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# Conclusions

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## I. Introduction

Through the various contributions, this volume has analysed and reflected on the distinctive impact of Article 47 of the Charter in the composite European legal order. As mentioned in the introduction to this book, the application of this provision in the Court of Justice case law has been remarkable both quantitatively and qualitatively. Additionally, recent cases decided in Luxembourg have relied on Article 19 TEU to further strengthen the reach of effective judicial protection so as to 'capture' national rules regulating the structure and functions of domestic courts.[1] In this sense, Article 47 of the Charter is part of a web of provisions having a twofold purpose: first, they mould the protection of rights in the EU via national (and, to a more limited extent, EU) procedural rules; secondly, they delineate the division of labour between EU and national courts in the enforcement of EU law.

The contributions in this book have explored two main research questions, namely, the constitutional significance and impact of Article 47 of the Charter and the way in which the requirements stemming from Article 47 are interpreted by the Court of Justice in various policy areas. In this concluding chapter, we draw the threads of the chapters together to answer these questions while outlining the main trends in ~~respect of~~ the Court's case law.

## II. The Constitutional Impact of Article 47 of the Charter in the EU Legal Landscape: Between Continuity and Rupture

The Court of Justice case law on Article 47 of the Charter has shaped some of the essential tenets and principles of EU law and ultimately the EU constitutional setting. It features both continuity and rupture, as will be explained in the following paragraphs.

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[1] See Case C-619/18 *Commission* v *Poland* EU:C:2019:615.

The constitutional impact of Article 47 of the Charter emerges in two respects. First, Article 47 of the Charter is the cardinal provision operationalising the administration of justice in the EU multi-level system. In other words, Article 47 constitutes the legal anchor for the Court of Justice to paint the essential elements of the administration of justice in the EU. In this context, Article 47 has a 'positive' role: that of establishing the EU way of administering justice. In their contribution to this volume, Gentile and Menzione demonstrate that Article 47 of the Charter is the 'right of EU rights', as it ensures the enjoyment of all other legal entitlements stemming from EU law. The prominence of this provision in the EU legal landscape is evident when exploring the synergies between Article 47 and the other articles included in the 'Justice Title' of the Charter. Although protecting different rights, Articles 48, 49 and 50 of the Justice Title all interplay, to varying degrees, with Article 47, which appears to be the primary building block of the fundamental rights concerning the administration of justice in the EU. In this sense, Article 47 offers the legal basis to tease out the core elements of the EU understanding of justice: the rights of defence, the principle of legality and proportionality of penalties and the *ne bis in idem* are all emanations of the rights to an effective remedy and to a fair trial, although to different extents.

The centrality of Article 47 in the administration of justice in the EU reveals itself also in another setting: the preliminary reference procedure. The chapter by Wallermann Ghavanini and Rauchegger reflects on the synergies between Article 47 and the preliminary ruling system, recently acknowledged for the first time by the Court in *Consorzio Italian Management*.[2] The Court has established that Article 47 of the Charter imposes on national courts of last instance a duty to state reasons in case of refusal to submit a question to the Court of Justice. Hence, Article 47 becomes a provision to check the legitimacy and the soundness of the decisions of national courts of last instance not to refer to the Court of Justice. The authors reflect also on whether the Court might follow the example of some national constitutional courts[3] and take an even bolder step: establishing under Article 47 of the Charter a right to obtain a preliminary reference. They convincingly argue that such a step would be extremely complex and disruptive and that the most ~~convincing~~ way forward is an expansion and strengthening of the right to a reasoned decision on referral.

The second way in which Article 47 of the Charter shapes ~~the~~ EU constitutionalism is 'negative' in nature: Article 47 constrains the justice design choices of the Member States. It does so by imposing structural and procedural obligations to the Member States regarding in particular their courts. As explored by Prechal in this volume, via the joint reading of Articles 47 of the Charter and 19 TEU, the Court has established that Member States must ensure that their judicial systems respect and guarantee certain structural requirements concerning the functioning and activity of the national courts. In this context the principle of judicial independence is essential, ~~which~~ demands that

[2] Case C-561/19 *Consorzio Italian Management* EU:C:2021:799.

[3] The chapter refers in particular to the approaches of the German, Austrian, Czech and Slovak Constitutional Courts.

national courts must be impartial from the parties in the dispute as well as free from any external interferences in their activities.

