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Article 47 of the Charter and the Netherlands

A World to Win

ROB WIDDERSHOVEN, SIM HAKET, ANNA VAN DUIN AND ANNA TAIMR*

The influence of Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR) in Dutch case law is increasingly visible, especially in administrative law, in particular migration law, and in criminal law, especially in judicial procedures regarding the European Arrest Warrant. Article 47 EUCFR is often applied in conjunction with secondary EU law (eg, the Asylum Procedure Directive and the European Arrest Warrant (EAW) Framework Decision) or an international treaty (the Aarhus Convention). The number of preliminary questions concerning Article 47 EUCFR to the Court of Justice of the European Union (CJEU) has increased as well, many of them made by lower courts. Although the Dutch courts tend to take Article 47 EUCFR seriously, there is still a world to win. The Dutch courts are used to referring to Articles 6 and 13 ECHR rather than Article 47 EUCFR, even if the case is clearly within the scope of EU law. This 'Charter indifference' might change when the autonomous content of Article 47 EUCFR becomes clearer.

I. Introduction

Article 47 of the Charter of Fundamental Rights of the European Union (EUCFR) is still a relatively new instrument for effective judicial protection, and less ingrained in Dutch legal practice than Articles 6 and 13 of the European Convention on Human Rights (ECHR). Over the years, the ECHR has become the most important fundamental rights standards for the Dutch courts. While Article 120 of the Constitution (Grondwet)

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prohibits the constitutional review of primary legislation (Acts of Parliament), Article 94 of the Constitution gives precedence to directly effective international provisions – including Articles 6 and 13 ECHR – over contrasting national norms. Article 47 EUCFR enjoys primacy over national law as well, but so far it has not been as widely applied in Dutch case law as the ECHR's corresponding provisions.

This chapter examines the application of Article 47 EUCFR in judicial decisions in the Netherlands. In section III.A, we provide a quantitative overview. From the numbers it appears that initially, after the entry into force of the Charter in 2009, the number of references to Article 47 EUCFR was rather low. In recent years this number has increased significantly, first in the area of administrative law, in particular in migration law, and also in the area of criminal law since 2018. Section III.B will focus on the relationship between Article 47 EUCFR and the equivalent rights of Articles 6 and 13 ECHR. In this regard, the Dutch courts seem to follow different strategies, ranging from 'Charter first' to 'Charter indifference', with a coordinated ECHR-Charter approach in the middle. Next, in section IV.A, we discuss the preliminary questions made by Dutch courts to the Court of Justice of the European Union (CJEU) in relation to Article 47 EUCFR, especially in areas which have been significantly harmonised by EU law, such as migration law and the European Arrest Warrant (EAW). In addition, in section IV.B, we examine some areas where the Dutch courts have interpreted Article 47 EUCFR in an autonomous way. Section V contains a comprehensive evaluation of the findings in the different sections.

Before examining the practical effects of Article 47 EUCFR in the Dutch legal order, it is necessary to explain the main features of the Dutch legal system in section II. These relate to the organisation of the judiciary (section II.A) and the constitutional status of the EUCFR and the ECHR (section II.B).

II. The Main Features of the Dutch Legal System

A. The Organisation of the Judiciary

The competent court in the first instance is always the rechtbank (district court, hereafter abbreviated as Rb in the footnotes), of which there are 11. There are three sectors dealing with the main areas of law: private law, criminal law and administrative law. In some district courts, designated entities or chambers have been created, which have jurisdiction in specific areas of law. Most important for the purposes of this chapter is the Rechtbank of The Hague, which is the first instance administrative court in all migration law cases, and the Rechtbank of Amsterdam, which houses the chamber for international legal assistance in criminal matters, the court of first and final instance in cases concerning EAWs.

In private law and criminal law, judgments of the rechtbank courts can be challenged before one of the four Gerechtshoven (Courts of Appeal). Judgments of the latter are open to cassation before the Hoge Raad (Supreme Court, hereinafter HR). In administrative law, appeals can be brought before different courts. The most important appellate court is the Afdeling bestuursrechtspraak van de Raad van State (Judicial Division of

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the Council of State, hereinafter ABRvS), which is competent by default unless another court has been assigned. The Afdeling deals, for instance, with migration and environmental law cases. The appellate courts in tax matters are the four Gerechtshoven (Courts of Appeal), whose judgments can be appealed further, in cassation, before the Hoge Raad. The other administrative appellate courts are the Centrale Raad van Beroep (Central Appellate Court, hereinafter CRvB), which is competent in social security and civil service matters, and the College van Beroep voor het bedrijfsleven (High Administrative Court for Trade and Industry, hereinafter CBb), which is competent in economic matters (eg, competition, telecommunication, energy, financial supervision, food law, EU subsidies and agriculture).

B. The Constitutional Status of the EUCFR and the ECHR

The Netherlands does not have a constitutional court.[1] Moreover, the above-mentioned prohibition of constitutional review (Article 120 Grondwet) has been interpreted as precluding the courts from assessing whether Acts of Parliament comply with unwritten national legal principles as well.[2] Thus, on a national level, there is neither a 'dual regime' of fundamental rights protection nor a conflict between the Charter and the Constitution. However, on the basis of Article 94, in conjunction with Article 93 of the Constitution, Dutch courts are obliged to review whether Acts of Parliament are compliant with so-called self-executing provisions of international law and, if not, to disapply those Acts. The competence to review and disapply lies with every national court. The Hoge Raad has defined self-executing provisions as provisions which are unconditional and sufficiently precise to be applied in the national legal order as objective law,[3] a definition which comes close to the CJEU's definition of direct effect of EU law. Pursuant to Article 94 of the Constitution, self-executing provisions of international treaties enjoy primacy above all Dutch law, including the Constitution itself. In the past, Dutch courts have qualified as being self-executing or directly effective all fundamental rights and freedoms of the ECHR and its Protocols, including the right to a fair trial of Article 6 ECHR and the right to an effective remedy of Article 13 ECHR. This applies not only to the ECHR provisions, but to the case law of the European Court of Human Rights (ECtHR) as well. As a consequence, regarding fundamental rights protection, the ECHR and the case law of the ECtHR are far more important than the Dutch Constitution.

[1] C Wissels and A Pahladsingh, 'The Netherlands: The New Kid on the Block, Growing Pains or Growing Gains?' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020) 258–74; J Uzman, T Barkhuysen and M van Emmerik, 'The Dutch Supreme Court: A Reluctant Positive Legislator?' in A Brewer-Carías (ed), *Constitutional Courts as Positive Legislators* (Cambridge University Press, 2011) 645.

[2] HR 14 April 1989, ECLI:NL:HR:1989:AD5725 (*Harmonisatiewet*). Reaffirmed in, for instance, HR 19 December 2014, ECLI:NL:HR:2014:3679 (*Boseton*) and ABRvS 1 March 2023, ECLI:NL:RVS:2023:772.

[3] HR 1 April 2011, ECLI:NL:HR:2011:BP3044; HR 10 October 2014, ECLI:NL:HR:2014:2928. Recently this definition was adopted by the ABRvS 3 February 2021, ECLI:NL:RVS:2021:205.

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Dutch courts do not base the primacy of EU law on Articles 93 and 94 of the Constitution. The Constitution does not contain an 'EU clause' either. Instead, courts have accepted the authority of EU law on the terms set out by the CJEU in *Van Gend en Loos* and *Costa/ENEL*.[4] According to these cases, EU law constitutes an autonomous legal order, enjoying primacy *on its own accord*. Therefore, national law that is inconsistent with directly effective EU law should be disapplied. In this respect, Articles 93 and 94 Constitution do not play a role.[5] As a source of primary EU law, the EUCFR has primacy over Dutch law as well. Dutch courts consider the Charter to be legally binding and applicable in the Netherlands whenever the implementation of EU law within the meaning of Article 51(1) EUCFR is the issue.[6] Article 47 EUCFR was applied in almost 900 judicial decisions to date, as we discuss in section III below.

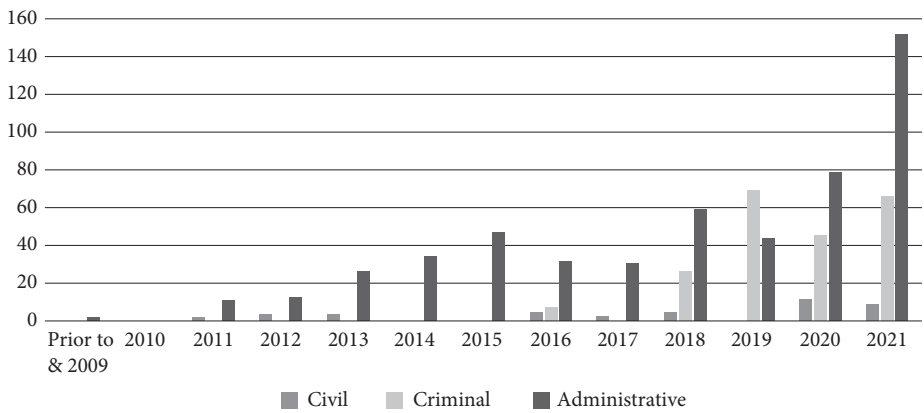
III. Article 47 EUCFR in Dutch Case Law: The General Picture

A. Article 47 EUCFR in Numbers

The figures in this section only show the number of cases from 2009 (and prior) to 2021.[7] The numbers mentioned in the text include all judgments up until 31 July 2022.

i. The Total Number of Cases: General Overview

Figure 8.1 General overview 2000–21



[4] Case C-26/62 *Van Gend en Loos* EU:C:1963:1; Case C-6/64 *Costa v ENEL* EU:C:1964:66.

