

The doctrine of effective judicial protection in the European Court of Justice (ECJ) case law

Professor Sophie Robin-Olivier
La Sorbonne School of Law
University Paris 1 Panthéon-Sorbonne



Funded by the European Union's Justice Programme (2014-2020).

The content of this publication represents the views of the author only and is her/his sole responsibility.
The European Commission does not accept any responsibility for use that may be made of the information it contains.

Structure of the presentation

I- The principle of national procedural autonomy

II- Limits to procedural autonomy: The principles of Equivalence and Effectiveness

III- Effective judicial remedy as a fundamental right
and general principle of EU law

I- The principle of national procedural autonomy

Presumption of national competence

in procedural matters and organization of the judiciary

Implementation of EU law is ensured according to national law,
unless EU norms exist

The powers of the EU are limited

«...in the absence of Community rules on the subject, it is for the domestic legal system of each Member State to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which individuals derive from the direct effect of Community law,

(... provided that such conditions are not less favourable than those relating to similar actions of a domestic nature nor framed so as to render virtually impossible the exercise of rights conferred by Community law »)

ECJ, *Emmott*, C-208/90 (1991)

It is for the Member States to ensure effective collection of the Union's own resources...

... to ensure that all VAT revenue is collected, and thereby that the financial interests of the EU are protected, the ***Member States are free to choose the applicable penalties***, which may take the form of administrative penalties, criminal penalties or a combination of the two

CJUE, *M.A.S*, C-42/17 (2017)

- What happens if a Member State omits to exercise its procedural autonomy, and there is no remedy for the protection of rights attributed to the individuals by EU law?
- What must national courts do to remedy such omission?

II- Limits to procedural autonomy: The principles of Equivalence and Effectiveness

Repayment of charges levied by a member state contrary to the rules of community law
« may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable »...

But

« those conditions *may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by community law* »

CJCE, *San Giorgio*, 199/82 (1983)

The notion of Equivalence

“Protection of the rights conferred to individuals by EU law must be fundamentally equivalent to the ones that the Member State accords to the rights protected by national law”

= no distinction, where the purpose and cause of action are similar

- Equivalence does not require Member States to extend their most favourable rules
- Equivalence is respected if an objective justification, not linked with the EU or national nature of the remedy questioned, is invoked

What Equivalence means, regarding limitation periods

Equivalence has not been disregarded if

national rules on the limitation period are applicable both to actions for damages based on EU law and those based on national law

and

their applicability does not depend on whether the right to claim full compensation for the harm results from an infringement of national competition rules or EU competition law »

ECJ, *Cogeco Communications*, C-637/17 (2019)
Compensation for abuse of dominant position

Identification of comparable procedures is not always easy...

It requires full knowledge of (comparable) national procedures...

« With regard to the comparability of actions, ***it is for the national court***, which has direct knowledge of the detailed procedural rules applicable, to ascertain whether the actions concerned are similar as regards ***their purpose, cause of action and essential characteristics*** »

ECJ, *Commissaire général aux réfugiés and aux apatrides*, C-651/19 (2020)
Procedural rules concerning service of decisions relating to applications for international protection (implementation of Directive 2013/32 on common procedures for granting and withdrawing international protection)

⇒ ***In most cases, assessment of equivalence is for the national court***

The notion of Effectiveness

National law does not satisfy the effectiveness requirement
if it makes “*virtually impossible or excessively difficult*”
the exercise of right conferred by EU law that national courts must protect

« any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to community law would be incompatible with community law

This is the case for « **presumptions or rules of evidence** intended to place upon the taxpayer the burden of establishing that the charges unduly paid have not been passed on to other persons or special limitations concerning the form of the evidence to be adduced, such as the exclusion of any kind of evidence other than documentary evidence »

CJCE, *San Giorgio*, 199/82 (1983)

⇒ **national procedures must allow implementation of EU law**

This requirement goes beyond the principle of non-discrimination /equivalence

Global assessment of effectiveness

The question as to whether a national procedural provision renders the application of EU law impossible or excessively difficult must be analysed by reference to ***the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies***

In that context, it is necessary, inter alia, to take into consideration, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure

ECJ, *Commissaire général aux réfugiés and aux apatrides*, C-651/19 (2020)

Key topics in the ECJ case law in which Effectiveness was tested

- Standing
 - Substantive remedies available to individuals
- Adequacy and appropriateness of the compensation provided for by the national legal system
 - Existence of interim reliefs in case of urgent need for redress
 - Time limits to activate remedies
- Scope of national courts' authority to consider EU law on their own motion

On standing

“Effective judicial protection is not ensured if **the individual is forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Community law**”

ECJ, *Unibet*, C-432/05, 2007

On types of remedies

Member states do not have to introduce new or specific remedies

But

Sanctions must be effective and with a deterrent effect

⇒ Inadequacy of a mere reimbursement of the expenses incurred for a work interview

ECJ, Von Colson, C14/83, 1984

⇒ In discrimination cases, when compensation is the chosen remedy, it must be full

ECJ, McDermott and Cotter, C-286/85, 1987

ECJ, Marshall II, C-271/91, 1993

On time limits for bringing proceedings

Reasonable time limits are compatible with the principle of effectiveness ***in the interests of legal certainty*** which protects both the individual and the authorities concerned

