Article 47 of the Charter and the Principle of Effective Judicial Protection before National Courts

~~Concluding~~ Remarks

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I. Introduction

We concluded our first volume of this project arguing that the application of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter EUCFR or 'the Charter') by the Court of Justice of the European Union (hereinafter CJEU or 'the Court') has been 'remarkable', both quantitatively and qualitatively.[1] Quantitatively, Article 47 is – by far – the most commonly used provision of the Charter by the CJEU.[2] Qualitatively, the first volume showed that Article 47 has become a cornerstone of the European system of multilevel judicial protection and has been used to shape systemic features of the national legal orders of the Member States.[3]

However, to that finding we also added that the story of the role of Article 47 in the European legal order could only be complete if the perspectives of national courts are also taken into consideration. This is what our contributors have done in this second volume, presenting domestic stories and perspectives on the application of Article 47

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[1] See M Bonelli, M Eliantonio and G Gentile, 'Conclusions', in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection – Volume I: The Court of Justice's Perspective* (Hart Publishing, 2022) 273.

[2] See G Gentile and S Menzione, 'Searching for the Pieces of the EU Justice Puzzle: Articles 47, 48, 49 and 50 of the EU Charter of Fundamental Rights', in Bonelli, Eliantonio and Gentile (n 1) 27. See also E Frantizou, 'Binding Charter Ten Years on: More than a "Mere Entreaty"?' (2019) 38 *Yearbook of European Law* 73; K Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in M Bobek and JM Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020).

[3] See, for example, S Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?', M Krajewski, 'The EU Right to an Independent Judge: How Much Consensus Across the EU?' and M Bonelli, 'Article 47 of the Charter, Effective Judicial Protection and the (Procedural) Autonomy of the Member States', all in Bonelli, Eliantonio and Gentile (n 1).

by national courts of 11 legal orders. Is the application of Article 47 of the Charter by national courts also 'remarkable'? Does Article 47 of the Charter play the same fundamental role before national courts?

On the basis of the analyses conducted in the chapters of this second volume, our conclusions on the national courts' perspectives are more nuanced. First, as we will point out in the following pages, there is remarkable diversity between different Member States, both from a quantitative and a qualitative point of view. The answers to the question of the 'overall impact' of Article 47 in the national legal orders range from an almost 'non-existent' impact in Croatia to a 'pervasive' impact in Italy. Second, the term of comparison also influences our conclusion. So, for example, from a quantitative point of view, Article 47 is the most commonly used provision of the Charter by the national courts of the legal systems selected for this collection as well.[4] When comparing the use of Article 47 to other Charter provisions, its use by national courts is therefore rather remarkable.[5] At the same time, if the points of comparison are the corresponding rights of the European Convention of Human Rights (ECHR)[6] or of national constitutions, then a less positive picture emerges, as the Charter seems to still mostly play second fiddle to other fundamental rights documents. In that sense, while Article 47 might be comparatively more popular than other Charter rights, the overall limited use of the Charter by national courts continues to raise broader questions on the impact of the Charter in domestic legal orders.[7]

It is challenging to offer general conclusions bringing together all national experiences. Hence, the only main conclusion could be that we can observe a rather differentiated impact of Article 47 in the legal orders that our authors have studied. As a consequence, we need to look closer to the ground, within the different legal orders, and within them to different substantive areas of law. Thanks to our contributors, we can highlight areas where the impact of Article 47 has been significant and others where it has been more limited, or even negligible; we can reflect on the obstacles that may have limited the application of Article 47, but also highlight its emerging – at least in some Member States – potential as a tool to ensure a more robust protection of European fundamental rights, and of EU law more generally; we can assess whether the CJEU and national courts are speaking the same language, or at least a sufficiently similar one, when it comes to the interpretation and application of Article 47; and ultimately we can reflect on what the national perspectives teach us on the role of the provision in the composite and multilevel European fundamental rights landscape.

This concluding chapter illustrates the quantitative findings of the national contributions before moving on to the qualitative analysis and then looking at the systemic impact of Article 47 EUCFR in the national legal orders, following the structure of

[4] Of course, the frequency of its use by the CJEU also depends on the number of the preliminary references related to Art 47 raised by national courts, so in that sense its relatively frequent use by national courts also feeds into the CJEU use.

[5] See the chapter on Ireland.

[6] See Arts 6 and 13 ECHR.

[7] See also M Bobek and JM Adams-Prassl, 'Conclusions' in M Bobek and JM Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020) 561, who observe that from a quantitative point of view, the use of the Charter by national courts is 'underwhelming'.

the questionnaire presented to our authors.[8] The chapter concludes with a reflection on the role and position of Article 47 in the European network of fundamental rights protection.

II. Quantitative Analysis

Our contributors have sought to explore how many cases cite Article 47 of the Charter, and in which fields and in which type of courts the citations of this provision could be traced. While mindful of the limited information which sheer numerical data can reveal, we nevertheless considered it important to get some information on the quantitative presence of Article 47. The numerical presence of cases involving Article 47 reveals, from a comparative perspective, the potential impact of the provision *on the ground*. How many cases involve the interpretation of this provision is indicative of several findings, among others: the familiarity of national lawyers and courts with Article 47, the importance of the EU standards of judicial protection in national litigation, and the extent to which they shape the arguments submitted by national practitioners before national courts in relation to EU law claims.

One fundamental caveat, before embarking on our quantitative examination of the use of Article 47 by national courts, regards the important methodological limitations reported by our contributors. As illustrated by several chapters, the publicly available data are limited, dispersed in different platforms or not easily accessible.[9] Also, in some cases, different search engines have produced different numerical results.[10] This is because not all judgments have been published or reported in the same databases. Another complication for the quantitative analysis concerned the selection of the search terms and the ways in which national courts have used concepts of 'effective remedies', '(effective) judicial protection' and synonyms interchangeably. The linguistic variety has unsurprisingly further complicated the quantitative analysis of the impact of Article 47 in the Member States studied.