[5] JH Jans, S Prechal and RJGM Widdershoven, *Europeanisation of Public Law* (Europa Law Publishing, 2015), 88–89.

[6] See explicitly ABRvS 19 July 2011, ECLI:NL:RVS:2011:BR3782.

[7] The numbers in this section have been derived from the search engine for Dutch case law, Rechtspraak.nl (https://www.rechtspraak.nl). This database contains all judgments of the highest courts (Hoge Raad,

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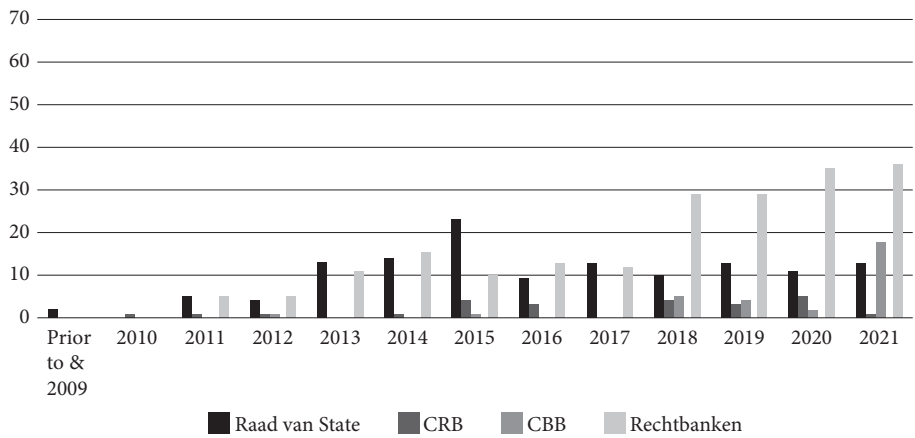
Between 1 January 2000 and 31 July 2022, Article 47 EUCFR was applied in 888 judgments in total. The administrative courts were the most prolific. No fewer than 587 judgments originated from these courts, of which 167 judgments were from the tax courts. Of the remaining decisions, 260 were adopted by a criminal court. The lowest number of cases is in private law litigation (41 judgments).

In the first years after the entry into force of the Charter in December 2009, the use of Article 47 EUCFR by Dutch courts was rather limited. However, in recent years, this has increased considerably.

ii. Article 47 EUCFR before the Administrative Courts (Including the Tax Courts)

The two charts in Figures 8.2 and 8.3 below provide the number of Article 47 EUCFR judgments of the administrative and tax courts. There is a separate chart for tax law, because we expected a high number of judgments in this area. After all, tax decisions are protected by Article 47 EUCFR insofar as they are implementing EU law within the meaning of Article 51(1) EUCFR (eg, in the case of customs, value-added tax and company tax decisions), while these decisions do not fall within the scope of application of Article 6 ECHR.[8]

Figure 8.2 Administrative law 2000–21



Afdeling bestuursrechtspraak, CRvB and CBB) and a selection of most important cases from the lower courts. The main search term which we have used to find the relevant cases was '47 van het Handvest' (in English: '47 of the Charter'). From a quick scan of the judgments, it appeared that this phrase was suitable for detecting relevant case law of the Hoge Raad and the Afdeling bestuusrechtspraak. Cross-checking with a variation of this phrase produced only a few extra cases. Therefore, overall the numbers can be considered reliable.

[8] For the exclusion of tax decisions from the scope of Art 6 ECHR, see Judgment of the European Court of Human Rights of 12 July 2001 in Case No 44759/98 *Ferrazzini v Italy*. Note, however, that tax fines are protected by Art 6 ECHR because they qualify as criminal charges in the meaning of Art 6(1) ECHR. See, eg, Judgment of the European Court of Human Rights of 23 November 2006 in Case No 73053/01 *Jussila v Finland*. On Art 47 EUCFR in the tax law field, see K Pantazatou, 'The Evolution of the Right to an Effective Remedy and to a Fair Trial in Direct and Indirect Taxation: Are We There Yet?' in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart Publishing, 2022).

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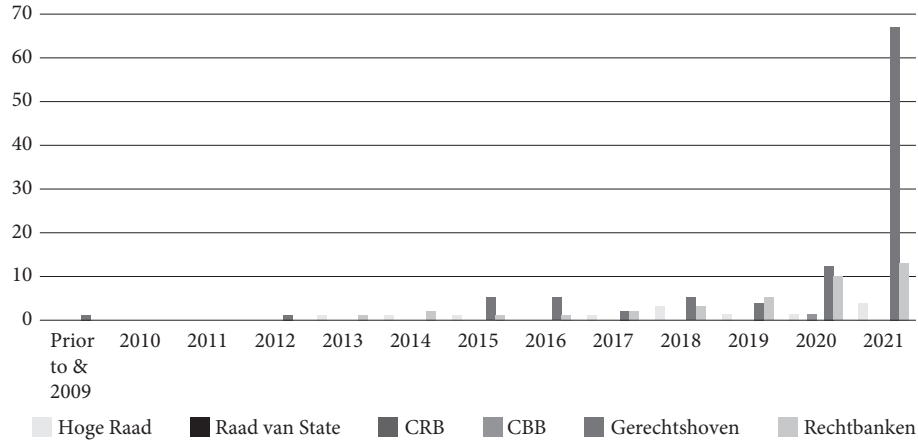
Figure 8.3 Tax law 2000–21



From the chart in Figure 8.2 on administrative law, it appears that out of the 420 Article 47 EUCFR judgments, 190 were taken by appellate courts and 230 by the first instance rechtbanken. The number of applications of Article 47 EUCFR in administrative law has increased gradually, from about 10 judgments in 2011 to about 60 in 2021. Of the appellate court judgments, most judgments originate from the Afdeling bestuursrechtspraak (137). The CBb decided in 48 cases and the CRvB in 24.

As regards the areas of law, the numbers are dominated by migration law cases. Of the total group of 420 judgments, no fewer than 192 concerned this field; 148 cases originating from rechtbanken and 44 from the Afdeling. This high number can probably be explained by the fact that migration law decisions do not fall within the scope of application of Article 6 ECHR,[9] but are protected by Article 47 of the Charter, as virtually all migration law decisions fall within the scope of EU law within the meaning of Article 51(1) EUCFR. The remaining cases (228) concern a large variety of sectoral areas, such as environmental law, social security, EU subsidies and data protection. Surprisingly, the number of Article 47 EUCFR applications in economic administrative law, being the competence of the CBb (see section II.A above), is rather low, although these cases often fall within the scope of EU law within the meaning of Article 51(1) EUCFR. This issue will be discussed in greater depth in section III.B.iv below.

In quite a few cases, Article 47 EUCFR is invoked not in respect of the interpretation or application of national rules and provisions *vis-a-vis the government*, but because the judicial protection offered *by the courts themselves* was allegedly inadequate. Often these cases are about violations of the requirement of reasonable time of Article 47(2) EUCFR.

[9] For the exclusion of migration law decisions from Art 6 ECHR, see Judgment of the European Court of Human Rights of 5 October 2000 in Case No 36952/98 *Maaouia v France*. On Art 47 in the migration and asylum law field, see M Reneman, 'No Turning Back? The Empowerment of National Asylum and Migration Courts under Article 47 of the Charter' in Bonelli, Eliantonio and Gentile (n 8).

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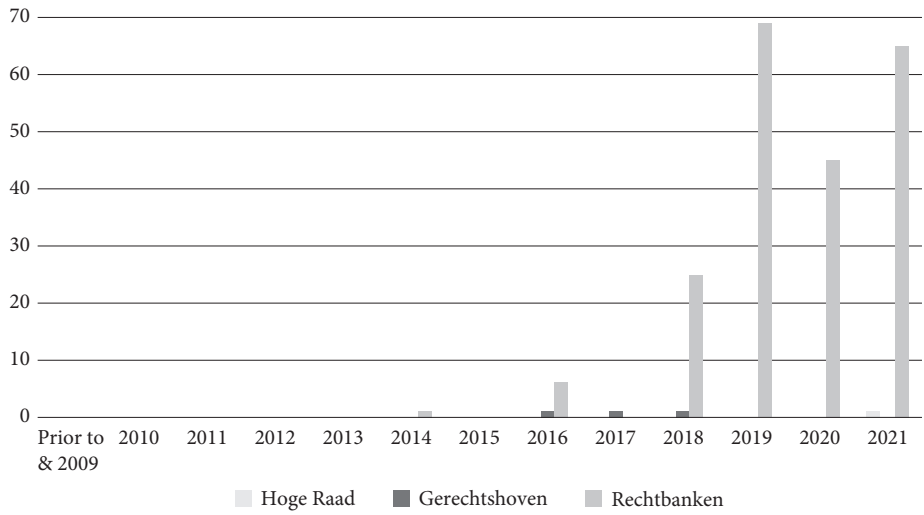
As expected, the number of Article 47 applications by the tax courts is high, namely 167 judgments. Only 11 cases originate from the Hoge Raad, the highest court in tax cases. By far the most cases have been decided by a Gerechtshof (Court of Appeal) in the years 2021–22. A majority of these cases are about the reasonable time requirement of Article 47(2) EUCFR.

iii. Article 47 EUCFR before the Criminal Courts

Figure 8.4 Criminal law 2000–21



As mentioned above, the criminal courts are responsible for 260 judgments in which Article 47 EUCFR is applied. The chart in Figure 8.4 indicates that the Charter acquiring binding effect in 2009 did not (immediately) impact the number of applications by the Dutch criminal courts. Almost all criminal law cases (255) have been decided by the chamber of international legal assistance of the Rechtbank Amsterdam, the competent court in EAW cases. By far the majority of these cases date from after April 2018, when the CJEU held in the case of *LM* that national courts are entitled to refuse surrender of a person on the basis of an EAW if there is a real risk that the person's right to a fair trial of Article 47 EUCFR will be violated because of structural deficiencies in the independency of the judiciary of a Member State.[10] A proliferation in other areas of criminal law, which could perhaps be caused by an increase of secondary EU law measures in the area of criminal law,[11] has not really materialised yet.