A tension that arises in this context is to what extent the application of the EU principle of effective judicial protection as a structural condition for national courts could (and perhaps should) limit the diversity existing in the Member States with reference to various aspects of judicial independence. Krajewski's chapter observes that the Court of Justice has struck a fine balance between protecting the EU standards of judicial independence while respecting the plurality of existing judicial organisation arrangements in the Member States. Additionally, EU case law on Article 47 has equipped national judges with the context-sensitive 'appearance of independence' test, which facilitates the decentralised application of EU standards, though that approach opens critical questions in terms of the correct enforcement of EU ~~standards.~~ Yet, beyond the realm of judicial independence, the evolving case law on Article 47 has overall constrained the so-called national procedural autonomy. As discussed by Bonelli in this volume, Article 47 is used by the Kirchberg judges to restrain the leeway Member States have in autonomously determining their justice systems. For instance, the Court of Justice relies on Article 47 of the Charter to detail the content of EU secondary provisions governing procedures as well as to create new remedies in the fields covered by EU law. Like Prechal and Krajewski, Bonelli too highlights the novelties brought by Article 47 with reference to the principle of judicial independence.

All in all, the constitutional impact of the EU case law on Article 47 in the EU legal order builds and expands on that of the general principle of effective judicial protection. Indeed, since the *Johnston* case,[4] the principle of effective judicial protection has allowed the Court of Justice to draw the path for national courts in ensuring the effective enforcement of EU law. However, two new profiles emerge when it comes to Article 47 of the Charter. On the one hand, the Court of Justice uses it in more prescriptive terms compared to the principle of effective judicial protection. The more prescriptive nature of Article 47 is facilitated by the binding nature of the Charter and the links between Article 47 and norms included in the Treaties having foundational value, such as Articles 2 and 19 TEU. On the other hand, Article 47 is officially part of the normative content of the EU rule of law. Although already since *Les Verts* judgment[5] the Court of Justice had highlighted the connections between the rule of law and effective judicial review, with the *ASJP*[6] judgment it has become clear that a violation of the principle of effective judicial protection would also breach the EU rule of law.

Although in different ways, the impact of Article 47 of the Charter in the policy areas discussed in this book is also characterised by continuity and rupture. It is to this aspect that our concluding chapter now turns.

[4] Case C-222/84 *Johnston* EU:C:1986:206.
[5] Case C-294/83 *Les Verts v Parliament* EU:C:1986:166.
[6] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ~~*v Tribunal de Contas*~~ EU:C:2018:117.

# III. Article 47 of the Charter in the Policy Areas: A Kaleidoscope of Colours with Increasingly More Visible Shapes

## A. The Relationship between Article 47 and the Principle of Effective Judicial Protection

As mentioned in the introduction, the interactions between Article 47, the general principle of effective judicial protection, and the other key EU law principles of equivalence and effectiveness have been extensively discussed in doctrine. Although this complex web of relations is not yet crystallised in the case law of the Court, it is clear that the Court seeks to build the core of Article 47 on the basis of the principle of effective judicial protection. For example, in *Rosneft* the Court held that Article 47, 'constitutes a reaffirmation of the principle of effective judicial protection'.[7]

The chapters in our volume confirm this picture by showing a great deal of continuity in the current case law of the CJEU. For example, in the field of non-discrimination, Gutman argues that the case law of the Court under Article 47 displays strong links with pre-Lisbon case law. This might also be due to the fact that the principle of effective judicial protection originated in fact in non-discrimination cases.[8] The chapter by Gutman also shows that the pre-Lisbon case law had filled in aspects of the principle of effective judicial protection beyond what is strictly required under Article 47.[9] As a consequence, these broad contours of the principle of effective judicial protection, drawn up by the Court pre-Lisbon, have been taken over and are now arguably 'embodied' in Article 47 to give further flesh to the obligations under this provision.[10] Similarly, in the field of migration, the case law of the Court under Article 47 is in line with earlier case law, including decisions stemming from other policy areas, which, in Reneman's opinion contribute to providing 'stability and relative neutrality' to the current case law on migration and asylum. Also in tax law, the principle of effective judicial protection was successfully invoked long before the entry into force of the Charter,[11] and current case law, while expansive, does not fundamentally depart from the foundations laid before Lisbon.

As is well known, the principle of effective judicial protection historically also has strong links with the right to a fair trial under Article 6 ECHR and the right to an effective remedy under Article 13 ECHR. Already the *Johnston* ruling explicitly established this link.[12] The case law of the Court under Article 47 contributes to the effort of aligning the scope of the notion of effective judicial protection with the right to a fair trial. This is made explicit, for example, by Pantazatou with respect to the case law concerning

[7] Case C-72/15 *Rosneft* EU:C:2017:236.