As hinted ~~at already~~ in the Introduction, there is remarkable difference in the quantitative results, ranging from legal systems where Article 47 has only been used in a handful of cases to systems where thousands of cases can be identified. ~~In Sweden,~~ ~~for~~ example, the quantitative search for judgments quoting 'Article 47 of the EU Charter' yielded only eight cases and ~~in Croatia~~ a few dozen. According to the author of the Croatian chapter, 'it can perhaps be argued that Article 47 of the Charter hardly exists in the case law of the Croatian courts'.[11] In Sweden, however, when expanding the search to terms such as an 'effective remedy', Article 6 of the European Convention on Human Rights (ECHR), the 'principle of effectiveness' and the 'principle of effective judicial protection', a different picture emerges, which illustrates a ~~remarkable~~ presence of a 'European judicial protection' narrative in the national courts' case law.

[8] The questionnaire is at p XXX [XXXX] of this volume.
[9] See, for instance, the chapters on Croatia and Germany.
[10] See the chapter on Germany.
[11] D Petrić, The Application of Article 47 of the Charter in Croatia: Happening by Accident?', ch 2 in this volume, [XXXX].

The reasons for ~~this~~ limited presence may be due to several factors. Certainly, the size of the Member States and the amount of litigation may have a played a role, but there may also be cultural reasons. For example, national lawyers and judges may not see Article 47 of the Charter as offering any added value compared to national existing guarantees for the right to a fair trial or may simply not be aware of the potential of Article 47.[12]

In other legal systems, the use of Article 47 has been extremely frequent, even after factoring in the significant differences in terms of population between the cases we have studied. A frequent use can be noted, for example, in Germany, where domestic courts, and specifically the administrative higher courts, have made recurrent use of Article 47. According to Angela Schwerdtfeger, this can be explained~~,~~ by the high number of administrative court cases decided by German courts and the fact that administrative judges are likely to have a comparatively good knowledge of EU law. Similar results appear in the Spanish chapter, especially with respect to the administrative and civil courts. What is remarkable here is the observation there have been almost 2,000 rulings issued by lower civil courts invoking Article 47 EUCFR.

The Italian legal system also deserves a special mention in this context: the authors of the Italian chapter estimated that more than 3,000 judicial decisions delivered since 2000 by the Constitutional Court, the Court of Cassation, ordinary courts and administrative courts contain a reference to Article 47. In particular, most quotations of Article 47 appear in areas of law which have developed i~~n recent times mainly thanks to~~ EU law, such as anti-discrimination law, consumer protection, data protection, the common European asylum system, environmental law and public procurement law. Interestingly, the Polish chapter also reports results in the range of 1,000. However, the authors ~~report~~ that in the vast majority of these cases, reference to Article 47 was used as a sheer 'ornament' and brought little ~~of~~ added value to the argument built by the court.

Between these two extremes, there is a whole palette of systems. The French chapter reports results in the range of several hundred, with administrative courts (and the administrative courts of appeal in particular) taking the lead in the use of Article 47. According to the authors of this chapter, the total number of cases of both ordinary and administrative courts in France referring to Article 47 is actually quite disappointing. Yet, this chapter mentions that the real numerical presence of Article 47 might be very different if the lower courts' case law were to be made publicly available. In the absence of a public database of the lower courts' rulings, the quantitative search is partial. Similarly, in Hungary, Article 47 EUCFR has been raised, and at least mentioned ~~in the decisions,~~ in around 200 cases, most frequently in civil and administrative law proceedings. Also, in Belgium, similar results to Hungary (both numerically and in terms of the type of courts active in the use of Article 47) can be identified. Dutch courts have been more active, with results of ~~use of~~ Article 47 close to 1,000, with the administrative courts once again being the most prolific. In Ireland, the picture is mixed: after an initial high point in terms of references in 2011 and a dip in the following years, more recently the number of references has grown slowly but steadily. There are now almost 20 references annually.

[12] In Spain, for example, many practitioners are convinced that Art 47 can rarely, if ever, offer a higher level of protection than domestic provisions, most probably as a consequence of the *Melloni* ruling that forced the Spanish Constitutional Court to lower the constitutional protection of the right to fair trial.

Overall, the picture emerging from the quantitative analysis is that, apart from a handful of exceptions, the main trend in the Member States' litigation is an increased familiarity of EU lawyers with the potential of Article 47 in EU litigation. This finding also highlights two interesting dynamics. First, the significance of EU standards of effective judicial protection in claims around the application of EU law at the national level is evident. Second, and consequently, the important role of Article 47 before national courts indicates a strong procedural dimension in the claims raised in the field of EU law.

Finally, from a comparative perspective, we can speculate that the knowledge of EU law plays a role not only in the frequency of use of Article 47, but also its potential – at least in the eyes of the national operators – to reinforce national provisions on effective judicial protection as well as Articles 6 and 13 ECHR. The qualitative analysis will ~~then~~ reveal more precisely when Article 47 has played a significant role in domestic contexts.

III. Qualitative Analysis

Moving to the qualitative analysis, we analyse in the next sections 'who' (ie, which courts) applies Article 47 of the Charter, in what areas of law and 'when', meaning whether the application is reserved for questions falling within the scope of EU law, or outside its scope as well. Then, we briefly reflect on which substantive and procedural issues t~~he~~ national courts have made use of the provisions. We then move on to discuss the dialogue between the national courts and the CJEU on Article 47 within and outside of the preliminary reference procedure, before looking at some initial insights our contributors offer on the interplay between different sources of effective judicial protection in the European system.[13]

A. Who Applies Article 47 of the Charter and when

At a broad level, we can see instances of application of Article 47 of the Charter by all jurisdictions (administrative, civil and criminal, but also constitutional)[14] and at all levels (first instance, appeal and also supreme courts). This is common to almost all legal systems studied in this volume, with the partial exception being those Member States where Article 47 has had an extremely limited impact. However, on closer inspection, we can see significant variety in terms of the use of and engagement with Article 47 of the Charter, and national differences emerge more clearly.

Across the board, the most active courts have been those deciding on migration and tax law.[15] This can be easily explained by two facts: first, in those fields of law,

[13] This topic will return in the concluding section of this chapter; see section V below.