[10] Case C-216/18 PPU *LM* EU:C:2018:586.

[11] For this expectation, see also J Krommendijk, 'Tien jaar bindend EU-Grondrechtenhandvest in de Nederlandse rechtspraktijk: een inleidende schets van de status quo' in H de Waele, J Krommendijk and K Zwaan (eds), *Tien jaar EU-Grondrechtenhandvest in Nederland. Een impact assessment* (Kluwer, 2019) 40.

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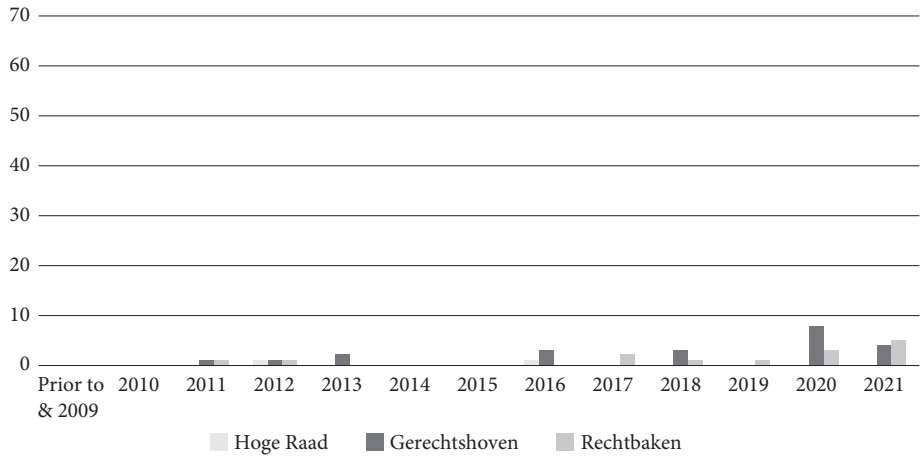
iv. Article 47 EUCFR before the Civil Courts

Figure 8.5 Civil law 2000–21



Only 41 judgments wherein Article 47 EUCFR is applied originate from a civil court, in different areas of law – varying from private international law to intellectual property, consumer law and competition law. Ten judgments pertain to state liability for wrongful legislation, such as the incorrect transposition of the EAW Framework Decision, or the wrongful administration of justice, eg, a violation of the right to be heard. More than half of the judgments date from recent years (2020 and later). Of the different civil courts, the Gerechtshoven have been the most prolific (27 cases). In most cases, the Dutch civil courts seem to mention Article 47 EUCFR almost as an afterthought, or merely as part of a broader reference to CJEU case law. Notable exceptions can be found in 12 cases on cost orders in the field of data protection (further discussed in section IV.B.ii) and in a few cases on unfair arbitration clauses in consumer contracts (which will be considered in section IV.B.iii).

The Dutch civil courts, including the Supreme Court, are 'loyal' to the CJEU in that they generally follow the CJEU.[12] However, they rarely refer to Article 47 EUCFR autonomously; Article 47 EUCFR is most often mentioned as part of a wider reference to CJEU case law.[13] For instance, in four cases concerning the recognition and enforcement of a foreign judgment and a European Order for Payment (EOP),[14] the rechtbank held this would not be refused – or suspended, in case of the EOP – because there was no real risk of a violation of Article 47.[15]

[12] See, eg, J Krommendijk, 'De civiele kamer en de prejudiciële procedure: kritisch doch loyaal aan het Hof van Justitie' (2019) *Tijdschrift voor Civiele Rechtspleging* 1.

[13] Illustrative in this respect is the only (explicit) reference to Art 47 EUCFR by the Supreme Court in its follow-up judgment after Case C-681/13 *Diageo Brands* EU:C:2015:471, which literally cites the CJEU's preliminary ruling: HR 8 July 2016, ECLI:NL:HR:2016:1431, para 4.3.1.

[14] Regulation (EC) No 186/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure [2006] OJ L399/1.

[15] Rb Amsterdam 7 November 2019, ECLI:NL:RBAMS:2019:8380 (with reference to Art 6 ECHR and Art 47 EUCFR); Rb Amsterdam 21 August 2019, ECLI:NL:RBAMS:2019:6250, ECLI:NL:RBAMS:2019:6259, ECLI:NL:RBOVE:2021:6259 (EOP originating from Poland).

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The references to Article 47 EUCFR in private law mainly concern the application and interpretation of national rules and provisions, eg, the court's power to issue a cost order, or secondary EU law, such as the Brussels I bis Regulation[16] or Directive 93/13/EEC on unfair terms in consumer contracts.[17] Very few references pertain to complaints about the judicial protection offered by the courts in a concrete case. Sometimes, procedural rights such as the right to be heard are invoked without any (explicit) reference to Article 47, even if the case falls within the scope of EU law. This shows how not only courts, but also the parties to the proceedings do not always see the added value of Article 47 EUCFR.

The assumption that Article 47 EUCFR and Article 6 ECHR are interchangeable (see section III.B below) is particularly persistent in private law. Dutch civil courts generally do not link infringements of procedural safeguards to EU law, perhaps because other norms – in particular, Article 6 ECHR – are perceived as being more comprehensive or because there are other means available to achieve the required level of judicial protection, such as the principle of effectiveness.[18] Moreover, the lack of constitutional review,[19] and legality review on the basis of EU law (including the Charter) being relatively new in private law,[20] might be another explanation for the reluctance of civil courts to apply Article 47.

B. Competition and Interplay between Article 47 EUCFR and Article 6 ECHR

i. Introduction

As is apparent from the numbers in general, Dutch courts do not shy away from applying Article 47 EUCFR. Nevertheless, the number of applications is not extremely high and does not come close to the number of applications of the corresponding ECHR rights of Articles 6 and 13 ECHR.[21] As explained in section II.B above, like Article 47 EUCFR, these ECHR provisions enjoy primacy over national law within the Dutch legal order. ECHR rights are older and in principle have a more general scope of application; they apply to cases within and outside the scope of application of EU law. Therefore, it comes as no surprise that Articles 6 and 13 ECHR are in competition with Article 47

[16] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

[17] Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

[18] See more elaborately on this function of the effectiveness principle A van Duin, *Effective Judicial Protection in Consumer Litigation* (Intersentia, 2022) 200 ff.

[19] T Barkhuysen, AW Bos and F Ten Have, 'Een verkenning van de betekenis van het Handvest van de grondrechten van de Europese Unie voor het privaatrecht. Deel 2: De verhouding van het Handvest tot het EVRM en de meerwaarde van het Handvest' (2011) 28 *Nederlands Tijdschrift voor Burgerlijk Recht* 547.

[20] C Sieburgh, 'Het EU-Handvest van de Grondrechten en het algemene vermogensrecht. De (potentiële) betekenis van het Handvest voor rechtsverhoudingen tussen particulieren' in J Gerards et al (eds), *Vijf jaar bindend EU-Grondrechtenhandvest. Doorwerking, consequenties, perspectieven* (Wolters Kluwer, 2015) 510.

[21] A quick scan of the case law in the same period published on rechtspraak.nl, applying the search term '6 EVRM' (in English: 6 ECHR) leads to 7,044 judgments with a reference to Art 6 ECHR.

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EUCFR and that the application of the two ECHR provisions, being more familiar to the national courts and more established, may prevail.

According to Article 52(3) EUCFR, Article 47 has the same scope and content as the corresponding ECHR rights, but the Charter may provide for a more extensive protection. As yet, regarding Article 47 EUCFR, the CJEU has not explicitly and in general terms provided for such more extensive protection. However, when applying Article 47 EUCFR in conjunction with secondary EU legislation in specific areas of law, such as migration and consumer law, the CJEU has chosen its own particular interpretation of the provisions which cannot be found in the ECtHR case law and may be considered to offer more protection in the area concerned. Examples will be mentioned below in sections IV.A.iii and IV.A.v. Moreover, Article 47 EUCFR has a different scope of application from Article 6 ECHR[22] and, unlike the latter, is not limited to the determination of civil rights and obligations and criminal charges. Instead, it applies to all Member States' acts implementing EU law. As indicated above in section III.A.ii, this extension is particularly important for migration law and tax law.

Below, the interaction between Article 47 EUCFR and Articles 6 and 13 ECHR in the case law of the Dutch courts is examined in a comprehensive way. First, we focus on the case law of the Dutch courts in which the Charter is the point of departure. Second, we discuss the common, coordinated approach of the ECHR and Charter rights followed by the Dutch courts in respect of several procedural doctrines. Third, we study the case law of several courts where we observe Charter unawareness, or even indifference. At the end of this section, we briefly analyse which of these approaches would be preferred from our point of view.

ii. The Charter as a Point of Departure

The approach of the Afdeling bestuursrechtspraak can be labelled as 'Charter comes first'. The Afdeling mostly starts with determining whether in the case at hand, the implementation of EU law is at stake within the meaning of Article 51(1) EUCFR, so that the Charter is applicable. In this respect, the Afdeling applies the broad concept of 'acting within the scope of Union law' adopted by the CJEU in the *Åkerberg Fransson* case.[23] In line with this concept, the Afdeling considers the Charter to be not only applicable in the so-called agent situation, where a national administrative decision implements a specific provision of secondary EU legislation, a directive or a regulation – although, in practice, most Afdeling cases within the scope of EU law come into this category.[24]

[22] Wissels and Pahladsingh (n 1) 263–67.