[8] ~~Case C-222/84~~ *Johnston* ~~EU:C:1986:206~~.

[9] See eg, Case C-185/97 *Belinda Jane Coote* EU:C:1998:424 in the field of protection against retaliation.

[10] Eg, Case C-404/18 *Hakelbracht e.a.* EU:C:2019:523 where old case law on the principle of effective judicial protection was taken on board to broaden the scope of Article 47.

[11] See eg, Case C-349/07 *Sopropé* EU:C:2008:746.

[12] ~~Case C-222/84~~ *Johnston* ~~EU:C:1986:206~~. See also the introduction to this volume.

the right of defence in tax proceedings and by Kalintiri who, in the field of competition law, observes that the case law on Article 47 reflects the earlier case law on the principle of effective judicial protection and the right to a fair trial enshrined in Article 6 ECHR. Kalintiri also notes that, in general, references to Article 47 are combined with those to Article 6 ECHR and to ECtHR case law.

This alignment between pre- and post-Lisbon case law is also apparent in the environmental law field, at least in as far as judicial protection before the EU courts is concerned. However, this alignment is not necessarily to the benefit of applicants. Indeed, with regard to cases concerning standing before the EU court, Krämer shows that the pre-Lisbon case law 'set the tone' to interpret the standing requirement under Article 263(4) TFEU, and neither the ratification of the Aarhus Convention nor the entry into force of the Charter served to change the restrictive approach of the CJEU. Yet earlier research has shown that, with respect to national litigation, the picture is different. While compared to the principle of effectiveness, the principle of effective judicial protection has been very much in the background in the case law of the Court, a much more intensive use of Article 47 can be detected in more recent case law.[13]

The only outlier here seems to be the field of public procurement, regarding which Caranta argued that Article 47 has only a limited role to play. He observed that, even before the Charter, a number of limitations in terms of access to court in procurement litigation had already been removed, Article 47 hence having a limited potential. In this respect, Caranta adds that, as Article 47 is not more specific than the principle of effective judicial protection, its presence does not seem to have the potential to add to what has been already established pre-Article 47. Therefore, when it comes to public procurement, the issue is not so much one of lack of continuity between the understanding of the Court of the principle of effective judicial protection and Article 47, but one of the absence of Article 47 as an additional source of effective judicial protection.

## B. The Relationship between Article 47 ~~with~~ EU Secondary Rules of a Procedural Nature, Primary Law and International Law

As noted in our introduction, another topic explored in the doctrine was the interaction between Article 47 and EU secondary rules of procedural nature. The debate has shown that EU secondary procedural rules are diverse, touching various procedural areas, and limiting the discretion of Member States to various degrees.

The chapters in our collection comprise policy areas with various degrees of proceduralisation, ranging from heavily proceduralised fields, such as public procurement, migration and non-discrimination, to fields with fewer (but still present) secondary EU rules of a procedural nature, to non-proceduralised fields, such as tax law. The presence of these rules clearly has an influence on the way in which Article 47 is used by applicants and by the Court, but this influence does not always produce similar results.

[13] See M Eliantonio, 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the "language of rights"?' (2019) 12 *Review of European Administrative Law* 95, with reference eg, to Case C-664/15 *Protect ~~Natur-, Arten- und Landschaftsschutz Umweltorganisation~~* EU:C:2017:987.

For example, in procurement, procedural rules have been present since 1989.[14] The existence of remedies clearly spelled out in secondary law, according to Caranta, gave rise to a line of case law more focused on the Remedies Directive than on Article 47 or the principle of effective judicial protection.

The fields of non-discrimination and migration point instead to quite different results. Here, both Gutman and Reneman observe that the extensive proceduralisation of the fields caused secondary rules to be used in combination with Article 47, most often as an interpretation aid for procedural rules which leave a wide margin of discretion to Member States as to their implementation. Reneman also ~~observes~~ that case law itself is strongly shaped by the applicable EU legislation, especially with respect to the scope and intensity of review.