[14] See the chapters on Belgium, Croatia, Germany, Italy and Spain in this volume.

[15] Migration courts and the area of migration law are particularly highlighted in a number of chapters, in particular those on Belgium, France, Germany, Hungary, Ireland, Italy, the Netherlands and Sweden; tax courts and tax law are ~~particularly highlighted~~ in the chapters on France, Hungary, the Netherlands and Poland.

Article 6 ECHR is generally not applicable,[16] something that 'forces' national courts to rely on the broader Charter provision instead; and, second, those are areas that are substantially harmonised by EU substantive and procedural law. Environmental law is another popular area, again for similar reasons to tax and migration.[17] More generally, administrative courts have been the most frequent users of Article 47 of the Charter.[18] Civil courts come second, with Article 47 of course being used especially in those areas at least partially harmonised by EU law, such as consumer law.[19] Article 47 has had a much more limited impact in criminal law and before criminal courts, the partial exception being (again unsurprisingly) the area of the European Arrest Warrant.[20] These findings in themselves are not surprising, given that the EU still has relatively limited competence to legislate on matters which are typically adjudicated before criminal courts. Decisions of constitutional courts mentioning Article 47 of the Charter are then still fairly rare, though here again the picture is mixed: in some Member States we still see no trace of engagement,[21] but in others we see significant examples of the use of Article 47[22] and also, as we will set out later, of engagement with the CJEU in preliminary references.

In terms of the levels of jurisdiction that have referred more to Article 47, once again we see different approaches in different legal orders. In countries like Croatia and Germany, we see a stronger engagement by higher courts, which is explained with reference to a better level of preparation of judges on questions of EU law as well as more resources being available to those courts. In contrast, in the French administrative system, lower courts made more frequent use of Article 47 than the Conseil d'État.

There is more commonality on the question of whether Article 47 is used only within the scope of EU law or outside of it as well. In most Member States, the application of Article 47 is reserved to issues within the scope of EU law,[23] though often without a fully detailed analysis of whether or not in fact EU law (and thus Article 47) is applicable.[24] Outside the scope of EU law, in most legal orders we see at times general references to Article 47 without a direct application of it – for example, in the case law of French administrative courts, or in Ireland and Germany.[25]

[16] The right to a fair trial provided in Art 6 ECHR is only applicable 'in the determination of … civil rights and obligations or of any criminal charge'.

[17] See the chapters on Germany, Ireland and Italy.

[18] See in particular the chapters on France, Germany, Hungary, Ireland and the Netherlands.

[19] See, for example, the chapters on Italy, Poland and Spain, the latter being perhaps the most remarkable example, as civil courts beat even administrative courts, in particular due to the relevance of Art 47 in the context of the frequently litigated issues arising from banking contracts and mortgage claims.

[20] Here we see strong engagement with Art 47, also via preliminary reference; see, for example, Case C-216/18 PPU *LM* EU:C:2018:586 (referred by the Irish High Court); Joined Cases C-354/20 PPU and C-412/20 PPU *L & P* EU:C:2020:1033; and Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie* ECLI:EU:C:2022:100 (both referred by the Amsterdam Rechtbank); or the earlier Case C-399/11 *Melloni* EU:C:2013:107 (referred by the Spanish Constitutional Court).

[21] See the chapters on France and Hungary.

[22] The most remarkable cases are Belgium and Italy, but see also the chapters on Croatia, Germany and Spain.

[23] See, for example, the cases of Belgium, France, Germany and Ireland.

[24] As we will note later, it remains a complex task for national courts to assess whether the Charter (and thus Article 47) is applicable. See also Bobek and Adams-Prassl (n 7).

[25] In Germany, Art 47 is at times referred even outside the scope of EU law 'as a supplement to national constitutional norms in order to strengthen their content'; see A Schwerdtfeger, 'The Application of Article 47 of the EU Charter of Fundamental Rights by German Courts', ch 7 in this volume [XXXX].

However, there are a few exceptions to this approach, particularly in Italy, the Netherlands and Spain. In the Spanish system, Article 47 is not applied directly outside the scope of EU law, but remains relevant in purely domestic cases thanks to Article 10(2) of the Spanish Constitution. This provision asks the Spanish courts to interpret the rights of the Constitution in line with relevant international standards, including the Charter.[26] Therefore, Spanish courts interpret the domestic standards of judicial protection, enshrined in Article 24 of the Constitution, in accordance with Article 47 of the Charter (and the CJEU case law on that provision) even when the concrete case falls outside the scope of EU law. In a nutshell, the Charter always applies: directly, when the situation is within the scope of EU law; or indirectly, via Article 10(2) of the Spanish Constitution, outside the scope of EU law. In the Netherlands, administrative courts, including tax courts, have built a coordinated approach to the ECHR and the Charter, applying Articles 6 and 13 ECHR and Article 47 of the Charter together at all times, regardless of whether the case is within or outside the scope of EU law.[27] However, it should be highlighted that other Dutch courts, such as criminal courts, are more reluctant in terms of using the Charter outside the scope of EU law. Finally, the most remarkable exception is Italy, where Article 47 is very often used outside the scope of EU law, together with the ECHR and the national constitution, without a clear distinction on the different scopes of application of the different provisions. This approach increasingly does not seem accidental, or based on a wrong interpretation of the scope of application of the Charter, but fully intentional: Italian courts, including the Constitutional Court, want to avoid a fragmentation of the application of fundamental rights and thus apply relevant standards across the board.

B. On what Issues

In terms of the concrete legal issues on which Article 47 has been invoked and applied, we see remarkable diversity between Member States with a few shared elements. Among the latter, we have seen, for example, Article 47 used to deal with access to justice issues, including legal standing[28] and the existence of judicial remedies.[29] A second 'branch' of issues in which Article 47 has played a significant role is the *effective* component of the right to effective judicial protection. Thus, Article 47 has been used to broaden the scope of national courts' competences[30] and strengthen the intensity of judicial review.[31] But Article 47 has also been used to deal with more structural aspects of domestic judicial

[26] See Art 10(2) of the Spanish Constitution: 'The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.'