[23] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105. For more on this broad concept and the situations distinguished thereafter, see Jans, Prechal and Widdershoven (n 5) 148–55.

[24] Examples of the agent situation are ABRvS 23 September 2013, ECLI:NL:RVS:2013:209; ABRvS 16 May 2013, ECLI:NL:RVS:2013:CA0167; ABRvS 18 September 2014, ECLI:NL:RVS:2014:352; ABRvS 4 February 2015, ECLI:NL:RVS:2015:265. In all these cases, the Afdeling considers the decision to be within the scope of EU law in the meaning of Art 51(1) EUCFR, because it is based on a provision of a national law, transposing a specific provision of a directive.

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A decision is also within the scope of EU law if it derogates from the free movement or EU citizenship rights.[25] Moreover, the Charter applies to decisions enforcing specific EU law provisions, as well as when EU law does not prescribe specific sanctions to be imposed against the violation.[26]

If a decision is within the scope of EU law, the Afdeling assesses it in the light of Article 47 EUCFR and also if the applicant has only invoked Articles 6 or 13 ECHR.[27] In this respect, the administrative courts are obliged to supplement *ex officio* the factual grounds of appeal with the relevant legal grounds. Therefore they should transform on their own motion an appeal on Article 6 ECHR into an appeal on Article 47 EUCFR, if the latter is applicable. In a similar vein, the courts are obliged to transform *ex officio* an appeal on Article 47 EUCFR into an appeal on Article 6 or 13 ECHR if the case is protected by these provisions and is not within the scope of EU law.

The final step in the Afdeling's approach is to determine the substance of Article 47 EUCFR in the case at hand and to decide whether the right to effective judicial protection has been violated. In this respect, the Afdeling refers to CJEU case law about Article 47 EUCFR, if available and relevant for the issue at stake.[28] If there is no CJEU case law (yet), the Afdeling resorts to the ECtHR case law on the corresponding Article 6 or 13 ECHR and relevant ECtHR case law. In this respect, the Afdeling refers to the explanations to the Charter, according to which Article 47 EUCFR provides for at least the same protection as Articles 6 and 13 ECHR.[29] Therefore, the guarantees offered by the ECHR are also applicable in the EU.[30]

The criminal courts sometimes explicitly hold that a situation falls within the scope of EU law (eg, as the relevant legislation has an implementing objective).[31] As the majority of cases in the area of criminal law concern the EAW Framework Decision,[32] most of the judgments in the area of criminal law do not discuss the scope of the Charter as such. If the scope is explicitly mentioned, it is usually because the court considers that the situation in question falls outside the scope of the Charter; logically, such judgments do *not* concern the EAW.[33] In a judgment of 4 July 2017, the Hoge Raad arrived at the conclusion that the situation did not fall within the scope of EU law as the transposition

[25] *cf* ABRvS 19 May 2021, ECLI:NL:RVS:2021:1058 (about a derogation of the freedom of services and with a reference to Case C-390/12 *Pfleger* EU:C:2014:281) and ABRvS 17 April 2019, ECLI:NL:RVS:2019:990 (about a derogation of EU citizenship within the meaning of Art 20(1) of the Treaty on the Functioning of the European Union (TFEU), with reference to Case C-221/17 *Tjebbes* EU:C:2019:189).

[26] See ABRvS 22 May 2013, ECLI:NL:RVS:2013:CA1292; ABRvS 13 May 2019, ECLI:NL:RVS:2019:1528, both with reference to *Åkerberg Fransson* (n 23).

[27] eg, ABRvS 28 June 2012, ECLI:NL:RVS:2012:BX0615.

[28] See ABRvS 22 May 2013, ECLI:NL:RVS:2013:CA1292, wherein the Afdeling refers to the interpretation of Art 47 EUCFR in Case C-279/09 *DEB v Bundesrepublik Deutschland* EU:C:2010:811.

[29] Eg ABRvS 15 July 2015, ECLI:NL:RVS:2015:2227.

[30] Eg ABRvS 10 October 2018, ECLI:NL:RVS:2018:3303, where the question as to whether an individual is entitled to free legal aid on the basis of Art 47(2) EUCFR was answered in the negative by applying EHRM 9 October 1979 (Airey), Series A, vol 32.

[31] Rb Amsterdam 1 May 2018, ECLI:NL:RBAMS:2018:2835, para 2.30.

[32] Council Framework Decision 2002/584/JHA 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.

[33] Rb Noord-Holland 10 November 2016, ECLI:NL:RBNHO:2016:9836, para 3.5.

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period for Directive 2013/48 had not yet expired at the relevant time.[34] Hence, the provision stipulating the right of access to a lawyer in criminal proceedings did not yet apply during the hearing of the accused. Moreover, the case law of the Supreme Court is not of a sort that it is liable to seriously compromise the attainment of the result prescribed by it.[35]

Furthermore, in a judgment concerning the question of whether a party can challenge the assignment of a judge to a particular case, it was decided that such a right cannot be derived from the relevant secondary EU legislation or Article 47 EUCFR. The judgment leaves aside the question of whether the persons involved could have invoked these provisions in the first place.[36] This approach is understandable, but does entail a risk that the scope of the Charter remains underexplored and that EU law is not applied.

The Rechtbank Amsterdam has been using the standard developed in the CJEU's judgment in *LM*.[37] In a national judgment delivered shortly after *LM*, the national court devotes several considerations to explain how it believes the judgment should be interpreted.[38] Article 47 EUCFR has become the point of departure in these cases. Furthermore, reliance on Article 6 ECHR by a party is understood by the Rechtbank as a reference to Article 47.[39]

iii. The Coordinated Approach of Charter and ECHR Rights

In respect of some specific procedural topics, the administrative courts, including the tax courts, have designed a common, coordinated approach, which incorporates Articles 6 and 13 ECHR and Article 47 EUCFR at the same time. They take this approach in all cases, independently of whether the case is within or outside the scope of EU law.

This approach is in the first place concerned with the requirement of reasonable time as codified in Article 6(1) ECHR and Article 47(2) EUCFR. In order to provide for an effective remedy against violations of this requirement,[40] the courts have designed a common approach on this issue in the period from 2008 to 2013. They apply uniform standards regarding the determination of the relevant period, the reasonable time for the judicial procedure as a whole and for the intermediate steps (first instance, appeal,

[34] Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

[35] HR 4 July 2017, ECLI:NL:HR:2017:1233, *NJ* 2021/121, para 3.5.2. A reference to the line of case law established in Case C-212/04 *Adeneler* EU:C:2006:443, which provides that 'from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive'.

[36] Rb Oost-Brabant 19 October 2016, ECLI:NL:RBOBR:2016:5799, para 6.6.

[37] *LM* (n 10).

[38] Rb Amsterdam 16 August 2018, ECLI:NL:RBAMS:2018:5925, para 6.4.2.

[39] See also Krommendijk (n 11) 12. See, by way of an example, Rb Amsterdam 13 November 2018, ECLI:NL:RBAMS:2018:8044, para 9.1.

[40] As required in Judgment of the European Court of Human Rights of 26 October 2000 in Case No 30210/96 *Kudla v Poland*.

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cassation if available) and remedies in case of the reasonable time being exceeded (normally compensation of €500 for every half-year). Deviation from these standards is possible if required in the circumstances of the case. The standards are based on the case law of the ECtHR, to which the courts frequently refer.[41] In recent years, the courts base these standards on Article 47(2) EUCFR as well, sometimes after stating that the requirement of reasonable time in Article 47(2) EUCFR has 'at least the same content and scope' as the requirement in Article 6(1) ECHR.[42] Therefore, the courts apply one common, coordinated concept of reasonable time in all cases and refrain from determining whether the specific case is within or outside the scope of EU law. As long as there is no indication that the CJEU will apply different standards from the ECtHR, this approach seems rather efficient.

A second topic, approached by the administrative courts in a coordinated and common way, is the permissibility of court fees. In this regard, the administrative courts have observed that although the Dutch system of court fees is generally consistent with the right of access to court, there may be cases in which court fees make it 'impossible or excessively difficult' for a litigant to exercise this right.[43] The courts deem this unacceptable, especially in the light of the importance of the right to access to an independent judicial authority as a central element of the rule of law underlying Article 6 ECHR and Article 47 EUCFR. To avoid such unacceptable situations, the courts no longer require a charge of court fees if an individual is actually unable to pay. Considering the line of reasoning by the courts, this is in part inspired by Article 47 EUCFR and is applied in all cases, independently of whether they are within or outside the scope of EU law.

It can sometimes be difficult to discern whether considerations of the national courts reflect a coordinated approach or are more appropriately viewed as 'Charter indifference'. This is especially so where Article 47 EUCFR is mentioned in one breath with Article 6 ECHR and the former is not given any specific consideration.[44] In the next subsection we discuss several examples where such indifference seems to occur. However, if there are no clear signs that the protection provided by Article 47 EUCFR differs from that provided under the ECHR, it would probably be going too far to label this as 'Charter indifference'.[45]

[41] See, eg, Judgment of the European Court of Human Rights of 10 November 2004 in Case No 62361/00 *Pizzati v Italy*; Judgment of the European Court of Human Rights of 29 March 2006 in Case No 36813/97 *Scordino v Italy*.

[42] CBb 7 August 2018, ECLI:NL:CBB:2018:413; CBb 25 June 2019, ECLI:NL:CBB:2019:243. See also, in the context of criminal law, Rb Amsterdam 1 May 2018, ECLI:NL:RBAMS:2018:2835, para 2.30.

