

Introduction

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Introduction

MATTEO BONELLI, MARIOLINA ELIANTONIO
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Article 47 of the Charter of Fundamental Rights of the European Union

Right to an effective remedy and to a fair trial

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

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

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

The Project

This book is the first of two volumes on the interpretation and application of the principle of effective judicial protection and of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') in the composite European legal order. It offers a *top-down* perspective by analysing the Court of Justice's interpretation and application of Article 47 at the EU level. This inquiry will be then followed and complemented by a *bottom-up* perspective in the second volume,¹ which will explore the national courts' approaches to the application of Article 47 of the Charter and its related provisions.

The project starts from two observations, which are, respectively, of an empirical and a systemic nature, on the state of the evolution of Article 47 and the principle of effective judicial protection. In empirical terms, as is also explained in Gentile and

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¹ M Bonelli, M Eliantonio and G Gentile, *Article 47 of the EU Charter and Effective Judicial Protection: Volume II: The National Courts' Perspectives* (Hart Publishing, forthcoming).

Menzione's chapter in this first volume,² we noticed that Article 47 is the provision of the Charter most commonly used by the Court of Justice as well as by national courts in their preliminary references.³ This is not merely a curious statistic. The prevalence of Article 47 in the Court's case law on the Charter is in fact so remarkable that it merits closer analysis. We have hypothesised that the study of the CJEU case law on Article 47 might reveal important findings on the role of that provision in the EU fundamental rights landscape, as well as on the approach of the Court of Justice towards claims involving fundamental rights issues. The popularity of Article 47 has even been viewed with a degree of concern, as it might obscure other dimensions of the Union's bill of rights.⁴ In any event, this preliminary empirical observation generates a series of questions: what are the reasons for the prevalence of Article 47, both at EU and at national level? Is this predominance due mainly to developments in a specific policy area or field, or can we see it across the board? Are particular components⁵ of Article 47 more invoked and applied than others? Beside these quantitative observations, a qualitative analysis further reveals that Article 47 features prominently in several landmark rulings of the CJEU with a profound constitutional dimension: the key significance of Article 47 in the EU constitutional toolkit is evident.⁶ This prevalence, if not predominance, of Article 47 in the case law of the Court was the first thrust for us to reflect on its role and impact in the multilevel system of protection of European fundamental rights and more broadly on the Union's constitutional framework.

In systemic terms, what stimulated our analysis is the complex landscape in which Article 47 of the Charter is situated. As the Court of Justice held in *Abida* and then repeated in *Rosneft*, Article 47, containing the right to an effective remedy and to a fair trial, 'constitutes a reaffirmation of the principle of effective judicial protection.'⁷

² See also: E Frantziou, '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); X Grousot and GT Peterson, 'Je t'aime ... moi non plus: Ten years of application of the EU Charter of Fundamental Rights', (2022) 59 *Common Market Law Review* 239; and the data of the FRA Fundamental Rights Agency, Fundamental Rights Report 2019, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf.

³ As the second volume of this project will make clear, Article 47 is the Charter provision most commonly used by national courts in most domestic legal orders not only in their preliminary references to the CJEU, but also when they autonomously – that is, without consulting the CJEU in a preliminary reference – apply EU law.

⁴ Frantziou (n 2).

⁵ Article 47 contains two main dimensions: the right to effective judicial protection; and the right to fair trial. For each dimension, we can then identify many sub-components: see for an overview A Ward, 'Article 47 – Right to an Effective Remedy and to a Fair Trial' in S Peers et al (ed), *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing, 2021).

⁶ See eg Case C-414/16 *Egenberger* EU:C:2018:257 (in which the Court recognised the horizontal direct effect of Art. 47); Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117; Case C-72/15 *Rosneft* EU:C:2017:236. The point will be developed later.

⁷ Case C-562/13 *Abida* EU:C:2014:2453, para 45; and *Rosneft* (n 6) para 73. See also the earlier decision in Case C-432/05 *Unibet* EU:C:2007:163, para 37, where the Court used a slightly different formulation: 'the principle of effective judicial protection is a general principle of Community law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights of the European Union' (italics added)

The latter had already been discovered by the Court of Justice in the 1980s with the *von Colson* and *Johnston* rulings,⁸ and developed on the basis of Articles 6 and 13 of the European Convention on Human Rights,⁹ as well as national constitutional traditions.¹⁰ Due to the composite nature of the EU judicial system, the principle of effective judicial protection has been seen as imposing obligations both at the EU level¹¹ and on national authorities, acting as a limit to the national procedural autonomy of the Member States¹² together with the principles of equivalence and effectiveness that the Court of Justice had elaborated in the *Rewe* case.¹³ Article 47 thus reaffirmed and ‘codified’ the principle of effective judicial protection, but did not replace it: the right and the general principle continue to coexist next to each other.