However, as Gutman observes, there is also evidence of a self-standing use of Article 47: indeed, the *Egenberger* ruling can be used as an example of Article 47 being regarded by the Court as sufficient to have vertical and horizontal direct effect.[15] Gutman furthermore argues that Article 47 'permeates' post-Lisbon rulings even where the Charter provision is not mentioned explicitly. She also observes, in relation to the use of Article 47 vis-à-vis EU secondary rules of a procedural nature, that the relevance of the Charter (and thereby of Article 47) depends on the specifics of the case: if the legal matter is closely linked to the detailed requirements of EU secondary law, Article 47 might not be mentioned, while the latter does play a role where the issue revolves around the 'effective judicial protection aspect' of the relevant EU secondary law rule.

In the European Arrest Warrant system, according to Martufi, after some initial hesitance,[16] Article 47 now firmly underpins the interpretation of secondary law and works as a key constitutional benchmark even when it is not explicitly mentioned in the case law of the Court.[17] The very existence of the right to an effective remedy under the Charter guides the Court in interpreting the EAW Framework Decision in a way that leads to a (more) robust protection of fundamental rights.

In environmental law, what is crucial is not only the relation of Article 47 with EU secondary rules, but also with the international rules of the Aarhus Convention. With respect to EU secondary rules, earlier research has shown that Article 47 has been used by the Court both in combination with secondary rules and as a self-standing basis in the absence of EU rules on the matter.[18] With regard instead to Article 9 of the Aarhus Convention, Krämer ~~observes~~ that, in the case law of the Court, Article 47 is sometimes used alone without Article 9,[19] in other cases Article 9 is used alone without Article 47,[20]

[14] Council Dir 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [1989] OJ L395/33.

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

[16] Case C-396/11 ~~*Ciprian Vasile*~~ *Radu* EU:C:2013:39 and Case C-168/13 PPU *Jeremy F* EU:C:2013:358. In those cases, the Court used Article 47 only to 'confirm' the level of protection offered by the [illegible] almost as if the correct standards of protection should be set by secondary legislation.

[17] Case C-452/16 *Poltorak*, EU:C:2016:858, Case C-453/16 PPU *Özçelik* EU:C:2016:860 and Case C-477/16 PPU *Kovalkovas* EU:C:2016:86.

[18] Eliantonio (n 13).

[19] Case C-723/17 *Craeynest and Others* EU:C:2019:533.

[20] Case C-570/13 *Gruber* EU:C:2015:231.

while in other cases both provisions are used.[21] According to Krämer, the approach is not consistent, but these different formulations seemingly do not lead to any substantial difference in the result.

The tax law field shows a very different picture. As Pantazatou illustrates, in VAT legislation there is strong – substantive – harmonisation, while in direct taxation EU legislation has mostly focused on creating harmonised procedures of exchange of information before national administrative authorities.[22] There is thus no proceduralisation, in the sense of EU secondary rules of a procedural nature applicable before national courts. Naturally, therefore, Article 47 was used as a self-standing provision to protect taxpayers' rights. Often, however, Article 47 was used in combination with other Charter articles of the Justice Title.

In other fields, the discussion on proceduralisation and the use of Article 47 in combination with EU secondary rules does not lead to the same results, as the litigation takes place before the EU Courts rather than the national courts. This is partly the case with environmental law, where Article 47 has been used – though unsuccessfully – to challenge the Court of Justice's interpretation of primary law (ie, Article 263 TFEU). Article 47 also played a role in competition litigation before the EU Courts, with respect to claims arising from the application of Articles 101 and 102 TFEU, and in cases brought under the Common Foreign and Security Policy, where Article 47 has most often been used in the context of challenges to restrictive measures and sometimes in respect of acts of bodies set up by CFSP acts, as Poli's chapter makes clear.

## IV. The Pivotal Role of Article 47 to Further the *Acquis Communautaire*

The overwhelming impression arising from the chapters contained in this collection is that the Court of Justice has used the potential of Article 47 (alone or in combination with EU procedural rules) to boost the protection offered by EU substantive law. In some areas, this has also had the effect of limiting the procedural autonomy of the Member States.[23] From this perspective, our findings corroborate earlier research which has shown that the process of 'proceduralisation' has served to boost the effective application of substantive rules.[24] Article 47, in this sense, 'boosts the boosters'.

This is evident, for example in the case law in the fields of migration and non-discrimination. With respect to the latter, as Gutman shows, Article 47 has served to strengthen the protection offered by EU secondary rules of a procedural nature, and, thereby, thanks to Article 47, ultimately the level of protection in non-discrimination

[21] Case C-752/18 *Deutsche Umwelthilfe eV* EU:C:2019:1114.

[22] Council Dir 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L64/1.

