v Landwirtschaftskammer für das Saarland*, C-33/76, EU:C:1976:188.

⁴ See, more recently, Judgment of 6 October 2015, *Târsia*, C-69/14, EU:C:2015:662, point 27.

traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the European Convention for the protection of human rights and fundamental freedoms". As such, this principle "must be taken into consideration in Community law"⁵, Member States being called upon to ensure the access to their respective national courts in order to guarantee the protection of the rights conferred by Union law.

In its practice, the Court has consistently emphasized that the principle of effective judicial protection is a general principle of Union law⁶. Thus, "while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection" and, consequently, "it is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right"⁷. Given the general nature of the principle, the Court has extended its applicability to the protection of individuals and, where appropriate, even to the protection of Member States against European institutions [3], being analyzed from its perspective not only the national remedies, but also those created by the Treaties.

The content of the principle has been determined by the vast case law of the CJEU. Through its interpretative function, the Court has established an effective judicial protection standard, affecting in particular national legislation. In essence, Member States are required, on behalf of this principle, to ensure access for all claimants, in reasonable time-limits, to an independent and impartial court, which actually has the power to review the contested decision and the right to have a fair trial and the principles of due process, with a reasonable duration, during which the rights of defense, the procedural balance and the right to be represented are respected [2], [4].

In addition to its jurisprudential development, the requirement of effective judicial protection has been recognized in the Union's secondary law either by the incorporation in secondary law of "procedural safeguards" stemming from the standards of judicial protection established by the Court (e.g., Free Movement Directive - Directive 2004/38/EC), either by adopting measures to harmonize national procedural rules in certain complex or sensitive areas of EU law such as public procurement (Directive 89/665/EEC), consumer rights (Directive 93/13/EEC) or refugees

⁵ Judgment of 15 May 1985, *Johnston v Chief Constable of the Royal Ulster Constabulary*, C-222/84, EU:C:1986:206.

⁶ Judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, point 37; Judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, Joined cases C-402/05 P and C-415/05 P, EU:C:2008:461, point 335.

⁷ Judgment *Unibet* (C-432/05), point 42.

(Directive 2005/85). If such harmonization measures or specific rules contained in provisions of secondary legislation are to be complied with within the framework of the procedural conditions for the exercise of EU rights, the interpretation of the relevant provisions in secondary law is guided by the general principle of effective judicial protection itself [5], stating the possibility of the Union to intervene in the implementation sphere.

The doctrine thus notes the existence of a process of “communitarisation” of national procedural law, characterized by the gradual replacement of national procedural rules by (then) Community law standards on the one hand, and by the creation of (then) Community minimum standards on the other [6].

With the entry into force of the Treaty of Lisbon, the principle of effective judicial protection has been expressly confirmed in primary law of the Union. Thus, on the one hand, Article 47 of the Charter of Fundamental Rights of the European Union (“Right to an effective remedy and a fair trial”) states that “everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”. This article, which, according to the CJEU, “constitutes a reaffirmation of the principle of effective judicial protection”⁸, defines in the following paragraphs the content of that right, retaining much of the elements of the case-law of the Court. On the other hand, Article 19(1) TEU, after having defined the EU Courts’ missions in its first paragraph, in the second paragraph provides that “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*”. The position in the treaty of this obligation of the Member States, already enshrined in the case-law of the Court as an expression of the principle of loyal cooperation enshrined in Article 4(3) TEU⁹, reflect the decentralised system for the protection of EU rights. The Court of Justice has interpreted this Article to mean that “the guardians of [the EU] legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States”¹⁰.

⁸ Judgment of 18 March 2010, *Alassini and Others*, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08, EU:C:2010:146, point 61; Judgment of 15 September 2016, *Star Storage and Others*, C-439/14 and C-488/14, EU:C:2016:688, point 46; Judgment of 26 July 2017, *Sacko*, C-348/16, EU:C:2017:591, point 31.

⁹ Judgment of 25 July 2002, *Unión de Pequeños Agricultores v Council*, C-50/00 P, EU:C:2002:462, point 41.

¹⁰ Opinion of 8 March 2011, *Draft agreement - Creation of a unified patent litigation system*, EU:C:2011:123, para. 6.