[43] ABRvS 6 March 2013, ECLI:NL:RVS:2013:BZ4443; HR 28 March 2014, ECLI:NL:HR:2014:699; CRvB 13 February 2015, ECLI:NL:CRVB:2015:282, 283 and 284.

[44] An example can be found in (civil) cases concerning court fees and challenges of the judge's impartiality where the link with EU law – and thus the applicability of Art 47 of the Charter – is not (immediately) obvious: see eg, Rb Zutphen 4 January 2012, ECLI:NL:RBZUT:2012:BV6245; Rb Zutphen 12 January 2012, ECLI:NL:RBZUT:2012:BV1679; Gerechtshof Arnhem-Leeuwarden 3 July 2014, ECLI:NL:GHARL:2014:5450; Gerechtshof Den Haag 25 November 2014, ECLI:NL:GHDHA:2014:3833.

[45] Such a reference to Art 47 EUCFR can be observed in, for example, HR 14 December 2021, ECLI:NL:HR:2021:1841, para 4.5; HR 5 April 2022, ECLI:NL:HR:2022:475, para 6.12.4.

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iv. Charter Unawareness or Indifference

Several Dutch courts tend to give precedence to the ECHR over the Charter and show a lack of awareness or even indifference of the Charter. This line is the main approach of the CBb,[46] the civil courts and, to some extent, the criminal courts.[47] However, in the latter area proceedings concerning the EAW have become dominant and in those cases Article 47 EUCFR has also become dominant.

As stated above (see section II.A), the CBb is the appellate administrative court in economic matters. Although many CBb cases therefore fall 'within the scope of Union law', the number of CBb applications of Article 47 EUCFR is surprisingly limited. Furthermore, the CBb offers little or even no elaboration on whether the case is within or outside the scope of EU law.[48] Cases where Article 47 EUCFR is applied, without referring to Article 6 ECHR, are very rare.[49] In most cases the CBb approach depends on whether the appellant has invoked Article 47 EUCFR or not. If Article 47 EUCFR has not been invoked, but the case raises questions concerning the right to an effective remedy and a fair trial, the CBb decides on the basis of Article 6 ECHR alone and also if the case most probably falls within the scope of EU law. If Article 47 EUCFR is invoked by a party, the CBb generally leaves the applicability of the Charter aside and assesses the issue primarily in the light of Article 6 ECHR as well. This CBb preference for Article 6 ECHR over Article 47 EUCFR deviates considerably from the 'Charter comes first' approach of the Afdeling bestuursrechtspraak (see section III.B.ii above). This difference can be explained in part by the Afdeling's competence in migration law cases. In these cases the Afdeling is forced to apply Article 47 EUCFR, because migration cases do not fall within the scope of Article 6 ECHR, but are generally protected by Article 47 EUCFR. The CBb preference, to an extent, seems to be a matter of choice. In some cases the CBb justifies this choice by explicitly stating that the case (also) comes within the scope of Article 6 ECHR.[50] In addition, the CBb refers to Article 52(3) EUCFR, according to which Article 47 EUCFR has the same meaning and scope as Article 6 ECHR.[51] To this the CBb incidentally adds that Article 47 EUCFR does not offer more protection than the ECHR regarding the issue at stake.[52]

[46] However, recently in CBb 3 May 2022, ECLI:NL:CBB:2022:214 and ECLI:NL:CBB:2022:215, the CBb has referred preliminary questions on whether, very briefly, Art 47 EUCFR requires that in an admission procedure for plant protection products the scientific results of the examination in another Member State can be questioned. Perhaps these cases are the beginning of a different approach towards Art 47 EUCFR.

[47] See, for example, Rb Amsterdam 17 January 2014, ECLI:NL:RBAMS:2014:1303, para 6.3, concerning the right to proceedings regarding an EAW within a reasonable time, for which the court only looks at Art 6 ECHR; Rb Oost-Brabant 31 January 2013, ECLI:NL:RBOBR:2013:BZ0842, para 10, concerning jurisdiction under the European Small Claims Regulation, which the court refers to in conjunction with Art 6 ECHR (not the Charter).

[48] In the CBb case law about Art 47 EUCFR, we found one explicit application of Art 51(1) EUCFR only, namely CBb 3 May 2022, ECLI:NL:CBB:2022:210.

[49] eg, CBb 26 October 2018, ECLI:NL:CBB:2018:78, in which the court assesses and rejects applicants' appeal in the case of *Unitrading* (Case C-473/13 *Unitrading* EU:C:2014:2318). See section IV.A.ii below.

[50] CBb 7 August 2018, ECLI:NL:CBB:2018:413.

[51] CBb 21 July 2015, ECLI:NL:CBB:2015:260.

[52] CBb 19 March 2018, ECLI:NL:CBB:2018:53.

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A similar approach can be observed in criminal law. If the case is clearly within the scope of EU law – because it implements specific obligations of secondary EU law, in particular the EAW Framework Decision – the criminal courts assess the cases in the light of Article 47 EUCFR. Outside this specific area of criminal law, Article 47 EUCFR is usually applied in conjunction with Article 6 ECHR. This is not very problematic if there is deliberate coordination or if there are no clear signs that Article 47 has any added value (see section III.B.iii above). However, if this is not the case, it can be viewed as a sign of indifference, or perhaps a lack of awareness, if the conclusion based on Article 6 ECHR is automatically applied to Article 47 EUCFR. An interesting example concerns a decision regarding the (im)possibility for family members of the victim in a criminal case to rely on the right to an effective remedy as a ground for (emotional) damages.[53] The rechtbank found that Articles 8 and 13 ECHR did not have a horizontal effect and therefore did not provide a basis for a damages claim from the victim against another private party. The Victims' Rights Directive did not have this horizontal effect either.[54] However, in the light of the *Egenberger* judgment stipulating the horizontal direct effect of Article 47, it is not self-evident that the same applies for Article 47 EUCFR (read together with the Victims' Rights Directive).[55] In these circumstances, the court should have considered the Victims' Rights Directive and Article 47 EUCFR separately. Perhaps the conclusion would then have been that there is no right to compensation, but that is different from dismissing the claim on the grounds that EU law is not deemed to be applicable in the first place.

Charter indifference (or lack of awareness) is the dominant approach of the civil courts as well. Insofar as the right to an effective remedy and a fair trial is at stake, civil courts generally decide the case on the basis of Article 6 ECHR, as well as if it falls within the scope of EU law.[56] An example is a case on *ex officio* control of unfair arbitration clauses in consumer contracts.[57] While the Supreme Court did refer to the fundamental nature of the right of access to court, there was no mention of Article 47 EUCFR at all, even though the case explicitly fell within the scope of Directive 93/13. As regards the application of Article 47 EUCFR by the civil courts, there is still a world to win.

v. The Preferred Approach?

The question can be raised as to whether the indifferent approach of several Dutch courts towards the Charter and their preference for Article 6 ECHR are really problematic. After all, in most cases Article 47 EUCFR does not necessarily provide for more protection than Article 6 ECHR, a provision which is, moreover, elaborated much further in both the ECtHR and national case law. In addition, Article 6 ECHR

[53] Rb Noord-Holland 5 July 2018, ECLI:NL:RBNHO:2018:5988, para 8.

[54] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

[55] Case C-414/16 *Egenberger* EU:C:2018:257, para 82.

[56] See eg, n 49 above.

[57] HR 8 November 2019, ECLI:NL:HR:2019:1731. See also van Duin (n 18) 213.

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enjoys the same primacy above national law as Article 47 EUCFR, albeit on the basis of the Dutch Constitution. Although the practical problems of Charter indifference or lack of awareness should not be exaggerated, there are reasons why academic literature favours in principle the 'Charter first' approach, discussed in section III.B.ii above.[58]

The CJEU has already taken the first steps in giving its own particular interpretation of Article 47 EUCFR in specific areas of law, such as migration law and consumer protection, offering more (specific) protection than the ECHR as well. It is to be expected that this case law will continue in future and cover more areas of law. Therefore, it is essential to have a clear idea which cases this 'extra' judicial protection may be relevant for, and to make clear what Article 47 EUCFR means in the context of (specific) EU law instruments. National courts can also take the lead in this regard by interpreting Article 47 EUCFR in a way that does not always merely follow strictly the minimum standards developed by the ECtHR and/or by referring questions to the CJEU that enable it to further develop the autonomous content of Article 47 EUCFR. However, to make use of this EU 'helpline', which may even be an obligation for courts of the last instance, it is necessary that the courts are aware of the fact that a case comes within the scope of EU law (and the Charter). Therefore, a 'Charter first' approach is obviously preferable to Charter indifference because the latter obscures the EU law dimension of a case. Insofar as this dimension is overlooked, so is the question whether more (specific) protection is required.

Finally, it can be noted, irrespective of preference, that the 'Charter first' approach seems most popular in cases where Article 47 EUCFR is at stake in conjunction with secondary EU law, in particular migration law directives and the EAW Framework Decision. This issue will be discussed in greater depth in the next section.

IV. The Constructive Application of Article 47 EUCFR by the Dutch Courts

A. The Dialogue between the Dutch Courts and the CJEU

i. Overview

The chart in Figure 8.6 provides the number of preliminary references by the Dutch courts to the CJEU, related to Article 47 EUCFR since 2010 and until 2021.[59]

[58] See S Prechal and RJGM Widdershoven, *Inleiding tot het Europees bestuursrecht* (Ars Aequi Libri, 2017) 155–56.

[59] The number of preliminary references by Dutch courts could not be derived from the Rechtspraak.nl database because preliminary references are coded in an incoherent way. Therefore, we have used another source, namely *Nieuwsbrief Rechtspraak Europa* (NRE 2022) which, in its annex, give a full overview of all of the preliminary references answered by the CJEU in response to the Dutch courts' preliminary references since 2010. Next we have checked all preliminary references found on whether they related to Art 47 EUCFR.