Furthermore, the Treaty of Lisbon did not limit itself to making the Charter and Article 47 legally binding. It also added the current version of Article 19 TEU, which includes another key reference to the concept of effective judicial protection, or to be more precise, to ‘effective legal protection’ (but the concepts can certainly be seen as perfect synonyms). Indeed, the second sentence of Article 19 requires the Member States to ‘provide remedies sufficient to ensure effective legal protection in the fields covered by Union law’. The primary law landscape is thus rather complex: Article 47 of the Charter, other ‘Justice’ rights of the Charter related to Article 47,¹⁴ Article 19 TEU,¹⁵ and an unwritten general principle of effective judicial protection, related to the *Rewe* principles of equivalence and effectiveness.

But there is more: Articles 6 and 13 of the ECHR continue to be relevant in the interpretation of the general principle of effective judicial protection and of Article 47, also in the light of Article 52(3) of the Charter, which affirms that Charter rights should be given the same meaning and scope as corresponding ECHR rights.¹⁶ What is more, national constitutions also offer protection to the right to a fair trial and the right to effective judicial protection.¹⁷ Last but not least, we should mention that in the last few decades the EU has also increasingly adopted procedural rules that concretise the more general

⁸ Case C-14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* EU:C:1984:153; Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* EU:C:1986:206.

⁹ Article 6 ECHR guarantees the right to a fair trial; Article 13 ECHR protects the right to an effective remedy.

¹⁰ *Johnston* (n 8) para 18.

¹¹ Famously see e.g. Joined Cases C-402/05 P and C-415/05 P *Kadi I* EU:C:2008:461.

¹² On this concept, see Bonelli’s chapter in this volume.

¹³ Case C-33/76 *Rewe v Landwirtschaftskammer für das Saarland* EU:C:1976:188. The precise relationship between the three concepts has never been fully clarified: see e.g., S Prechal and R Widdershoven, ‘Redefining the Relationship between “Rewe-effectiveness” and Effective Judicial Protection’ (2011) 4 *Review of European Administrative Law* 31.

¹⁴ See Gentile and Menzione’s chapter in this volume.

¹⁵ On the relationship between Art. 19 TEU and Art. 47 of the Charter, see in particular the chapters of Prechal and Krajewski in this volume.

¹⁶ The Explanations of the Charter clarify that the provision corresponds to Article 6 and Article 13 ECHR. Note however that Article 47 is actually formulated in a broader manner and offers more extensive protection than the two ECHR provisions: see e.g., Gutman (n 2).

¹⁷ By way of example, see Art 13 of the Belgian Constitution, Art 29 of the Croatian Constitution, Art 111 of the Italian Constitution, Arts 19 and 103 of the German Constitution, Art 28 of the Hungarian Constitution, etc.

requirements stemming from Article 47. These EU procedural rules work together with – or sometimes replace – national procedural rules. The landscape therefore becomes even more complex: Article 47 interacts with other EU primary and secondary substantive and procedural rules, EU general principles,¹⁸ ECHR rights, national rights and national procedural rules. We thus sought to reflect on those interactions and on the role of Article 47 in that landscape, or, using a different metaphor, on how the different pieces of the jigsaw of EU effective judicial protection fit together.

In the light of these observations, we decided to structure the book project around two main perspectives. The first is the perspective of the Court of Justice of the European Union. In this respect, our first volume builds on and contributes to an already rich discussion on effective judicial protection and Article 47 of the Charter at the EU level. So far, the literature on these topics has developed mostly in two directions. A more *analytical* strand focused on the content of Article 47,¹⁹ explored the question of its essence²⁰ and possible limitations,²¹ and looked at its role in specific policy areas.²² A more *systemic* strand placed Article 47 in the broader landscape we depicted above, and looked at its interaction with the general principle of effective judicial protection and the other key EU law principles of equivalence and effectiveness,²³ and also explored the

¹⁸ See also the interaction between Art 47 of the Charter, legality, and legal certainty in Eliantonio's chapter in this volume.

¹⁹ P Aalto et al 'Article 47 – Right to an Effective Remedy and to a Fair Trial' in S Peers et al (eds), *The EU Charter of Fundamental Rights* (Hart Publishing, 2014); Ward (n 5); Gutman (n 2).

²⁰ K Gutman, 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?' (2019) 20 *German Law Journal* 884.