[23] See in particular the EAW system studied by Martufi, but also in the fields of migration and non-discrimination. The theme is discussed also in Bonelli's chapter ~~in the first part of the volume~~.

[24] See M Eliantonio and E Muir, 'Concluding Thoughts: Legitimacy, Rationale and Extent of the Incidental Proceduralisation of EU Law', (2015) 8 Review of Europ[illegible] Administrative Law 175.

cases has been raised. In relation to migration, Reneman shows that Article 47 has been used not only to interpret secondary rules which are complex and sometimes vague, but also to limit the discretion of Member States in their (possibly too restrictive) implementation of secondary rules. Also with respect to tax law, Pantazatou observes that in the field of VAT, the applicability of the Charter has been undisputed since *Akerberg Fransson*,[25] and Article 47 has clearly upped the game in protecting taxpayers' rights. Since the *Edwards* ruling,[26] Article 47, at least when used with respect to national procedural rules, has also served to strengthen environmental protection both in combination with Article 9 of the Aarhus Convention and sometimes even alone. Finally, in the EAW system, the Court has in recent times developed a 'dynamic' interpretation of the EAW Framework Decision[27] that allows ~~a~~ strengthening of the protection offered by secondary legislation.

However, in all these areas, our authors critically remark that there is some untapped potential for Article 47. In the field of non-discrimination, for example, Gutman concludes that the role of Article 47 could further grow in those procedural areas where the Court has stuck to the tests of equivalence and effectiveness, such as for time limits to bring actions before the court. Similarly, in direct taxation, Pantazatou remarks that the actual applicability of the Charter had to be established in the field of taxpayers' rights, a move which only took place recently with the *Berlioz* ruling.[28] For this reason, while the applicability of the Charter served to strengthen the rights of information holders in the procedures of exchange of information, there is much that Article 47 could add with respect to the rights of taxpayers or third parties in judicial procedures. Finally, with respect to migration, Reneman observes that it is sometimes not clear whether a certain result achieved by the Court depends on EU secondary rules or on Article 47 or on a combination of the two sets of provisions. She argues that this lack of clarity could have very severe consequences because, if a certain result depends on EU secondary rules, it would then be possible to amend them to reduce the protection granted by EU law to asylum seekers. In the EAW context, Martufi highlights the remarkable absence of considerations on Article 47 or the principle of effective judicial protection in the assessment of the role of public prosecutors in surrender procedures.[29] The Court might be concerned that a more robust use and interpretation of the requirements of Article 47 – one that would narrow the functions of public prosecutors or even exclude them from the list of authorities able to issue EAWs – could disrupt the effectiveness of the cooperation scheme. Ultimately, according to Martufi, the approach of the Court seems to be at odds with the second paragraph of Article 47 as well as the ECHR requirements on the right to a fair trial.

The most striking example of the untapped potential of Article 47 appears to be the procurement field. Here, as Caranta remarks, Article 47 could have been used possibly as aid in interpreting secondary rules and in filling gaps left by secondary rules.

[25] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

[26] Case C-260/11 *Edwards* EU:C:2013:221.

[27] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ L190/1.

[28] Case C-682/15 *Berlioz* ~~*Investment Fund*~~ EU:C:2017:373.

[29] See eg Joined Cases C-508/18 and C-82/19 PPU *OG* ~~&~~ *PI* EU:C:2019:456; Case C-509/18 *PF* EU:C:2019:457.

However, this has not happened so far: national courts have tried to rely on Article 47, but the CJEU has so far stuck to the text of the Directives.[30] Caranta concludes that the Court of Justice does not give much weight to Article 47 because of what has been defined as a 'peculiar *collective* understanding' of the right of access to justice under Article 47, which focuses more on the systemic problems than on the specific protection of the economic operator. As a consequence, according to Caranta, the courts 'walks backwards' 20 years and absorbs the notion of effective judicial protection into *effet utile*.[31] If anything, Article 47 actually worked *against* the applicants, and it has strengthened national procedural autonomy.[32] Caranta does see a role for Article 47 to create a more level playing field in procedural areas such as standing, liability rules and intensity of review where national rules are still very divergent, but he also observes that it is eventually up to the Court to decide whether it wants to take up this role.