2. Problem Statement

The two reflections on the principle of effective judicial protection currently contained in the primary law of the Union have been the subject of considerable jurisprudence of the Court in recent years (also determined by the piecemeal state of written EU procedural law), generating an equally abundant literature. Part of the doctrine (particularly some judges of the Court, as part of their extra-judicial activity) considers that through the interaction of Articles 47 of the Charter and paragraph 2 of the Article 19(1) TEU "a Union of effective judicial protection emerges", this being characterized "by a unique, common and autonomous standard of protection", which applies both at national and EU level and which is "infuses" into the legal orders of Member States through the interpretative jurisprudence of the CJEU on the requirements of effective judicial protection and the effectiveness of EU law [7]. As such, the EU system of judicial protection is coherent and completes [8].

However, an important number of commentators critically assess the Court's interpretation of the two provisions. Those criticisms concern, first, the uncertainties which lie in the case-law of the Court as regards the relationship between the requirement of effective judicial protection and the requirement of effectiveness relating to the procedural autonomy of the Member States. Thus, it is noted that in most of the case-law the requirement of effective judicial protection is used as a means serving the effectiveness of EU law, given the content and purpose of the two requirements (individual rights protection, respectively, effective application of substantive EU law) are not the same [3], [9]. On the other hand, it is alleged that the Court applied a double standards of effective judicial protection for the Member States and the Union itself, with reference to its restrictive interpretation of the conditions under which individuals may bring a direct action before the Court of Justice under Article 263(4) TFEU, thereby burdening the Member States with the obligation to provide for indirect review [9], [10].

If the most analyzed aspect, both in literature and case law, is the right to effective judicial protection enshrined in Article 47 of the Charter (and this, quite rightly, given its instrumental role in the exercise of the other fundamental rights recognized by the Charter, [5]), the obligation stipulated in art. 19(1) TEU has also been the subject of ambitious interpretations, which reveal the existence of some autonomous significance. Our paper seeks to identify, based on recent CJEU case law, the content of this latter dimension of the principle of effective judicial protection and implications in the domestic legal orders of the Member States.

3. Research Questions/Aims of the research

In essence, the paper will focus on assessing the case-law of the CJEU in terms of the answer that could be given to whether the obligation incumbent upon Member States under Article 19(1) TEU must be analyzed in relation to the standard of protection established on the basis of Article 47 of the Charter and whether this could affect the Member States' procedural autonomy even in contexts which do not concern fundamental rights.

4. Research Methods

The work is based on a critical analysis of selected case-law of the Court of Justice, in relation to which we intend to identify the elements of continuity and change in the approach of the Court, implications of these decisions on national procedural frameworks and to suggest possible future developments.

5. Findings

5.1. The valences of the effective judicial protection obligation

In the case law of the CJEU, the second subparagraph of Article 19(1) TEU was interpreted as constituting a reaffirmation of the obligation on Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection¹¹, this obligation corresponding to the right enshrined in Article 47 of the Charter of Fundamental Rights of the European Union¹².

The exact meaning of the obligation under Article 19(1) TEU and its relationship with the principle of procedural autonomy, on the one hand, and with Article 47 of the Charter, on the other hand, are quite uncertain.

The effective judicial protection obligation is recognized mainly a procedural dimension - ensuring access to the judge by the Member States¹³. I seem to address the Member States in general and not directly to their national courts, is intended to ensure that possibilities of remedies exist in the Member States so that each individual is able to benefit from such

¹¹ Judgment of 3 October 2013, Inuit Tapiriit Kanatami and Others v Parliament and Council, C-583/11 P, EU:C:2013:625, point 100-101.

¹² Judgment of 16 May 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, point 44; Judgment of 26 July 2017, Sacko, C-348/16, EU:C:2017:591, point 30.

¹³ Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811, point 59.

protection in all the fields in which EU law is applicable. In other words, the provision aims rather to guarantee the exercise to rights and obligations deriving from EU law, rather than protecting a fundamental right of the individual, representing an additional and more specific requirement of the principle of procedural autonomy, together with the classical requirements of equivalence and efficiency (in the sense of *Rene* judgment)¹⁴.

At the same time, the obligation laid down in Article 19(1) TEU can be regarded as an expression of the principle of sincere (loyal) cooperation enshrined in Article 4(3) TEU which requires Member States to ensure effective implementation of EU law by the national judge. Some authors consider that, even in the absence of explicit expression of effective judicial protection obligation in Article 19(1) TEU, it could have been deduced from the provisions of Article 4(3) TEU [11].

If access to the judge is assured, the national procedural rules are assessed with regard of their impact on the effective implementation of EU law. In this case, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that achieves effective judicial protection in the areas covered by European Union law by interpreting domestic law in conformity with EU law or even set aside national procedural rules, therefore eliminating the obstacle that prevents the individual from having access to an adequate remedy¹⁵. In *Unibet*, the Court seems to suggest that, by doing so, the national judge may even correct the state's failure, in support of its fulfillment of its obligation under Article 19(1) TEU, thereby helping to avoid its breach [9].