²¹ T Ojanen, 'Making the Essence of Fundamental Rights Real: The Court of Justice of the European Union Clarifies the Structure of Fundamental Rights under the Charter: ECJ 6 October 2015, Case C-362/14, Maximilian Schrems v Data Protection Commissioner' (2016) 12 *European Constitutional Law Review* 318; G Gentile, 'The CJEU Scrutiny of National Procedural Rules under Article 47 EUCFR: Between EU Constitutional Essentialism and the Enhancement of Procedural Justice in the Member States', in C Mak and B Kas (eds), *Civil Courts and the European Polity: The Constitutional Role of Private Law Adjudication in Europe* (Hart Publishing, forthcoming).

²² A van Duin, 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' (2017) 6 *Journal of European Consumer and Market Law* 190; C Mak, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in HW Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press, 2014); M Reneman, 'Asylum and Article 47 of the Charter: Scope and Intensity of Judicial Review' in A Crescenzi et al (eds) *Asylum and the EU Charter of Fundamental Rights* (Editoriale Scientifica, 2018).

²³ W van Gerven, 'Of rights, remedies and procedures' (2000) 37 *Common Market Law Review* 501; R Barents, 'EU procedural law and effective judicial protection' (2014) 51 *Common Market Law Review* 1437; M Accetto and S Zleptnig, 'The Principle of Effectiveness: Rethinking Its Role in Community Law' (2005) 11 *European Public Law* 375; A Arnull, 'The principle of effective judicial protection in EU law: an unruly horse?' (2011) 36 *European Law Review* 51; M Bobek, 'Why there is no principle of procedural autonomy of the Member States' in B De Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2011); Prechal and Widdershoven (n 13); M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3; S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen et al (eds), *Fundamental Rights in International and European Law* (Springer, 2016); J Krommendijk, 'Is there light on the horizon? The distinction between "Reve-effectiveness" and the principle of effective judicial protection in Article 47 of the Charter after Orizzonte' (2016) 53 *Common Market Law Review* 1395; R Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 *Review of European Administrative Law* 5.

interaction between the right, the principles and secondary EU procedural law.²⁴ Our volume brings in turn two innovative perspectives. First, it focuses on the constitutional dimension of Article 47 and the principle of effective judicial protection, which have become structural norms of the EU judiciary, expanding on the first analyses offered in the debate.²⁵ Secondly, it offers the first²⁶ cross-sector analysis of the case law of the CJEU on Article 47, which allows for fresh comparisons between different policy fields and can help in answering several questions: do we see similar issues emerging in different areas? Is the approach of the Court to those issues consistent? How does the Court approach the interaction between Article 47 and the other ‘judicial protection’ provisions in these different fields?

The second volume takes the perspective of the national courts, which are called on to apply Article 47 and the principle of effective judicial protection in concrete cases. These courts engage with this Charter provision and the parent general principle in a threefold manner: they implement the case law of the CJEU on Article 47; they, on some occasions, involve the Luxembourg Court to clarify the scope and content of the relevant provisions via the preliminary reference procedure; and they manage the interaction of Article 47 and other relevant EU norms with national constitutional provisions and the ECHR. This second perspective contributes to an emerging strand of the literature,²⁷ which has started to explore how the Charter provisions have been received, interpreted and applied by national courts, zooming in on what has so far been arguably the most important and most impactful article of the EU bill of rights.

Combining the two dimensions – the EU and the national – the project allows us to better place Article 47 in the composite and multilevel European fundamental rights landscape, bringing to light the main challenges emerging at each level as well as those created by the interaction of different levels, and then to reflect on whether there is a sufficient degree of consistency and convergence in the interpretation and use of Article 47 vertically – between the CJEU and national courts – and horizontally – between national courts in different Member States.

²⁴ R Caranta, ‘The interplay between EU legislation and effectiveness, effective judicial protection and the right to an effective remedy in EU public procurement law’ (2019) 12 *Review of European Administrative Law* 63; 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; L Tsourdi, ‘Of legislative waves and case law: Effective judicial protection, right to an effective remedy and proceduralisation in the EU asylum policy’, (2019) 12 *Review of European Administrative Law* 143.

²⁵ L Pech and S Platon, ‘Judicial Independence Under Threat: The Court of Justice to the Rescue’ (2018) 55 *Common Market Law Review* 1827; M Bonelli and M Claes, ‘Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary’ (2018) 14 *European Constitutional Law Review* 622; V Roeben, ‘Judicial Protection as the Meta-norm in the EU Judicial Architecture’ (2019) 12 *Hague Journal of the Rule of Law* 29; A Mickonytė, ‘Effects of the Rule-of-Law Crisis in the EU: Towards Centralization of the EU System of Judicial Protection’ (2019) 79 *Heidelberg Journal of International Law* 815; M Bonelli, ‘Effective Judicial Protection in EU Law: an Evolving Principle of a Constitutional Nature’ (2019) 12 *Review of European Administrative Law* 35.