[27] Our contributors assess this approach positively: it is considered 'efficient', of course as long as EU and ECHR standards do not diverge: see R Widdershoven, S Haket, A van Duin and A Taimr, 'Article 47 Charter and the Netherlands: A World to Win', in this volume [XXXX].

[28] See, for example, the chapter on Germany.

[29] See in particular the chapter on Hungary.

[30] See, for example, in the migration and asylum field in Hungary, but also in the Netherlands, or in the area of consumer law in Poland and Spain.

[31] See the area of migration and asylum in Ireland.

systems. Questions of judicial independence in Hungary and Poland immediately come to mind – there, Article 47 of the Charter has most often acted in tandem with Article 19 of the Treaty on European Union (TEU) to deal with judicial independence issues.[32] Another example may be the Italian *Randstad* case,[33] where Article 47 has been (unsuccessfully) invoked by the Italian Court of Cassation to deal with a complex question of division of jurisdiction between administrative and civil (top) courts. These latter cases highlight how Article 47 may affect highly controversial and structural issues of domestic legal orders.

C. The Dialogue with the CJEU

Moving to the issue of judicial dialogue with the CJEU on Article 47, we have to start here again with the by now usual disclaimer: the contributions reveal a mixed picture.[34] We can juxtapose, for example, the attitude of the ~~French, Croatian~~ or Swedish courts, which are traditionally reluctant to send preliminary references to the CJEU,[35] with that of Italian courts,[36] which have often asked for the Court's help even in areas outside the scope of application of EU law.[37]

Moving beyond the simple number of cases referred to the CJEU, from a more qualitative point of view, we can generally conclude that Article 47[38] is a source of prolific judicial dialogue between national courts and the CJEU. Even in countries where the general engagement with the preliminary reference has been sporadic, we can see key issues relating to effective judicial protection being referred to the CJEU for clarifications on the meaning and standards of Article 47 EUCFR.[39] National courts have often sent references to seek the CJEU's support before moving to the disapplication

[32] On this issue, see also Krajewski (n 3); and Prechal (n 3).

[33] Case C-497/20 *Randstad* EU:C:2021:1037.

[34] And very often the findings on Art 47 reflect the overall approach of national courts to the preliminary reference procedure, as highlighted in particular in the chapters on Belgium, ~~Italy, France~~ and Sweden.

[35] As explained in the chapter on Sweden, on a few occasions the refusals to send preliminary references may actually amount to a breach of the obligation to refer under Art 267 TFEU for last-instance courts. Similar observations are offered in the chapter on France: here Art 47 is at times used 'too autonomously', and references to the CJEU would have been warranted or even obligatory under Art 267 TFEU.

[36] Belgium is another example of robust engagement with the preliminary reference procedure, an approach which matches the general 'Eurofriendliness' of the Belgian courts. Ireland, where high-profile references regarding Art 47 EUCFR have been started (see Case C-362/14 *Schrems* EU:C:2015:650; and *LM* (n 20)) and Spain are other examples.

[37] For a case that possibly went 'too far', see Case C-555/12 *Loreti and Others* EU:C:2013:174, with the CJEU in its response warning 'about the incorrect use of the preliminary ruling, which cannot serve the purpose of settling judicial and doctrinal disputes at the national level, when they are totally unrelated to EU law', as discussed in C Favilli, N Lazzerini and S Torricelli, 'Article 47 of the Charter in the Italian Legal System: The Pervasive Application of a Provision Perceived as the Expression of a Common Legal Heritage', ch 7 in this volume [XXXX].

[38] At times 'in tandem' with provisions of secondary law: take, for example, the chapter on the Netherlands, where most references do not concern Art 47 EUCFR as a 'stand-alone' provision, but combine the provision with effective remedy requirements in secondary EU law. See also the chapter on Spain, where references relating to the interpretation of Art 47 have been made in connection with the effective legal protection of consumer rights under Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[39] See crucially the chapters on Hungary and Poland.

of conflicting national provisions or practices. This is highlighted in particular in cases such as Italy, with our contributors stressing that domestic courts at times used the preliminary reference to ask for guidance from the CJEU even when the domestic judge was already aware of the Court's interpretation and there was no duty to refer; or, in a more complex context, in Hungary, where preliminary references have become tools for judicial review against the executive, and they are used to challenge the incompatibility of national legislation and practice with EU law requirements.[40] But also in Poland, national judges and courts that are still independent have relied on Article 47 EUCFR and the preliminary reference procedure as a 'shield' to protect themselves and the entire legal system against ~~violations of judicial independence~~.[41]

As a final note on the preliminary reference procedure, Article 47 has also been a platform for the still relatively rare dialogue between national constitutional courts and the CJEU. The constitutional courts of Belgium, Italy and Spain in particular have sent references (also) concerning Article 47 of the Charter. The Italian and Spanish courts notably tried to push the CJEU to offer higher protection to fundamental rights and avoiding the possibility that EU (secondary) law might lower the domestic standard of protection. This effort was successful in the Italian case,[42] but much less so for the Spanish court in *Melloni*.[43]

When the preliminary reference decisions of the CJEU 'returned home', our contributors observe that the vast majority of them were implemented in the national legal order faithfully and correctly. There are instances of inconsistencies, in terms of results[44] or narrative and approach,[45] and at times new preliminary references should have been made and they were not,[46] but the overall picture is positive. More generally, even when national courts h[illegible]pplied EU law autonomously – and this of course is in the vast majority of cases[47] – they have mostly correctly followed the interpretation of the CJEU and have often also made explicit reference to it.[48] With one important exception, which will be discussed in the following paragraphs, the conflict between national courts and the CJEU is episodic and limited in scope.[49] Even when national courts do not directly

[40] Two notable examples are Case C-556/17 *Torubarov* EU:C:2019:626 and Joined Cases C-924/19 PPU and C-925/19 PPU *FMS and Others* EU:C:2020:367.