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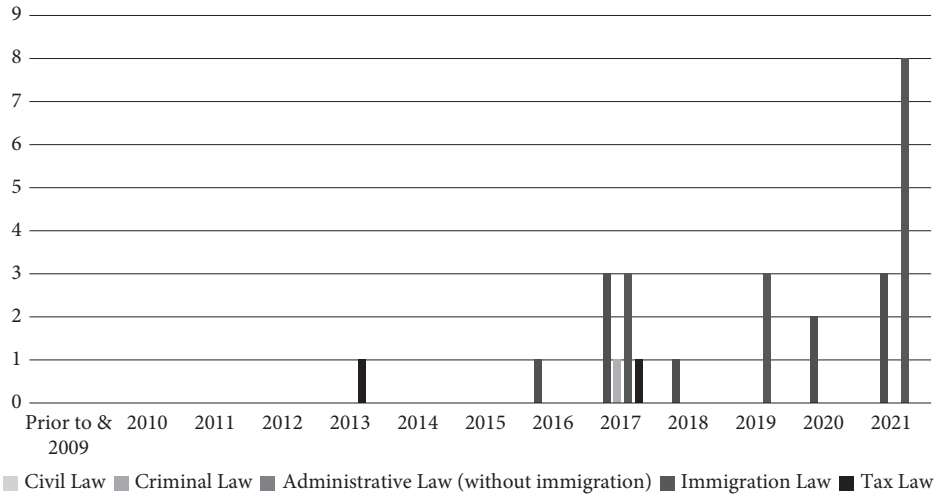
Figure 8.6 Preliminary references



In total, since 2010 Dutch courts have referred 34 preliminary questions relating to Article 47 EUCFR.[60] Of these cases, a considerable number (20) originated from the administrative courts, of which 17 were concerned with migration law. Of the remaining references, 12 preliminary questions were referred by criminal courts and two by the supreme tax court, the Hoge Raad. The criminal law references originated mostly (10 cases) from the Rechtbank Amsterdam (chamber of international legal assistance), and for the rest from the supreme criminal court, the Hoge Raad (two references). The civil courts did not refer any preliminary questions about Article 47 EUCFR. A more general observation is that most references do not concern Article 47 EUCFR as a 'stand-alone', but combine the provision with specific effective remedy requirements in secondary EU law, in particular Article 46(3) of the Procedural Directive (recast) and Article 9(2) of the Aarhus Convention.

ii. The Tax Courts

The first Dutch preliminary reference to the CJEU regarding Article 47 EUCFR was submitted in 2013 by the supreme tax court, the Hoge Raad, in the case of *Unitrading*,[61] which concerned the origin of imported goods in a customs case. The central issue in *Unitrading* was the admissibility of test results carried out by an external US laboratory as evidence, even if the laboratory did not wish to disclose detailed information about its methods, as these methods allegedly involved 'law enforcement sensitive information'. This lack of transparency of the US laboratory made it impossible for Unitrading to defend itself against the test results and this seemed – according to the

[60] The table only includes the 27 cases until 2021. Between 1 January 2022 and 31 July 2022, Dutch courts referred seven other preliminary questions to the CJEU, bringing the total number to 34.

[61] HR 12 July 2013, ECLI:NL:HR:2013:20.

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Hoge Raad – contrary to Article 47 EUCFR. However, the CJEU refused to assess the matter in the light of Article 47 EUCFR and rather saw the issue as a matter falling under national procedural autonomy, limited by the *Rewe* principles of equivalence and effectiveness.[62] This autonomy approach generally offers more room for national procedural law than the more strict test of Article 47 EUCFR.[63] In its follow-up ruling, the Hoge Raad applied Dutch evidence law in line with both principles and annulled the contested judgment of the Amsterdam Gerechtshof on the ground that the court did not give sufficient reasons as to why it considered the 'secret' findings of the US laboratory to be reliable.

The CJEU's *Unitrading* judgment can be criticised because, arguably, the use of unverifiable evidence *does* fall under the fair trial requirement of Article 47(2) EUCFR.[64] Moreover, by assessing the issue in the light of procedural autonomy, the CJEU fails to set a uniform standard for the use of 'secret' evidence in all customs cases on the basis of Article 47 EUCFR and accepts the application of potentially very different national evidence rules on the issue in all the Member States.

iii. The Administrative Courts

As mentioned above, 17 out of 20 preliminary references by the administrative courts were about migration law. No fewer than 10 of these references came from the first instance court, the Rechtbank The Hague, while only six preliminary questions were referred by the highest court in migration cases, the Afdeling bestuursrechtspraak. According to the literature,[65] the main reason for the high number of Rechtbank references is that first instance courts sometimes entertain serious doubts as to whether the interpretation of EU law by the Afdeling is EU law-compliant. If the Afdeling does not refer the issue to the CJEU, the first instance court may do so. In this respect, it is interesting to note that sometimes the mere reference by the Rechtbank prompts the Afdeling to change its case law even before the CJEU has decided on the issue. This happened, for instance, with two references of the Rechtbank about whether the Netherlands, in respect of the transfer of so-called Dublin claimants to Malta and Croatia, had to set aside the principle of mutual trust.[66] In both cases, the references, which concerned the combination of Article 47 EUCFR and the Dublin Regulation,[67]

[62] *Unitrading* (n 49) para 30.

[63] *cf* RJGM Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 *Review of European Administrative Law* 5; S Prechal and RJGM Widdershoven, 'Redefining the Relationship between "*Rewe*-Effectiveness" and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31.

[64] RJGM Widdershoven, 'Unitrading Revisited. Oncontroleerbaar bewijs tussen eerlijk proces en doeltreffendheid' (2016) 22 *Nederlands tijdschrift voor Europees Recht* 85.

[65] KE Geertsema and AB Terlouw, 'Vragen staat vrij. Welke instantie kan het best prejudiciële vragen stellen?' (2022) *Jurisprudentie Bestuursrecht Plus* 26.

[66] See for the references Rb Den Haag 4 October 2021, ECLI:NL:RBDHA:2021:10735 (*Malta*); Rb Den Haag 18 March 2022, ECLI:NL:RBDHA:2022:2305 (*Croatia*). In Rb Den Haag 15 June 2022, ECLI:NL:RBDHA:2022:5724, the same issue is referred to the Court in respect of Poland. Whether this question will be answered remains to be seen.

[67] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013, establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31.

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were withdrawn before the CJEU could rule on the issue because the transfer decisions were reversed after the Afdeling had 'autonomously' set aside mutual trust in relation to both Member States.[68]

Sometimes the first instance Rechtbank refers a question in addition to preliminary questions already referred by the Afdeling bestuursrechtspraak because it is of the opinion that the Afdeling has framed the issue in an incorrect manner. This was the case with regard to the question of whether the national court is, on the basis of the Return and Reception Directives,[69] obliged to examine *ex officio* all the requirements for the lawful detention of an illegal resident. While the Afdeling framed the issue as a matter of procedural autonomy (subject only to the limits of equivalence and effectiveness), which would leave the national court considerable leeway not to examine the requirements *ex officio*,[70] the Rechtbank framed it as a matter of effective judicial protection and Article 47 EUCFR, in relation to the strict EU rules for the imposition and continuation of detention measures.[71] In short, to clarify the difference, the test of Article 47 EUCFR is more intrusive on national procedural law as it applies regardless of (the degree of) procedural autonomy, and guarantees a number of procedural rights in and of itself, which can only be limited within the strict standards of Article 52(1) EUCFR.[72] In its answer the CJEU followed the Article 47 EUCFR framing of the Rechtbank and determined that the strict EU rules on the application of detention measures, read in conjunction with Articles 6 and 47 EUCFR, require the *ex officio* examination by the national courts of non-invoked legal requirements for lawful detention as well.[73] Although the CJEU does not explicitly state it, this CJEU judgment seems to offer more protection than that provided for by ECtHR case law on Article 5 ECHR, which corresponds to Article 6 EUCFR. In this case law, an obligation for *ex officio* examination of the lawfulness of detention decisions has never been based on Article 5 ECHR.[74]

Other preliminary references of the Afdeling concern the combination of Article 47 EUCFR with the effective remedy requirement of Article 46 of the Asylum Procedure Directive.[75] What is interesting from a general administrative

[68] *cf* ABRvS 15 December 2021, ECLI:NL:RVS:2021:2791, and ABRvS 24 February 2022, ECLI:NL:RVS:2022:586.

[69] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L348/98; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96, respectively.

[70] ABRvS 23 December 2020, ECLI:NL:RVS:2020:3034, referring to Joined Cases C-430 and C-431/93 *Van Schijndel* EU:C:1995:441 and Joined Cases C-222/05 to C-225/05 *Van der Weerd and Others* EU:C:2007:318, wherein a prohibition of *ex officio* application of EU law of the civil and administrative courts was considered to be consistent with the *Rewe* principle of effectiveness.

[71] Rb Den Haag 26 January 2021, ECLI:NL:RBDHA:2021:466.

[72] See further, inter alia, van Duin (n 18) 51–53 and 59–60, with reference to T Tridimas and G Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 *German Law Journal* 784, at 806 and 812. For a similar version, see Widdershoven (n 63).

[73] Joined Cases C-704/20 and C-39/21 *Staatssecretaris van Justitie en Veiligheid v C, B and X* EU:C:2022:858.

[74] In this regard, the Afdeling in its referral decision mentions the Judgment of the European Court of Human Rights of 19 May 2016 in Case No 37289/12 *JN v United Kingdom*, point 87, from which it can be derived that on the basis of Art 5 ECHR the national court is not under an obligation to automatically assess the lawfulness of the detention.