When applied before the EU Courts, a somewhat less rosy picture of Article 47 appears. Certainly, when looking at the litigation under the CFSP, Article 47 has played an essential role in expanding the jurisdiction of the CJEU and has been pivotal to the 'de-pillarisation' of the EU post-Lisbon, including in somewhat 'controversial cases', where the CJEU jurisdiction was far from straightforward.[33] It could even be argued (and indeed Poli does so) that at times the Court might even have gone too far with this expansive trend, as the *Venezuela* case shows.[34]

In competition law too, as Kalintiri ~~observes,~~ Article 47 has raised the procedural fairness bar in two ways. First, it has provided claimants with due process rights, and, second, it imposes stringent obligations on both the Commission and the EU Courts. In this manner, that provision has enhanced the legitimacy of competition law enforcement by setting several procedural obligations on the Commission, obligations which are reviewable and reviewed by the EU Courts. This is particularly evident in respect of the case law concerning the duty to give reasons.[35] At the same time, however, Article 47 has constrained the Commission's discretion and ability to act by imposing procedural duties on the Commission. The application of Article 47 in the field of competition offers an example of the complex balancing between fairness and effectiveness of competition enforcement. At the same time, when looking at the case law regarding the use of Article 47 in competition law, we cannot but form the impression that the Court is not quite practicing what it is preaching. Indeed, as Kalintiri shows, many attempts have been made to rely on Article 47 in proceedings at EU level to enhance procedural guarantees, but they have not been successful.

[30] As a matter of fact, as mentioned by Caranta, Article 47 in procurement litigation actually played a role only in procurement by EU institutions where the Remedies Directive is not applicable.

[31] See for an explanation of the different notions, M Eliantonio and E Muir, 'The principle of effectiveness: under strain?' (2019) 12 *Review of European Administrative Law* 255.

[32] See Case C-61/14 *Orizzonte Salute* EU:C:2015:655 and Case C-439/14 *Star Storage* EU:C:2016:688.

[33] Case C-455/14 P *H* EU:C:2016:569; ~~Case C-72/15~~ *Rosneft* ~~EU:C:2017:236~~; Case C-134/19 P *Bank Refah Kargaran* EU.

[34] Case C-872/19 P *Venezuela v Council* EU:C:2021:507. It is to be noted though that in this case the principle of effective judicial protection and not Article 47 has been used by the Court.

[35] See Case T-28/11 *Koninklijke Luchtvaart Maatschappij v Commission* EU:T:2015:995 and the other decisions mentioned in footnote 68 in Kalintiri's chapter; see also Case T-95/15 *Printeos and Others v Commission* EU:T:2016:722 and Case C-434/13 P *Commission v Parker Hannifin Manufacturing and Parker-Hannifin* EU:C:2014:2456.

The discrepancy between the requirements stemming from Article 47 with regard to national courts and those applicable to the Court of Justice is most evident with respect to environmental litigation. While the Court has used the principle of effective judicial protection and later Article 47 to expand avenues of judicial protection especially for environmental NGOs before national courts, it has not regarded Article 47 as imposing any duty to relax the standing condition in annulment actions under Article 263(4) TFEU. This approach of the CJEU has eventually led to findings of non-compliance with the Aarhus Convention by the Aarhus Convention Compliance Committee. As a consequence, the Aarhus Regulation implementing the Aarhus Convention in the EU legal system (with respect to the EU institutions)[36] has been amended. Yet, according to Krämer, even this amended version of the Regulation does not comply with the Convention or with Article 47. For this reason, according to Krämer, a more robust interpretation of Article 47 in the field of environmental law, together with the political will to change the applicable legislation, might repair these shortcomings. Whether there actually is the political will to do so is uncertain~~, though~~.

## V. The Broad Range of Procedural Areas Affected by Article 47

The range of procedural areas touched by first the principle of effective judicial protection and later Article 47 of the Charter is very broad, as the contributions in our volume illustrate. The national rules concerning access to court appear to be those which have probably most often been challenged by the requirements of effective judicial protection. This also seems logical if we consider that access to court is the first prerequisite for (effective) judicial protection. Not by accident the *Johnston* ruling, where the principle of effective judicial protection was first enunciated, indeed concerned a limitation to challenge an administrative measure before the competent court.[37] For example, national rules on standing and access to court have been tested against Article 47 in the field of non-discrimination,[38] migration,[39] environment,[40] the EAW[41]

[36] Reg (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/1.

[37] ~~Case C-222/84~~ *Johnston* ~~EU:C:1986:206~~.