[41] Take, for example, Case C-585/18 *AK and Others* EU:C:2019:982; and Case C-487/19 *WZ* EU:C:2021:798. See also in the Hungarian context Case C-564/19 *IS (Illegality of the Order for Reference)* EU:C:2021:949.

[42] See Case C-481/19 *Consob* EU:C:2021:84.

[43] See *Melloni* (n 20).

[44] See, for example, the discussion on the decision of the Hungarian Supreme Court in Kúria, Kf.IV.37.468/2019/17 in the chapter on Hungary.

[45] Here the reference is to the Spanish Constitutional Court decision transposing the judgment in *Melloni*, which is discussed in the chapter on Spain: see Spanish Constitutional Court, Judgment 26/2014, of 13 February 2014.

[46] Take again the Hungarian case mentioned in n 44, but the point is also raised in the chapter on France.

[47] However, for a partially different conclusion, see the chapter on Poland, where Art 47 has been primarily used by domestic courts in interconnection with the preliminary reference, and rarely used outside the 'shadow' of CJEU ~~decision~~.

[48] See, for example, the chapters on Belgium, France, Germany, Ireland, Italy and Spain.

[49] The chapter on Germany, for example, observes slight deviations from CJEU case law, but due to the unfamiliarity with certain nuances of EU law rather than a deliberate confrontation with the CJEU. In Hungary we also observe some difficulties in the reception of the CJEU asylum decisions, also because of a partial contrast between the CJEU and the ECtHR in the field: compare CJEU, *FMS and Others* (n 40) and Judgment of the European Court of Human Rights of 21 November 2019 in Case No 47287/1 *Ilias and Ahmed v Hungary*.

rely on the CJEU case law, the application of Article 47 is most often in line with the standards established in Luxembourg, also as a consequence of the fact that the ECHR offers equivalent protection in principle.[50]

The one significant exception is Poland. Here the faithful application of CJEU case law on Article 47 and judicial independence[51] depends on which court (or which chamber of a certain court) is called upon to decide on the domestic case. What is key in that sense is whether the individual judges deciding are 'old' judges appointed under procedures that adequately guaranteed their judicial independence, or 'new' judges appointed after the controversial reforms of the judiciary. So, for example, at the Supreme Court level, chambers with a majority of 'old' judges have properly applied the *AK* or ~~*WZ*~~ decisions on judicial independence, while chambers dominated by 'new' judges have diverged from the CJEU interpretation.[52] And of course, the Constitutional Tribunal has boldly rejected the CJEU's interpretation of the judicial independence standards under Article 19 TEU and Article 47 of the Charter in the controversial K 3/21 decision.[53] Poland is the only case discussed in our volume where we can observe a direct and explicit disobedience in relation to the case law of the Court.

D. The Interplay between Different Sources of Judicial Protection

We conclude this qualitative analysis with a few considerations on the picture that emerges from the national chapters on the interplay between the different sources of judicial protection, with the proviso that a fuller discussion on the interaction between the Charter, the ECHR and national constitutions is reserved for the final section of this conclusion. We wish to reflect here on two questions that featured in our questionnaire, namely the interplay between the Charter and EU secondary (procedural) legislation fleshing out requirements of judicial protection, and the interplay between Article 47 EUCFR and the pre-Charter principles of effective judicial protection, equivalence and effectiveness.

The shared observation is that no clear picture emerges from the national legal systems on the relationship between EU secondary law and the Charter. We have observed cases in which national courts refer exclusively to Article 47, others in which courts combine primary and secondary law,[54] and others in which mostly they mostly make reference to EU procedural law, and then eventually Article 47 might be mentioned by the CJEU in its response if a preliminary reference is requested.[55] There does not seem to be a coherent approach horizontally.

[50] An observation in this sense is made in the chapter on Croatia. However, note that this approach creates the risk of 'missing' cases in which CJEU goes beyond ECHR; see the discussion below.

[51] For an analysis of these decisions, see Krajewski (n 3).

[52] Contrast Judgment of the Polish Supreme Court of 5 December 2019, III PO 7/18, Orders of the Polish Supreme Court of 15 January 2020, III PO 8/18 and III PO 9/18, and ~~also~~ Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, 23 January 2020 r (BSA I-4110-1/20), all faithfully applying the CJEU's case law, with Order of the Polish Supreme Court of 16 June 2021, I KO 6/21, rejecting the application of the CJEU case law.

[53] Judgment of the Polish Constitutional Court of 7 October 2021, K 3/21.

[54] See, for example, the chapters on Ireland or Sweden.

[55] See, for example, the sections of the chapter on Poland discussing the consumer law cases.

The same is true for the question of the interplay between Article 47 EUCFR, the (unwritten) principle of judicial protection, and the *Rewe*[56] principles of equivalence and effectiveness. While the debate continues to be lively at the EU level,[57] it seems less interesting at the national level. None of the chapters describes this as a central issue before national courts and judges. At times, national courts do still refer to the old principles,[58] but without a clear logic. The remarkable case in this respect is Sweden, where the emphasis is still on the pre-Charter principles, which are more popular and more frequently used than Article 47, but there too, there does not seem to be a fully fleshed-out explanation of that choice: as Johanna Engström in the Swedish chapter ~~points out~~, the right of Article 47, the unwritten principle and the *Rewe* principles are used 'side by side, interchangeably and randomly'.[59]

However, some chapters do mention that the Charter has made the EU dimension of the right to effective judicial protection more visible. This is the case, for example, in France, where with the entry into force of the Charter the right to effective judicial protection in Article 47 has become more accessible, and this has led to a greater awareness of the EU requirements and better enforcement, or in Spain, where the Charter's binding force has made it easier to rely on the right to an effective judicial remedy before domestic courts and has also led to more preliminary references and a more frequent application of the right by national courts.