Although the Court has often used the requirement of effective judicial protection as a parameter for determining the content of the principles of effectiveness, it can be noted, however, that, as opposed to the negative formulation of the principle of effectiveness (do not render impossible or excessively difficult the exercise of rights), effective judicial protection implies rather a positive dimension [3], consisting of creating, where they do not exist, national competences or national remedies, with more serious consequences, therefore, on national procedural frameworks.

Thus, in *Impact*¹⁶, after having held that the requirements of equivalence and effectiveness “embody the general obligation on the Member States to ensure judicial protection of an individual’s rights under

¹⁴ Judgment Inuit, point 102.

¹⁵ Judgment Unibet (C-432/05), point 44.

¹⁶ Judgment of 15 April 2008, *Impact*, C-268/06, EU:C:2008:223.

[Union] law”, the Court has asked, in order not to infringe the principle of effective judicial protection, expanding the jurisdiction of national courts to EU law matters for which they have no competence under national law. The doctrine appreciates that, starting with this case, the principle of effective judicial protection become an overarching principle, absorbing the principles of effectiveness and equivalence, hierarchically superior to that of national procedural autonomy [3], [9].

Also, in the situation where the Member State has completely omitted to exercise its own procedural autonomy, omitting to arrange any kind of remedy for the protection of rights attributed to the individuals by EU law, such remedies must be created. Thus, in *Inuit*, the Court reiterated the considerations previously held in *Unibet*, stating that „[a]s regards the remedies which Member States must provide ... neither the FEU Treaty nor Article 19 TEU intended to create new remedies before the national courts to ensure the observance of EU law other than those already laid down by national law”, but adding that „[t]he position would be otherwise only if the structure of the domestic legal system concerned were such that there was no remedy making it possible, even indirectly, to ensure respect for the rights which individuals derive from EU law, or again if the sole means of access to a court was available to parties who were compelled to act unlawfully”¹⁷.

The obligation of effective judicial protection is, however, given an autonomous dimension in guaranteeing the functioning of the decentralised system for the protection of EU rights. In its name, Member States are required to ensure the place of the national judge in the judicial system of the Union through Article 267 TFEU, making provision for indirect review of the legality of acts of the Union by means of preliminary reference for validity. It is therefore for the Member States to compensate for the lack of judicial protection which would arise from the restrictive conditions in which individuals may bring a direct action before the Court under Article 263 TFEU, offering them the opportunity to change indirectly the validity of a Union act through the preliminary reference for validity when challenging national implementing measures. The preliminary reference thus participates in the complementarity of the Union's remedies, as to render the system of legal remedies available for the individual within the EU legal order overall complete and effective.

Stating that ”that requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of European Union acts”, and that ”the

¹⁷ Judgment *Inuit* (C 583/11 P), points 103-104.

protection conferred by Article 47 of the Charter does not require that an individual should have an unconditional entitlement to bring an action for annulment of European Union legislative acts directly before the Courts of the European Union”, in addition, ”neither that fundamental right nor the second subparagraph of Article 19(1) TEU require that an individual should be entitled to bring actions against such acts, as their primary subject matter, before the national courts or tribunals”¹⁸, Court burdening Member States shall provide an indirect. They must ensure the functioning of the preliminary reference procedure despite national procedural rules, as well as the effect of preliminary decisions despite national substantive or procedure rules [12].

If interpreted in this way, the obligation incumbent on Member States under Article 19(1) TEU can be regarded as an expression of what the doctrine referred to as "dual vigilance" of the European Union's composite system [13], consisting in the fact that, from the point of view of individuals, the national courts are the first ones to ensure the effectiveness not only of their rights deriving from EU law but also to change the lawfulness of an act of the Union, it is no less true that it imposes disproportionate burdens in ensuring effective judicial protection. Recognizing the need for an interpretation of the Treaty provisions on the admissibility of actions brought before it in the light of the fundamental right to effective judicial protection, the Court refuses to relax the conditions of access of individuals to the action for annulment, considering that it would result in a breach of the Treaty, Article 47 of the Charter having no such purpose¹⁹. As such, Member States must overcome this inability of the Union to grant broad access to justice by allowing the national courts, under the control of the Court (by way of preliminary reference), to do so, with the consequence that the absence of a preliminary reference may attract the responsibility of the State²⁰.