The imposition of periods for bringing proceedings ***which start to run only from the date on which the person concerned was aware*** or at least ought to have been aware of the situation is not considered as an excessive difficulty

See namely: ECJ, *Caterpillar Financial Services*, C-500/16, 2017

Importance of context

« *in the context of competition law ...*

...account must be taken of the *specificities of competition law cases* and in particular of the fact that the bringing of actions for damages ... requires, in principle, *a complex factual and economic analysis.*

... national legislation laying down the date from which the limitation period starts to run, the duration and the rules for suspension or interruption of that period must be adapted to the specificities of competition law

ECJ, *Cogeco Communications*, C-637/17 (2019)
Compensation for abuse of dominant position

Global and contextual assessment of Equivalence and Effectiveness

- Conformity of national law cannot be assessed *in abstracto* but must be evaluated in the concrete context of the case
- All relevant aspects of the national measures concerned, and of the legal system within which they apply, must be taken into account

Quiz

Is it possible that effectiveness requires criminal sanctions?

- a) Yes
- b) No

III- Effective judicial protection as a fundamental right and general principle of EU law

Constitutional dimension of the right to an effective judicial remedy

Core elements of the fundamental right

Substance of the right to an effective remedy and a fair trial (Article 47 CFR)

Constitutional dimension of the right to an effective judicial remedy

- A general principle of EU law (ECJ, *Johnson*, 222/84, 1986) referring to ***constitutional traditions common to the Member States***,
and to ***Articles 6 & 13 of the ECHR***
 - **Article 47 of the EU Charter of fundamental rights (CFR, 2000)**
 - **Art 19(1) TUE (Lisbon)**
- « Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law »

Article 47 - Right to an effective remedy and to a fair trial

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

Everyone is entitled to ***a fair and public hearing within a reasonable time by an independent and impartial tribunal*** previously established by law. Everyone shall have ***the possibility of being advised, defended and represented.***

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. »

Core elements of the fundamental right (and general principle)

- A right to activate the necessary judicial control and benefit appropriate remedies for the protection of the rights conferred by Union law
- A right that can never be totally eliminated, not even on grounds of national security
 - Direct effect

Direct effect of Article 47 of the Charter

Article 47 « is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order ***to confer on individuals a right on which they may rely as such*** »

ECJ, *Egenberger*, C-414/16, 2018

ECJ, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, C-585/18, C-624/18 and C-625/18, 2019

ECJ, *Országos*, C-924/19 PPU and C-925/19 PPU, 2020

Substance of the right to Article 47

EU Directives are interpreted « in the light of Article 47 »

⇒ Transformations of national procedures and judicial systems may be required

- ***Right to judicial review and not only an appeal before an administrative authority***

ECJ, Országos, C-924/19 PPU and C-925/19 PPU (Grand Chamber), 2020

Directive 2008/115 on common standards and procedures for returning illegally staying third-country nationals

- ***The balancing exercise required in cases of discrimination must be achieved by an independent authority, and ultimately by a national court***

ECJ, Egenberger, C-414/16, 2018

Directive 2000/78 on equal treatment

- ***The judgment of a court cannot remain ineffective*** because that court does not have any means of securing observance of that judgment

ECJ, *Torubarov*, C-556/17, 2019

Directive 2013/32 on common procedures for granting and withdrawing international protection

- A court is allowed (or even obliged) to ***order the coercive detention of office holders involved in the exercise of official authority who are responsible for violation of EU environmental law*** (after balancing the right to an effective remedy and the right to liberty)

ECJ, *Deutsche Umwelthilfe*, C-752/18, 2019

Directive 2008/50 on Atmospheric pollution

...

The right to an annual payed leave based on Directive 2003/88 on working time and **the right to an effective remedy** set out in Article 47 of the Charter

preclude the worker having to take his leave first before establishing whether he has the right to be paid in respect of that leave

CJUE, *King*, C-214/16, 2017

⇒ A reform of procedures before employment tribunals is necessary

Combining article 19(1) TEU and article 47 of the Charter

« ...Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law

... every Member State must, under the second subparagraph of Article 19(1) TEU, ***ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by EU law meet the requirements of effective judicial protection*** »

⇒ ***Independence and impartiality*** of national courts and tribunals are required

ECJ, *Associação Sindical dos Juizes Portugueses*, C-64/16, 2018

ECJ, *Commission v Poland*, C-618/19 (2019)

...

Quiz

Does Article 47 replace reference to Article 6 and 13 of the ECHR
in the case law of the Court of justice ?

- a) Yes
- b) No

Conclusion

1/ A major transformation of EU law

From procedural autonomy to EU law substantial impact on national procedures

2/ A tremendous extension of EU competences

⇒ Harmonisation of the law, mostly based on the case law of the ECJ

3/ **The fundamental right/general principle of law coexists with the requirement of Equivalence and Effectiveness of national procedures** to ensure implementation of EU law

4/ **A human right dimension was added to the requirement of effectiveness of national procedures**

Effective remedy is not only a question of enforcement of EU law

The right to an effective remedy has gained the value and legal force of a fundamental right