[38] See eg, ~~C-414/16 *Vera Egenberger* v *Evangelisches Werk für Diakonie und Entwicklung eV* ECLI:EU:C:2018:~~257. In this field see also the case law on standing of equality bodies (such as Case C-507/18 *Associazione Avvocatura per i diritti LGBTI – Rete Lenford* EU:C:2020:289), where Article 47 is not mentioned but Gutman argues that the secondary law provisions 'embody' a requirement of effective judicial protection.

[39] Case law has concerned rules on access to court vis-à-vis the presence of only an administrative remedy (Case C-403/16 *El Hassani* EU:C:2017:960); the right of access to court to challenge certain decisions which might not be challengeable (Case C-237/97 *AFS Intercultural Programs Finland ry.* EU:C:1999:69). However, Article 47 does not require, according to the Court, the need to ensure two levels of jurisdiction (Case C-180/17 *X and Y* EU:C:2018:775).

[40] Case C-115/09 *BUND* EU:C:2011:289, Case C-263/08 *Djurgaarden* EU:C:2009:631.

[41] ~~Joined Cases C-508/18 and C-82/19 PPU~~ *OG and PI* ~~EU:C:2019:456~~ and later clarified in Joined Cases C-566/19 PPU and C-626/19 PPU *JR* & *YC* EU:C:2019:1077, dealing with the problematic question of whether there should be access to a court in cases of EAWs issued by public prosecutors. Martufi considers

and tax law.[42] Also EU rules on access to court have been scrutinised under Article 47, sometimes successfully, such as in the CFSP field,[43] and other times unsuccessfully, such as in environmental policy.[44] Finally, with respect to access to EU courts, one aspect which is peculiar to the CFSP is that of scope of the Court of Justice's competence. In this area, Article 47 served to establish the jurisdiction of the CJEU in annulment actions[45] as well as in preliminary questions of validity[46] and in actions for Union liability.[47]

Closely linked to access to court are rules on costs of proceedings, for which the case law of the CJEU has played a crucial role in environmental policy.[48] An attempt was made also to review national rules on costs of proceedings in public procurement policy in light of Article 47, but unsuccessfully.[49] Rules on legal representation and legal aid are also connected to those on access to court, and they have been at stake mostly in tax litigation.[50]

Beyond rules on access to court, the case law on Article 47 has impacted rules concerning the scope and intensity of review by national courts. This has been the case especially in the field of migration.[51] In the field of public procurement, in contrast, attempts to expand the scope of review of national courts based on Article 47 of the Charter have been unsuccessful.[52] Several contributions in this collection point furthermore to an increasing role of Article 47 in respect of national rules on evidence and on the burden of proof, for example in migration,[53] non-discrimination,[54] and tax litigation.[55]

the approach of the Court to the question 'worrisome' as it fails to meaningfully engage with the guarantees of Article 47 and the ECHR.

[42] Case C-682/15 *Berlioz Investment Fund* EU:C:2017:373, Joined Cases C-245/19 and C-246/19 *État luxembourgeois v B and Others* EU:C:2020:795 and Case C-437/19, *État luxembourgeois v L* EU:C:2021:953.

[43] Case T-578/12 *National Iranian Oil Company* EU:T:2014:678; and *Venezuela* (n 34), which however is based on the principle of effective judicial protection rather than Article 47).

[44] Case C-565/19 P *Armando Carvalho and Others v European Parliament and Council of the European Union* EU:C:2021:252.

[45] Case C-455/14 P *H* EU:C:2016:569.

[46] Case C-72/15 *Rosneft* EU:C:2017:236.

[47] Case C-134/19 P *Bank Refah Kargaran* EU:C:2020:793.

[48] Case C-260/11 *Edwards* EU:C:2013:221.

[49] Case C-61/14 *Orizzonte Salute* EU:C:2015:655.

[50] Case C-543/14 *Ordre des barreaux francophones et germanophone and Others* EU:C:2016:605.

[51] See eg, C-146/14 *Bashir Mohamed Ali Mahdi* EU:C:2014:1320, according to which national courts should be able to investigate thoroughly the dispute at stake; Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* EU:C:2019:626, which required full examination *ex nunc* of the facts of the case; Joined Cases C-225/19 and C-226/19 *RNNS and KA* EU:C:2020:951, which established that a mere 'formal' examination is too limited, and a substantive examination of legality is required to comply with Article 47. See also in the environmental field Case C-72/12 *Gemeide Altrip and Others* EU:C:2013:712, which is however based on the principle of effectiveness.