²⁶ As noted above, while attention has been paid to the role of Article 47 in specific areas, as far as we know there is limited comparison *between* policy fields.

²⁷ Bobek and Prassl (n 2); R Tinière and C Vial (eds), *Les dix ans de la Charte de droits fondamentaux de l’Union européenne. Bilan et perspectives* (Bruylant, 2020).

The First Volume and its Structure

The first volume of the project focuses on the Court of Justice's perspective. It includes two sets of contributions. The first group analyses a range of constitutional themes linked to the Court's interpretation of Article 47 and the principle of effective judicial protection. The goal of this part of the volume is to better grasp the position and impact of Article 47 and of the principle of effective judicial protection in the Union's constitutional framework, as well as its relationship with other key EU law principles and rights. It also reflects in particular on the more recent case law of the Court that is transforming Article 47 into a key structural norm for the EU legal and judicial structure.²⁸

The first three chapters look at the interaction between Article 47 and other key EU 'judicial protection' and 'Justice' norms. Prechal compares and contrasts the scope of application of Article 19 TEU and of Article 47 of the Charter, and then reflects on what justifies the exceptionally broad scope of application of Article 19 TEU. Gentile and Menzione concentrate on the interplay between Article 47 and the other rights of the 'Justice' title of the Charter, which so far have remained 'in the shadow' of Article 47 in both the case law of the Court and academic analysis. Wallerman-Ghavanini and Rauegger look at the relationship between Article 47 and the preliminary reference procedure established by Article 267 TFEU, explicitly acknowledged in the recent case law of the Court.²⁹ Then Krajewski and Bonelli's chapters analyze the impact of the 'constitutional' jurisprudence of the Court based on Article 47 of the Charter and Article 19 TEU on domestic constitutional orders. Krajewski focuses on the judicial independence case law, assessing how the Court has dealt with the diversity (or commonality) of standards and national constitutional traditions, while Bonelli assesses how Article 47 contributes to shape the traditional question of the limits to the procedural autonomy – or autonomy *tout court* – of the Member States. This first part of the volume is completed by Eliantonio's chapter, which reflects on whether and how the principle of effective judicial protection and Article 47 have played a role in the line of cases on the finality of judicial decisions and the *ex officio* application of EU law.

The contributions to the second part of the volume look instead at the role of Article 47 in different policy areas. The analysis is chiefly qualitative, although occasionally complemented by quantitative findings.³⁰ We have selected a few policy areas more closely linked to rule of law and fundamental rights considerations, where Article 47 would be expected to play a decisive role, though in practice that might not always be the case.³¹ For instance, Gutman analyses the role of Article 47 in the Union's non-discrimination and equality law; Reneman reflects on how Article 47 has empowered domestic asylum and migration courts; and Martufi offers a critical study of the controversial approach of the Court to the Charter rights in the context of the European Arrest Warrant. The volume also includes more 'traditional' areas of EU economic law. In some of those fields, such as competition law, studied by Kalintiri, Article 47 has

²⁸ See in particular the chapters by Prechal, Krajewski, Bonelli, and Wallerman-Ghavanini and Rauegger.

²⁹ Case C-561/19 *Consorzio Italian Management* EU:C:2021:799.

³⁰ See in particular Kalintiri's chapter on competition law.

³¹ See in particular Martufi's chapter on the European Arrest Warrant system.

started to play a key role since the entry into force of the Charter; in others, such as taxation, analysed by Pantazatou, we are witnessing a slower evolution in the approach of the Court; and in public procurement, as argued by Caranta, Article 47 is not yet adequately considered by the Court. The same might be true for another area of EU law – the environment – where, according to Krämer, the Court is called on to rethink its approach. Finally, Poli's chapter analyses the use of Article 47 in the Common Foreign and Security Policy and shows how the provision has been used by the Court to expand its limited jurisdiction in the area.

In our conclusions, we attempt to tie together the different themes that have emerged in the substantive chapters of the volume and link them to the questions which have prompted us to embark on this research. First, we highlight some trends emerging with respect to the 'constitutional' role of Article 47 in the EU multi-level system of governance. Secondly, we present a few observations on the interactions between Article 47 and the principle of effective judicial protection, between Article 47 and EU secondary law, and on the complex network of protection offered by the Charter, the ECHR and national (constitutional) provisions. We finally examine the role and potential of Article 47 to further the application of EU substantive law and to shape national remedial rules.