IV. The Systemic Impact of Article 47

As we argued earlier, it is not only impossible, but also probably of limited value, to depict in broad strokes what has been the systemic impact of Article 47 across legal orders. We go from legal systems where Article 47 has almost played no role[60] to a few (or perhaps only one) where the impact of the provision has been 'pervasive',[61] with many others in between.[62] As highlighted earlier, the impact of Article 47 generally matches that of the Charter as a whole, even if Article 47 is the most commonly used provision of the Charter at the national level as well.[63] In the following paragraphs, we

[56] Case C-33/76 *Rewe* ~~*v Landwirtschaftskammer für das Saarland*~~ EU:C:1976:188.

[57] And the complexity of the case law may make things more difficult for domestic courts, as highlighted in the chapter on Sweden. For an overview of the debate, see the contributions to the special issue of *Review of European Administrative Law* (2019/2).

[58] This is mentioned, for example, in the chapters on Germany and the Netherlands. In the latter, civil courts still show a preference for effectiveness and the *ex officio* application of EU law instead of Art 47 EUCFR.

[59] J Engström, 'The Right to an Effective Remedy in Article 47 of the Charter and the Principle of Effective Judicial Protection before the Swedish Courts', ch 11 in this volume [XXXX].

[60] Article 47 has been 'unimportant' in Croatia, or perhaps even 'non-existent'. See also the chapter on Sweden.

[61] See the chapter on Italy.

[62] In this intermediate category we could place Belgium, where it is said that Art 47 has had a marginal impact quantitatively, but qualitatively has made a groundbreaking difference in some cases; Hungary; Germany, where the impact of Art 47 is 'non-negligible'; Ireland, where it is 'discernible', yet 'mixed'; and the Netherlands.

[63] This observation is made in the chapters on Croatia and Hungary, for example. See also the chapter on Spain.

explore in what systems and areas Article 47 has, or has not, played a significant role, and reflect on why that might be the case. We then conclude with observations on the future potential of Article 47, mapping out the fields where our contributors see 'movement' in domestic legal orders, or in any case possible changes being brought about by a greater reliance on Article 47.

A. Where, when and why Article 47 has Played a Significant Role

Before exploring the three legal systems where Article 47 seems to have played the most significant role (for different reasons, Hungary, Italy and Poland), an initial horizontal reflection is that in virtually all Member States discussed in this volume, Article 47 has played a more significant role in those areas where the corresponding ECHR provision of Article 6 is not applicable.[64] As noted earlier, migration and asylum law, as well as tax law, are perhaps the most remarkable examples. Due to the more limited scope of Article 6 ECHR vis-a-vis Article 47 of the Charter, national judges are forced to look into the Charter as the 'European' source of fundamental rights protection in those areas. The Charter is then often used in tandem with secondary legislation offering procedural guarantees in such areas.

Several chapters then offer individual success stories, where in a single legal order, for peculiar reasons strictly linked to that system, (specific) national courts have begun relying on Article 47 in a specific area. We see this, for example, in the *Abida* case and its follow-up in Belgium,[65] in the case law of Spanish civil courts on the protection of consumer law, or in the 'Charter-first' approach of certain Dutch courts. Here the impact of Article 47 is in any event more sporadic than systemic, as its application is confined to certain areas of law and certain specific cases. Finally, Article 47 has also played a crucial role in extraterritorial circumstances, as illustrated by the Irish data protection litigation saga. Cases such as *Schrems I*[66] and *Schrems II*[67] originating from the Irish courts have demonstrated the power of Article 47 as a supporting fundamental right for the enforcement of data protection rights in the US, where EU citizens' personal data may be processed. Article 47 was used as a parameter to review whether the remedies offered under the Safe Harbour and Privacy Shield, governing the international transfer of data from the EU to the US, was compatible with EU law. The answer of the CJEU was in the negative, and, prompted by the referring Irish court, the CJEU struck down both the Safe Harbour and the Privacy Shield.

We can see a more structural impact in three cases. In Italy, as already highlighted, the impact of Article 47 has been described as pervasive. Italian courts, including the Corte Costituzionale, have intentionally decided to constantly apply Article 47 and the Charter together with ECHR rights and domestic constitutional rights, leading to an ever-growing number of references and at the provision becoming increasingly 'rooted'

[64] This point is raised in the chapters on Belgium, Hungary, Ireland and the Netherlands.
[65] See Case C-562/13 *Abdida* EU:C:2014:2453.
[66] Case C-362/14 *Schrems* EU:C:2015:650.
[67] Case C-311/18 *Facebook Ireland and Schrems* EU:C:2020:559.

in the culture of Italian legal professionals. In Hungary, while the overall application of Article 47 by national courts is certainly not as pervasive as in Italy, we see examples of Article 47 being used to enable 'radical interventions in the Hungarian legal system for the protection of individuals against abusive administrative practices and against faulty, even illiberal legislation'.[68] Article 47, in dialogue with the CJEU, has been used in a limited but significant number of cases to remedy situations where access to legal remedies was denied, or where there were evident procedural irregularities that compromised the right to effective judicial protection. And finally in Poland, where again the overall impact is relatively limited,[69] Article 47 EUCFR in combination with Article 19 TEU nevertheless had a groundbreaking impact in the area of judicial independence. Article 47 is here used as a shield against the executive and the legislative attacks on judicial independence, and as a weapon of self-defence.[70] In Poland, but perhaps also in Hungary, our contributors confirm what had been argued earlier by Bobek and Adams-Prassl: Article 47 has operated 'as a text of "last resort" or "auxiliary constitution" for issues that, for the time being, cannot be properly addressed at the national level for political reasons'.[71]

B. Where, when and why Article 47 has not Played a Significant Role

At the opposite end of the spectrum, we see legal systems where Article 47 has been used very little, with Croatia and Sweden being the clearest examples. In Croatia, there is a preference for domestic sources and the ECHR, and a lack of systemic engagement with the application of Article 47, which is also due to the formalistic style of reasoning used by Croatian courts.[72] In Sweden, as noted earlier, courts still prefer to rely on the pre-Charter principle of effective judicial protection, or the *Rewe* principles of equivalence and effectiveness.