[75] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60.

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law perspective is the question, referred by the Afdeling,[76] of whether Article 47 EUCFR, in conjunction with the Asylum Procedure and Return Directives, requires the lodging of an appeal to the Afdeling against a first instance judgment upholding a decision refusing international protection to have automatic suspensive effect. If so, this would imply that the person involved cannot be expelled during the appeal procedure and is entitled to several allowances under Dutch law as well. The CJEU ruled that Article 47 EUCFR, in conjunction with both directives, does not confer upon the person concerned the remedy of appeal automatic suspensory effect even if this person has invoked a serious risk of infringement of the principle of non-refoulement.[77] The main reason for the CJEU's ruling is that, on the basis of Article 47 EUCFR, the person concerned is entitled to the existence of a single judicial remedy only, and not to the right of appeal. Therefore, Article 47 EUCFR cannot require that such a second level of jurisdiction, if voluntarily introduced by a Member State, shall have automatic suspensory effect.

Another interesting reference of the Afdeling, where Article 47 EUCFR was combined with Article 46(3) of the Asylum Procedure Directive, was concerned with the obligation, prescribed in Article 46(3), to ensure that appeal procedures before a court of first instance should provide 'for a full and *ex nunc* examination of both facts and law'.[78] In the reference, the Afdeling posed the question as to whether the *ex nunc* examination would also apply to grounds and evidence for granting international protection which could have (but had not) been invoked in the application stage before the administrative authority, but were only relied on before the first instance court for the first time. In the end, the CJEU did not have to answer the question of the Afdeling because the issue had already been decided in two Bulgarian cases.[79] In both cases, the CJEU answered the question in the positive, stating that the first instance court is indeed required to examine such grounds and evidence. In reaction to these judgments, the Afdeling withdrew its preliminary question and came to a revision of its earlier case law.[80] Since that time, the grounds and evidence concerned are no longer excluded from the *ex nunc* examination.

Finally, it is worth noting the CJEU decision in the case of *Varkens in Nood*,[81] even though it was referred by the Rechtbank Limburg as a question of interpretation of the 'access to justice' requirement of Article 9(2) of the Aarhus Convention, and not as a matter of Article 47 EUCFR.[82] The case is about a mandatory preparatory procedure as precondition for access to the court, which is mainly applied to decision-making in environmental law, but also in some other areas of law. According to Dutch law, interested parties can only bring an action against decisions to the administrative court

[76] ABRvS 29 March 2017, ECLI:NL:RVS:2017:869, and ABRvS 29 March 2017, ECLI:NL:RVS:2017:858.
[77] Case C-180/17 *Staatssecretaris van Veiligheid en Justitie (Suspensory Effect of the Appeal)* EU:C:2018:775.
[78] ABRvS 4 October 2017, ECLI:NL:RVS:2017:2669.
[79] Case C-652/16 *Ahmedbekova* EU:C:2018:801; and Case C-585/16 *Alheto* EU:C:2018:584.
[80] ABRvS 3 July 2019, ECLI:NL:RVS:2019:2073.
[81] Case C–826/18 *Stichting Varkens in Nood and Others* EU:C:2021:7. The preliminary question in *Stichting Varkens in Nood and Others* is referred by a lower court, the Rechtbank Limburg in its judgment of 21 December 2018, ECLI:NL:RBLIM.2018:12519.
[82] Therefore, the reference is not included in Figure 8.6 above in section IV.A.i.

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if they have submitted observations against the concept-decision in the preparatory procedure. According to the CJEU, this requirement is contrary to the objective of ensuring 'wide access to justice' provided for by Article 9(2) of the Aarhus Convention. Moreover, the CJEU does not approve of the combination of functions of the Dutch preparatory procedure, being the first step in judicial protection, and a means of participation at the same time. Therefore, the obligation to submit observations as a precondition for access to the court is rejected. However, what is remarkable is that the CJEU finds the obligation to first exhaust the preparatory procedure not inconsistent with Article 47 EUCFR, as this limitation of the right to an effective remedy is considered to be justified within the limitation clause of Article 52(1) EUCFR.[83] Hence, outside the scope of Article 9(2) of the Aarhus Convention, the preparatory procedure is fundamental rights-compliant. The decision in *Varkens in Nood* illustrates that the standards for effective judicial protection prescribed by secondary EU law can be at a higher level than those of Article 47 EUCFR itself.

iv. Criminal Courts

It took a while before Dutch criminal courts deemed it necessary to refer preliminary questions on Article 47 EUCFR to the CJEU. The vast majority of preliminary references concern the EAW Framework Decision.[84] In a judgment of 28 September 2017, the key question was whether a decision revoking the suspension of the execution of a sentence is included in the concept 'trial resulting in the decision' within the meaning of Article 4(a)(1) of the Framework Decision.[85] This provision was relevant as that provision allows for the refusal to surrender if a person was convicted *in absentia*. In this case, the person concerned had not been present during the trial leading to *the decision to revoke the suspension*. The Dutch court held that such a decision did not seem to fall within the scope of Article 6 ECHR as it did not concern a determination of civil rights and obligations or a criminal charge. However, this is followed by the observation that it was not excluded that Article 47 EUCFR – read in conjunction with the Framework Decision – could offer a higher standard of protection. The CJEU did not clarify the relation between Article 47 EUCFR and Article 6 ECHR in this respect. It 'closed the door' by only looking at the scope of Article 6 ECHR and concluding that Article 4(a)(1) therefore did not apply to the decision to revoke the suspension.[86] It may be asked whether this was a missed opportunity to explore the added value which Article 47 EUCFR potentially could have had.

There have been three references from the Rechtbank Amsterdam concerning the conditions of surrender to Poland in the light of issues regarding rule of law in

[83] *Stichting Varkens in Nood and Others* (n 81) paras 65–66, with reference to Case C-73/16 *Puškár* EU:C:2017:725.

[84] Council Framework Decision 2002/584/JHA 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.

[85] Rb Amsterdam 28 September 2017, ECLI:NL:RBAMS:2017:7037.

[86] Case C-571/17 PPU *Ardic* EU:C:2017:1026, paras 74–76.

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that Member State.[87] We will address three features of this part of the case law. First, requesting clarification from the CJEU has contributed to a better understanding of the requirements imposed by Article 47 EUCFR on the judicial independence of national courts and their consequences for the decision to surrender a person to a Member State where systemic or generalised deficiencies exist in this regard. The CJEU specified that when there is evidence of such deficiencies,[88] it cannot be presumed that there are also substantial grounds for concluding that in the individual case of the person concerned, surrender will lead to a violation of Article 47 EUCFR. This requires a specific and precise verification of the individual circumstances of the case.[89] To the knowledge of the authors, this has led to only one judgment in which surrender to Poland was refused. In line with the approach in the CJEU case law, it was established that there was a substantial risk that the rule of law deficiencies would lead to a violation of Article 47 EUCFR in the event of surrender on account of the specific circumstances of the case.[90] However, in the other cases, applying the test has not led to a refusal to surrender.[91]

Additionally, it can be seen that criminal courts follow the developing interpretation of Article 47 EUCFR in CJEU case law. Dutch courts have started to apply that provision not only in relation to requests for surrender with a view to prosecution, but also with a view to the execution of sentences.[92] It is also interesting to mention that the Rechtbank Amsterdam seems to have tried to make the test for surrender more demanding by asking the CJEU whether it should apply the retrospective three-step test on the stand-alone right of a tribunal established by law of Article 6 ECHR as found in the ECtHR's *Ástráðsson* judgment.[93] In brief, the CJEU's answer was that the prospective test as developed in previous case law – which requires not only that there are systemic or generalised deficiencies, but also the existence of a substantial risk that this leads to a violation of Article 47 EUCFR in the case of the person concerned – also applies in this context.[94] In the follow-up judgment, the Rechtbank Amsterdam agreed and, as it had not been established that there was a substantial risk pertaining to the case of

[87] Rb Amsterdam 31 July 2020, ECLI:NL:RBAMS:2020:3776; Rb Amsterdam 3 September 2020, ECLI:NL:RBAMS:2020:4328; Rb Amsterdam 14 September 2021, ECLI:NL:RBAMS:2021:5051.

[88] See the judgment of Rb Amsterdam 22 May 2020, ECLI:NL:RBAMS:2020:2673, for the conclusion that applying this first part of the test (systemic or generalised deficiencies) leads to the conclusion that there are no grounds to refuse surrender of persons to Hungary.

[89] See the answers to the preliminary questions in Joined Cases C-354/20 PPU and C-412/20 PPU *L and P v Openbaar Ministerie* EU:C:2020:1033. This judgment builds upon the foundations provided in *LM* (n 10).

[90] Rb Amsterdam 10 February 2021, ECLI:NL:RBAMS:2021:420.

[91] See eg, Rb Amsterdam 27 January 2021, ECLI:NL:RBAMS:2021:179; Rb Amsterdam 4 March 2021, ECLI:NL:RBAMS:2021:855; Rb Amsterdam 29 April 2021, ECLI:NL:RBAMS:2021:2317; Rb Amsterdam 20 May 2021, ECLI:NL:RBAMS:2021:2754; Rb Amsterdam 25 May 2021, ECLI:NL:RBAMS:2021:2668 (six other corresponding judgments on surrender were delivered on the same day); Rb Amsterdam 24 June 2021, ECLI:NL:RBAMS:2021:4228.

[92] Rb Amsterdam 3 September 2020, ECLI:NL:RBAMS:2020:4328, para 7, referring to Case C-627/19 PPU *Openbaar Ministerie (Procureur des Konings te Brussel)* EU:C:2019:1079. See also Rb Amsterdam 27 January 2021, ECLI:NL:RBAMS:2021:179, para 5.1.2.