Without proposing here to address this issue, we recall that there is a consistent doctrine that casts doubt on the ability of the preliminary reference to constitute a sufficient response to the effective judicial protection deficit of individuals [10], [14], [15], especially given that, in the case of acts of general application of the Union which do not involve implementing measures, the individual would first have to violate internal law in order to have access to justice, that the engagement of this procedure

¹⁸ Judgment Inuit (C-583/11 P), points 95, 105 and 106.

¹⁹ Judgment Inuit (C-583/11 P), points 76, 97 and 98. Although, in other cases, it accepted an extensive interpretation of its own competences in accordance with the provisions of the Treaties (Judgment of 28 March 2017, Rosneft, C-72/15, EU:C:2017:236).

²⁰ Judgment of 30 September 2003, Köbler, C-224/01, EU:C:2003:513; Judgment of 9 September 2015, Ferreira da Silva, C-160/14, EU:C:2015:565.

is not automatic, depending on the attitude the national judge or even taking into account the delays and costs in the Article 267 procedure.

It appears quite evident from the case - law of the Court that for a more effective judicial protection of individuals responsibility is transferred from the EU Court of Justice to the domestic courts. In this context it could be framed and the point of view of Judge Safjan, who believes that "the recognition and enforcement of an individual right under EU law to have access to the preliminary ruling procedure could be the cornerstone of our Union of effective judicial protection" [7].

However, the question arises whether the obligation imposed by Article 19(1) TEU on the Member States implies more than a mere opportunity they have to offer to individuals by means of national remedies to bring an action based on EU law. The requirement for remedies to be "*sufficient*" to ensure effective legal protection in the fields covered by Union law can be interpreted as imposing a certain substantive standard for review, which could be determined on the basis of Article 47 of the Charter?

Although in their scientific work some judges of the Court appreciated that the remedies referred to in Article 19(1) should indeed satisfy the requirements laid down in Article 47 of the Charter [3], and other authors formulating similar views [16], the Court has been reluctant to give Article 19 TEU a link between the procedural autonomy of the Member States and the fundamental right of Art. 47 of the Charter, even if the conclusions of some general advocates went in that direction. For example, in *Donau Chemie*²¹ the Advocate General considers that the principle of effectiveness must be reconsidered in the light of Article 19(1) TEU, which in turn requires "consideration of the right of access to a court, as protected by Article 47 of the Charter of Fundamental Rights of the European Union, as interpreted in the light of Article 6(1) of the European Convention of Human Rights and Fundamental Freedoms ('the ECHR') and the case-law of the European Court of Human Rights related to this provision". Consequently, it considers that the notion of effective judicial protection appears to be more demanding than the classic formula relating to practical impossibility and excessive difficulty, requiring that those national remedies be "accessible, prompt, and reasonably cost effective", which makes it possible to call into question the compatibility with Article 19(1) TEU of remedies which discourage the exercise of rights conferred by European Union law²². However, the Court has decided to test the national rules in

²¹ Judgment of 6 June 2013, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, C-536/11, EU:C:2013:366.

²² Opinion of Advocate General Jääskinen delivered on 7 February 2013 in case Donau

question solely in relation to the classic principle of effectiveness, thus proving to be more enforceable with the national procedural autonomy.

In some cases, the Court has accepted to recognize access to judicial protection as a central element of the effective judicial protection principle, an autonomous dimension going beyond its role as an instrument of guaranteeing the principle of effectiveness. By choosing a more focused approach to fundamental rights, it appears to be willing to decouple the principle of effective judicial protection from that of effectiveness, separately testing the national procedural rules in relation to the requirements arising from both principles²³. However, this autonomous dimension of the right of access to the court has not been established in relation to Article 19(1) TUE, but exclusively in relation to Article 47 of the Charter, by proceeding to a broad interpretation of the scope of its application in line with Article 51(1) of the Charter²⁴. Thus, in a context relating to the interpretation of Article 47 of the Charter, the Advocate General pointed out that this article "cannot be treated independently of the second paragraph of Article 19 TEU", the latter provision must be taken into account in determining the content of the right of access to justice²⁵, but the conclusion which the Court did not follow, the substance of the right to an appeal is examined only under Article 47 of the Charter.

5.2. A possible renewed activism of the Court under Article 19(1) TEU?

It is already several years since the Luxembourg Court described the principle of effective judicial protection as a general principle of law (*Impact judgment*), the literature considering that, in the context of that case-law and the inclusion in primary law of the obligation on Member States to provide for "sufficient remedies" to ensure effective legal protection in the fields covered by Union law, we can witness a renewed activism of the Court [9]. So far, the evolution of jurisprudence only partially confirms these forecasts, as regards the requirements for access to the preliminary procedure (see above). However, a number of elements recently retained by the Court may lead us to the idea that things may change in the future and that Article 19(1) TEU could be used as a basis for the application of the highest standard of

Chemie and Others (C-536/11, ECLI:EU:C:2013:67), paras. 5, 47 and 51.