Leaving aside these almost extreme cases, even where Article 47 is used at times, as we have set out before, its application is mostly confined to certain courts, in specific areas of domestic law. Our contributors offered several explanations for that. Some relate to general obstacles to the application of EU law, and the Charter in particular, in domestic legal orders, including the still limited knowledge or familiarity of national courts with EU law, a lack of resources, or again a legal culture not conducive to it.[73] In many chapters it has also been pointed out that national courts still struggle to

[68] See M Varju and M Papp, 'An Opportunity Seized or Lost? The Application of Article 47 of the Charter by Hungarian Courts', ch 5 in this volume, [XXXX].

[69] The chapter on Poland shows a limited number of references of Polish courts to Art 47 of the Charter, and in most of those cases in any event Art 47 is only used as an 'ornament'.

[70] Of course, the risks of lack of implementation must be highlighted; see also the discussion above.

[71] See Bobek and Adams-Prassl (n 6) 562.

[72] The chapter on Croatia highlights that even when Art 47 is mentioned by the domestic courts, it is not clear what its role is, what standard is derived from it and what its impact is vis-a-vis the ECHR provisions which are often mentioned in the same paragraphs.

[73] These points have been made in particular in the chapters on Belgium, Croatia, France, Germany and Sweden.

understand when the Charter applies, and whether they can use it in the case they have before them.[74] Another point made is that courts have difficulty seeing what the added value of Article 47 would be when compared and contrasted with domestic standards of protection or the ECHR, with the consequence that national judges still prefer to rely on the ECHR.[75] Domestic judges are much more familiar with the Convention, they can apply it across the board as the ECHR is not limited in scope, and the standards that have emerged thanks to the case law of the European Court of Human Rights ~~(ECtHR)~~ are relatively clear and well established. To put it simply: for (most) national judges, applying the ECHR is simply easier than relying on the Charter.

C. Where, when and why Article 47 Could Play a Significant Role

At this stage, the picture might seem relatively bleak: in most of the Member States studied in this volume, Article 47 of the Charter has a limited role, it often comes almost as an afterthought to the ECHR, and its added value is not entirely clear to many national judges. Yet despite these concerns, many chapters end on a more positive note, or they note still timid evolutions that might contribute to unlocking the potential of Article 47 in domestic legal orders.

In Croatia, for example, we see efforts by groups of judges, practitioners and academics 'to introduce a more EU-informed approach in adjudication',[76] which may contribute to give meaning to Article 47 of the Charter as well. We see an example of this in a recent preliminary reference request of the Zagreb Municipal Civil Court that tried to rely on Article 47 in order to correct an earlier decision of the Croatian Supreme Court, which in its view was not in accordance with EU law.[77] According to Petrić, the reference clearly shows the potential of Article 47 in acting as a shield against decisions of higher courts in contrast with EU law, but also as a sword to force those courts to truly engage with EU law. In France, recent rulings show that Article 47 is increasingly often relied upon by applicants before domestic courts. In the Netherlands, ~~which we may already consider as being relatively intensely reliant on Article 47,~~ the impact seems to be growing, both in terms of new references being sent to the CJEU[78] and also in terms of courts being more confident in applying Article 47 autonomously. An upward trend is also noticeable in Spain.

From a structural point of view, many contributions show that a more extensive reliance on Article 47 (together with or instead of domestic constitutional provisions) may prove beneficial and conducive to a stronger protection of EU fundamental rights. This is due to the substantive standards developed by the CJEU, but also to the structural features of EU law. So, for example, some several chapters show that, on closer

[74] For a discussion, see the chapters on Croatia and France.

[75] This is stressed in the chapter on France, but for other examples, see also the chapters on Croatia, the Netherlands and Spain.

[76] See Petrić (n 10) [XXXX].

[77] See Municipal Civil Court in Zagreb, Order for Reference from 15 October 2020 in Case C-567/20 *Zagrebačka banka*.

[78] For a recent example, see the reference that led to the judgment in Joined Cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid v C, B and X* ECLI:EU:C:2022:858.

inspection, Article 47 can actually offer higher protection than national standards in specific areas or on specific issues. In the French system, Article 47, as interpreted by the CJEU, offers more extensive protection in comparison with French law to the right of defence in administrative law. In the German legal order, the Charter offers more robust protection on questions of legal standing, especially in the area of environmental law. And while Spanish courts, on the basis of the *Melloni* saga, might have the impression that Article 47 is less protective than domestic constitutional law, in reality it goes beyond the domestic standard, for example, on the right to legal counsel. The national courts' realisation of this could further contribute to give meaning and effect to Article 47 in the domestic legal orders. In terms of the structural features of EU law, the CJEU recognition of the direct effect of Article 47 in the *Egenberger* case[79] is noted in the Belgian chapter as being potentially extremely relevant because it can empower national courts in ways in which the national constitutions or the ECHR cannot. In fact, the *Egenberger* line of cases show how Article 47 may become a 'directly applicable basis for jurisdiction' for national courts.[80] Finally, a few chapters highlight that Article 47 can play a role as a 'backstop' or shield in the context of planned or ongoing reforms of judicial review or judicial ~~structure~~. This is shown in cases like Hungary and Poland, but questions of judicial independence are also relevant in Spain, in terms of possible reforms to the General Council of the Judiciary or the Constitutional Court, while in Ireland, Article 47 could influence the proposed reforms of the procedures for challenging the decisions of public bodies by way of judicial review.

However, on this note, we should also acknowledge the possible threats to the role of Article 47 in the Member States. The Polish chapter clearly shows that the landmark case law of the CJEU on judicial independence has not been fully implemented on the ground, and that its correct application depends on the actual judges who are deciding the domestic case. The Hungarian chapter also ends on a concerned note, stating that 'the future impact of Article 47 EUCFR in Hungary depends primarily on whether the independence and the impartiality of the national judiciary – particularly that of courts acting in judicial review – can be maintained and protected'.[81] These observations perhaps serve as a reminder of the relative fragility of EU law, including the Charter, and of how the EU legal order crucially relies on national structures and actors for its implementation.