[52] Case C-300/17 *Hochtief* EU:C:2018:635. See on intensity of review the rulings in Case C-92/00 *Hi* EU:C:2002:379 and Case C-440/13 *Croce Amica One Italia* EU:C:2014:2435, where however Article 47 is not mentioned.

[53] Case C-406/18 *PG* EU:C:2020:216, on the basis of which national courts must have certain means of evidence to ensure effective judicial protection.

[54] C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* EU:C:2013:48, where Article 47 is not mentioned, but Gutman argues that the secondary law provisions 'embody' a requirement of effective judicial protection.

[55] With respect, in particular, to the collection and use of evidence to prove tax fraud (Case C-310/16 *Dzivev and Others* EU:C:2019:30) or without the knowledge of the taxpayer (Case C-419/14 *WebMindLicenses kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* EU:C:2015:832).

Finally, Article 47 has significantly influenced rules on remedies. This may be observed in the area of migration law,[56] and, with respect to sanctions, also in the field of non-discrimination.[57] Along those same lines, national rules on interim relief have also been affected by the case law of the CJEU on effectiveness and effective judicial protection.[58]

The use of Article 47 in litigation before the EU courts led to different results. The chapter dedicated to competition law and the CFSP show that the potential of Article 47 emerged with reference to rules on the right of defence, the principle of equality of arms and the right to be represented.[59] At the same time, in both policy areas, Article 47 has been used to strengthen the intensity of judicial review, which has also been linked to the duty to give reasons, but with inconsistent results.[60]

While the contributions contained in this collection reflect the diversity of rules which have been scrutinised under Article 47, in her contribution Eliantonio presents two 'notable' absentees, the rules on *res judicata* and those on the *ex officio* powers of national courts. Here the post-Lisbon case law has granted virtually no role for Article 47, although, as discussed by Eliantonio, at least with respect to rules concerning the duty to raise points of EU law *ex officio*, the case law seems to have moved to a somewhat increased attention towards Article 47. Yet, it is questionable whether in this area Article 47 could deliver any added value with respect to the principle of effectiveness or the relevant secondary procedural rules. By contrast, when it comes to the rules on *ex officio* application of EU law against the applicant and in respect of rules on *res judicata*, Eliantonio concludes there may be a potential added value emanating from Article 47 which the CJEU might be called to bring to the fore in the future if prompted by national courts.

## VI. Conclusions

The contributions contained in this collection demonstrate that Article 47 has become a cornerstone of the European system of multi-level judicial protection. Together with a number of 'friends' (Article 19 TEU, Articles 6 and 13 ECHR, as well as the increasing number of EU secondary law provisions of procedural nature), and 'relatives' (the principle of effective judicial protection, as well as the twin principles of equivalence and effectiveness), it has been used by the Court of Justice to shape not only national

[56] See eg, C-146/14 *Bashir Mohamed Ali Mahdi* EU:C:2014:1320, on the basis of which courts can substitute their own decision for that of the authority in Returns Directives cases; however, in cases of Procedures Directive this is not required: see the ruling in Case C-556/17 *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal* EU:C:2019:626. However, the power of substitution might become required under Article 47 if the lack thereof ends up in a game of judicial ping-pong.

[57] Case C-30/19 *Braathens Regional Aviation* EU:C:2021:269.

[58] Eg, Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia* EU:C:2013:8 which is based on the principle of effectiveness.

[59] Eg, Case C-199/11 *Otis and Others* EU:C:2012:684 in competition law; in the area of CFSP Case T-248/13 *Al Ghabra* EU:T:2016:721 which was however based on the principle of effective judicial protection rather than on Article 47.

[60] Case C-280/12 P *Council v Fulmen and Mahmoudian* EU:C:2013:77 in the field of CFSP; in competition law see Case T-95/15 *Printeos and Others v Commission* EU:T:2016:722.

procedural rules, but also systemic features of the national legal orders of the Member States. However, while showing the breadth and potential reach of Article 47, the contributions of this first volume have only shed light on one side of the story, that told from the Kirchberg plateau. The story of the role of Article 47 will only be complete if the perspective of the thousands of national courts – the European courts of 'general jurisdiction'[61] – is also accounted for. After all, in the decentralised system of enforcement of EU law, it is first and foremost national courts that are called to apply and protect the rights which individuals derive from EU law, and to consider whether their own national (procedural) rules comply with Article 47 of the Charter. ~~Our second forthcoming volume~~ turns to the perspective of the national courts.

[61] Case C-333/94 P *Tetra Pak International SA v Commission ~~of the European Communities~~* EU:C:1996:436.