²³ Judgment of 22 December 2010, DEB, C-279/09, EU:C:2010:811; Judgment of 30 June 2016, Toma, C-205/15, EU:C:2016:499.

²⁴ Judgment of 16 May 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373.

²⁵ Opinion of Advocate General Wathelet delivered in case Berlioz Investment Fund, C-682/15, EU:C:2017:2, paras. 38 and 67.

protection, thus affecting procedural autonomy even in contexts which do not concern fundamental rights.

Such an element is the increasingly frequent reference in the case-law of the Court to the correlation between the obligation imposed on Member States by Article 19(1) TEU by the right laid down in Article 47 of the Charter²⁶ or to the fact that the obligation of the Member States also flows from the two provisions²⁷, which can accredit the idea that there is room for an interpretation of Article 19(1) TEU in the light of Article 47 of the Charter.

At the same time, in the event that it would be limited by the provision in Article 51(1) of the Charter relating to its scope (although in some cases he interpreted this provision extensively²⁸), the Court could use Article 19(1) TEU as an independent basis of control over national procedural rules, possibly having in the background the loyalty obligation (Article 4(3) TEU), which is constantly invoked when discussing the obligations of the Member States to ensure the effectiveness of Union law [11]. From this point of view, the scope of Article 19(1) TEU ("fields covered by Union law") seems at least textually wider than that of the Charter ("implementing Union law"), the first may eventually cover those situations where there is no Union legislation. On the same basis, the Commission may also initiate an action for failure to fulfill obligations where it considers the national remedies inappropriate [9]. Moreover, such use of Article 19(1) TEU appears to be prefigured, given the press release of the Commission dated 29 July 2017²⁹. The Commission announces the launch the infringement procedure against Poland following the adoption of the Law on the Ordinary Courts Organisation, which would violate several primary and secondary Union provisions on equal opportunities and equal treatment of men and women in matters of employment and occupation. In the Letter of Formal Notice, the Commission also raises concerns that by giving the Minister of Justice the discretionary power to prolong the mandate of judges who have reached retirement age, as well as to dismiss and appoint Court Presidents, the independence of Polish courts will be undermined, sending in this regard to "Article 19(1) of the Treaty on European Union (TEU) in combination with Article 47 of the EU Charter of Fundamental Rights". Especially reference to the discretionary power of

²⁶ Judgment of 26 July 2017, Sacko, C-348/16, EU:C:2017:591, points 29- 30.

²⁷ Judgment of 28 April 2015, T & L Sugars and Sidul Açúcares v Commission, C-456/13 P, EU:C:2015:284.

²⁸ Judgment of 26 February 2013, Åkerberg Fransson, C-617/10, EU:C:2013:105.

²⁹ European Commission (2017) - Press release, European Commission launches infringement against Poland over measures affecting the judiciary Brussels, 29 July 2017, IP-17-220

the Minister of Justice to dismiss and appoint Court Presidents would give the CJEU, in the event that this case would reach the contentious phase, the chance to determine whether the effective European judicial protection standard established on the basis of Article 47 of the Charter should be applied, in the light of the obligation laid down in Article 19(1) TEU, also in purely internal situations.

6. Conclusions

Notwithstanding any criticism, the case-law of the CJEU on the principle of effective judicial protection, under the two dimensions it now stands- a duty of States and a right of individuals, is clearly aimed at ensuring a high and consistent standard of effective judicial protection. It is based on a legal construction in which the task of ensuring protection is primarily for the Member States, but under the control of the Court, which illustrates the EU legal order shift to "cooperative federalism" model [17].

The obligation of effective judicial protection laid down in Article 19(1) TEU has also contributed in recent years to the shaping of this procedural standard by the European Court of Justice, in particular as regards the definition of access to justice for individuals, extending, to a certain degree, the discretion of the national courts in enforcing this concept.

It remains to be seen whether, in the name of this high and uniform standard of protection, the Court will decide to bring arguments to show that there are certain obligations flowing directly from Article 19(1) TEU which do not require the Member States to be implementing or acting within the scope of EU law in the strict sense. It is interesting to see how much the Court will choose to interfere with the procedural autonomy of the Member States, such an interpretation undoubtedly posing significant pressure on each Member State's own protection mechanisms. Recent infringement procedure initiated against Poland if it comes before the Court can clarify its intent, sending signals equally to other Member States considered to put pressure on their judicial systems.

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