V. Article 47 in the European Network of Fundamental Rights Protection

We conclude by reflecting on the role of Article 47 of the Charter in the multilevel network of fundamental rights protection, which also includes, alongside the Charter, the ECHR and national constitutions. As noted earlier, while Article 47 is the more

[79] Case C-414/16 *Egenberger* EU:C:2018:257.

[80] Y Marique and C Rizcallah, 'Article 47 of the Charter of Fundamental Rights: A Fruitful Tree Growing in the Belgian Landscape of Judicial Protection', in this volume, [XXXX].

[81] See Varju and Papp, ch 5 in this volume, [XXXX].

'popular' provision of the EUCFR, in almost all Member States studied in this volume, our contributors point out that national courts still have a preference for relying on the ECHR[82] and/or their domestic constitutions[83] offering corresponding or related rights. When Article 47 is used, it is often cited together with these other sources of protection,[84] in a phenomenon that has been referred to as 'cluster citations'.[85]

In a sense, this is natural. Article 47, the Explanations to the Charter point out,[86] corresponds to Articles 6 and 13 ECHR, and its meaning should be interpreted in harmony with national constitutional traditions.[87] It is certainly not a new right added by the Charter, but one that already had solid roots in European constitutional law. As a consequence, the lack of references by national courts to Article 47 does not necessarily create a gap in judicial protection, precisely thanks to the existence of the neighbouring rights and principles.[88] Furthermore, the approach of those national courts that always refer to Article 47 alongside other constitutional and ECHR provisions may be beneficial from a systemic perspective. In the Dutch chapter, it is argued that a coordinated approach between the different sources facilitates the tasks of national judges. In Italy, as already noted, national courts constantly refer to Article 47 alongside other sources of fundamental rights protection, even outside the scope of EU law, and this prevents a fragmentation of the level of protection of fundamental rights and ultimately enhances the fundamental principle of effective judicial protection.

Yet there are also risks inherent in the 'cluster' or 'network' approach and more generally in the fairly uncoordinated co-existence between these different layers of protection. National courts in this network of fundamental rights protection might at times be 'lost in complexity' and lose track of the higher standards of protection that on occasion are guaranteed by Article 47 EUCFR.[89] The Charter's provision thus risks losing its autonomous meaning vis-a-vis the ECHR or national constitutions. The risks are particularly evident when EU and ECHR answers to the same (or very similar) legal questions diverge, potentially creating confusion for national courts or offering them an opportunity to reject the application of the CJEU's case law by making reference to the lower ECHR standard.[90] In the Italian chapter, it is also pointed out how the constant use of the three sets of provisions together may prevent the establishment of a higher standard of protection, as the outcome could be that the courts always fall back on the minimum level affirmed in one of the fundamental rights sources.

Nonetheless, there are also positive signs that suggest that Article 47 is at times able to fulfil its potential and play a significant and autonomous role in the multilevel system

[82] This argument is made in the chapters on Belgium, Croatia, France, Germany, Hungary, Ireland and the Netherlands.

[83] See the chapters on Belgium, France, Hungary and Ireland.

[84] This is highlighted in the chapters on Belgium, Croatia, France, Italy, the Netherlands, Poland and Spain.

[85] Bobek and Adams-Prassl (n 6).

[86] See Explanations Relating to the Charter of Fundamental Rights [2007] OJ L303/17.

[87] See Art 52(4) EUCFR.

[88] As also mentioned in the chapter on Croatia.

[89] For an illustration of these type of cases, see the chapters on Belgium, France, Germany and the Netherlands.

[90] See the discussion in the chapter on Hungary of the (non-)implementation of the *FMS and Others* (n 40) ruling.

of protection. First of all, many chapters point out that Article 47 has a crucial impact in those areas of national law where Article 6 ECHR is not applicable, including most elements of migration, tax and environmental law.[91] Then, some chapters show how national courts have been able to rely on Article 47, also thanks to the interpretation offered by the CJEU in preliminary references, in a way that raises the level of protection offered by the ECHR and national constitutions.[92] In Spain, notably, the indirect use of Article 47 as a tool to interpret domestic provisions has on occasion led to the enhancement of the protection of domestic fundamental rights.

To conclude, and to return to questions posed at the beginning of this chapter: there is no doubt, as we highlighted in the Introduction and more generally in our first volume, that Article 47 EUCFR is truly a cornerstone of the fundamental rights system at the EU level, also thanks to the cooperation of national courts that have sent dozens of preliminary references based on that provision. Yet, the reality at the Member State level is more complex and more diverse, and the impact of Article 47 varies quite significantly from one Member State to the other. Read together, the chapters show that Article 47 can, and at times already has, added value compared to other comparable provisions of the ECHR and national constitutions, and can contribute to raising standards of protection of fundamental rights. However, on other occasions, the autonomous meaning is not immediately evident and in fact domestic courts continue to prefer to rely on well-established ECHR provisions or domestic ones. The task of national courts could be facilitated if the CJEU would bring further clarity to its case law, explaining if and when Article 47 offers more extensive protection to the ECHR provisions,[93] as well as setting out in clearer terms the relationship between Article 47, secondary legislation, and the related principles of effective judicial protection, equivalence and effectiveness. In other words, the Court should make sure that the sources of protection are adequately coordinated and that the added value of Article 47 comes out clearly where necessary.

Finally, and more broadly, we cannot help but notice that while national courts are in principle operating in a web as 'EU courts', they effectively operationalise Article 47 autonomously in 'silo-mode' in the cases on which they adjudicate. This might have implications for the way in which the case law on Article 47 is received and consequently applied at the national level: while the CJEU case law on Article 47 applies equally to all national courts, the case law is filtered and translated at the national level through ~~the~~ domestic procedural traditions and frameworks. This volume has taken a first step in looking at the shapes which Article 47 takes at the national level. Further comparative law research should focus on specific policy and/or procedural areas to better understand the nuances of the use of Article 47 at the domestic level.

[91] See the discussion in the chapters on Belgium, France and the Netherlands in particular.
[92] A point made in the chapters on Belgium and Italy.
[93] This is an observation made in the chapter on the Netherlands.