[93] Judgment of the European Court of Human Rights of 1 December 2020, in Case No 26374/18 *Ástráðsson v Iceland*.

[94] Case C-562/21 PPU and C-563/21 PPU *X and Y v Openbaar Ministerie (Tribunal établi par la loi dans l'État member d'émission)* EU:C:2022:100.

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the person concerned, authorised surrender.[95] Subsequently, the current approach to surrender decisions concerning Poland has become more critical. This approach can be contrasted with an earlier decision where the court remarked that the situation is under investigation by means of Article 7 of the Treaty on European Union (TEU), followed by the generally phrased observation that it cannot at this moment be said that a surrender to Poland would lead to a violation of Article 47 EUCFR.[96] The current approach does not indicate a change in the interpretation of Article 47 EUCFR, but rather reflects a change in its application to surrender procedures regarding Poland.

Finally, it should be noted that Article 47 EUCFR has also played a relevant role in judgments making a preliminary reference concerning issues other than the EAW Framework Decision. These concern consequences that should result from a breach of procedural requirements in criminal proceedings,[97] and the meaning of the terms 'operator' and 'circumstances' under the Regulation on drug precursors[98] (a broad reading of which could lead to an incompatibility with the *nemo tenetur* principle) – in the latter judgment, Article 47 EUCFR is mentioned in combination with Article 48 EUCFR.[99]

v. The Civil Courts

There have been no preliminary references to the CJEU from the Dutch civil courts concerning Article 47 EUCFR. Procedural issues arising in connection to EU law are addressed mainly by reference to the principle of (full) effectiveness and *ex officio* application of EU law, in particular in consumer law. In this area, Article 47 EUCFR has had a more implicit but undeniable impact on the way in which civil courts provide effective judicial protection. In *Asbeek Brusse*,[100] the question arose as to whether and to what extent the Court of Appeal (as the court of second instance) could or should perform *ex officio* control of unfair terms. The CJEU held, in short, that the appellate court must indeed perform *ex officio* control, and reiterated explicitly that the principle of *audi alteram partem* requires the court to invite each of the parties to the dispute to set out their views, with the opportunity to challenge each other's views, by reference to the case of *Banif Plus Bank*.[101] In *Banif Plus Bank*, the CJEU confirmed that Article 47 EUCFR – which safeguards the rights of defence – applies when national courts perform *ex officio* control under Directive 93/13/EEC on unfair terms in consumer contracts. They must observe the rights of defence, which also means that the parties must be able to respond to the court's (*ex officio*) findings as regards the unfair nature of certain terms as well as the legal consequences.[102] Before *Asbeek Brusse*, the Dutch civil courts hardly made any reference to the rights of defence when performing *ex officio* control. After *Asbeek Brusse*, they started explicitly referring to

[95] Rb Amsterdam 6 April 2022, ECLI:NL:RBAMS:2022:1794.
[96] Rb Amsterdam 18 January 2018, ECLI:NL:RBAMS:2018:222, para 5.
[97] HR 5 April 2022, ECLI:NL:HR:2022:475.
[98] Articles 2(d) and 8(1) of Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors [2004] OJ L47/1.
[99] HR 14 December 2021, ECLI:NL:HR:2021:1841.
[100] Case C-488/11 *Asbeek Brusse* EU:C:2013:341.
[101] Case C-472/11 *Banif Plus Bank* EU:C:2013:88.
[102] ibid paras 29–36.

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the right to be heard of both parties, and there has been debate about its exact implications in relation to *ex officio* control. The right to be heard is also invoked by traders in unfair terms cases when they challenge judicial decisions that are unfavourable to them, arguing that it constitutes a 'surprise decision' based on information that was not part of the dispute between the parties.[103] This shows that even when Article 47 is not explicitly mentioned, it still trickles down into national procedural law.

B. The Autonomous Interpretation of Article 47 EUCFR by the Dutch Courts

The Dutch courts increasingly refer preliminary questions relating to Article 47 EUCFR to the Court of Justice, but most cases in which Article 47 EUCFR has been invoked are decided autonomously, ie, without making a preliminary reference. In this section we will discuss a few areas where Article 47 EUCFR is interpreted in the light of the case law of the CJEU in the absence of equivalent case law from the ECtHR. The cases derive from the administrative courts, in particular the Afdeling bestuursrechtspraak, and from the civil courts.

i. Judicial Competence against Governmental Action

In the Netherlands, judicial protection against governmental action is provided for by both the administrative and the civil courts. The administrative courts are specifically competent to decide on actions for judicial review brought by an interested party against decisions of non-general application, intended to produce legal effects. If the administrative courts are not competent to rule because the act does not qualify as a reviewable decision or the individual concerned is not an interested party, the civil courts provide for additional legal protection. In several cases individuals have invoked the principle of effective judicial protection and Article 47 EUCFR to obtain access to the administrative courts and review EU law-based governmental action not being reviewable under Dutch law, claiming that the civil court route would be less favourable than the administrative court route. In this regard, they have stated that civil procedure is more complex and expensive (because of the higher court fees and the risk of being required to pay for the costs of the governmental party).

Until recently, the administrative courts – in particular, the Afdeling bestuursrechtspraak – have rejected these claims consistently, because the action involved can be contested by the individual concerned before the civil courts, and the civil courts' protection complies with Article 47 EUCFR as well.[104] In this respect, the Afdeling often refers, by analogy, to the CJEU's *Unibet* case.[105] According to the Afdeling, it can

[103] See van Duin (n 18) 230–31 for further references.

[104] For instance, ABRvS 31 March 2010, NL:RVS:2010:BL9651, and ABRvS 4 August 2010, ECLI:NL:RVS:2010:BN3158 (both about non-appealable environmental plans); ABRvS 2 July 2014, ECLI:NL:RVS:2014:2377 (not an interested party) ABRvS 17 October 2018, ECLI:NL:RVS:2018:3324 (enforcement of air quality standards). For a similar line, see CBb 28 April 2009, ECLI:NL:CBB:2009:BI7098.

[105] Case C-432/05 *Unibet* EU:C:2007:163. For an extensive reference to *Unibet*, see ABRvS 2 July 2014, ECLI:NL:RVS:2014:2377.

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be derived from *Unibet* that the EU principle of effective judicial protection does not require the administrative courts to be competent in cases regarding governmental action which may be contrary to EU law. Conversely, as long as national law provides for an effective remedy, which complies with the principle of equivalence, and makes it possible to determine the consistency of the action with EU law as a preliminary issue, the CJEU is satisfied.

Quite recently, the Afdeling bestuursrechtspraak has decided several cases where – based on Article 47 EUCFR in conjunction with the *Rewe* principle of effectiveness – it has changed the division of judicial protection against governmental action in favour of the administrative courts, to some extent. The first group of cases concerns actions for damages, allegedly suffered by violations committed by an administrative authority of the data protection rights of Articles 15–22 of the General Data Protection Regulation.[106] In these cases the Afdeling determined that the administrative court which is competent to decide on the violations mentioned should also be competent to decide on requests for damages related to these violations. In this regard, the Afdeling refers to the need for concentration of jurisdiction in cases in which the violation itself is assessed and cases regarding the connected action for damages. According to the Afdeling, the need for concentration can be derived from the principle of effectiveness, as interpreted by the CJEU in *Impact*,[107] and may be based on Article 47 EUCFR as well.

Another interesting case of the Afdeling bestuursrechtspraak concerns the remedy against the exceeding of the time limit for deciding on asylum applications, prescribed by Article 31(3) of the Asylum Procedure Directive.[108] The reason for the case was the abolition by the Dutch legislator of the right of appeal before the administrative courts against such exceeding and of the connected right of having a penalty payment forfeited for every day the exceeding continues. The abolition was prompted by the fact that the immigration authority exceeded the time limit in almost every case and had to pay high penalty payments accordingly. According to the Afdeling, the abolition of the right to appeal before the administrative court is contrary to Article 47 EUCFR and the effectiveness principle because it affects the *effet utile* of Article 31(3) of the Asylum Procedure Directive. The fact that the abolition of the right to appeal in the Dutch system of judicial protection would result in the civil courts becoming the competent courts did not lead to a different decision, because in this specific case the Afdeling ruled the civil court's route to be ineffective.

ii. Data Protection and Effective Judicial Protection

Recently an increase of Article 47 EUCFR cases related to the General Data Protection Regulation (GDPR) can be observed.[109] The increase concerns both the

[106] ABRvS 1 April 2020, ECLI:NL:RVS:2020:898; ABRvS 1 April 2020, ECLI:NL:RVS:2020:900; ABRvS 1 April 2020, ECLI:NL:RVS:2020:901.

[107] Case C-268/06 *Impact* EU:C:2008:223, para 51.

[108] ABRvS 6 July 2022, ECLI:NL:RVS:2022:1810: ABRvS 30 November 2022, ECLI:NL:RVS:2022:3353.

[109] Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) [2016] OJ L119/1.

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administrative courts, which are competent if the controller or processor of the data is a public law authority, and the civil courts, which are competent if the controller or processor is a private entity. In section IV.B.i above, we mentioned the decision of the Afdeling bestuursrechtspraak, where the court has extended the competence of the administrative courts in relation to claims for compensation of damages connected to the violation by administrative authorities of the data protection rights of Articles 15–22 GDPR.

In other cases the Afdeling has been asked to weigh the enforcement of a data protection right against the interest of effective judicial protection. In a 2021 case, the public authority had processed special categories of personal data within the meaning of Article 9(2)(g) GDPR for reasons of substantial public interest, namely to allow decision-making about the right to legal aid as guaranteed in Article 47(3) EUCFR.[110] According to the Afdeling, in doing so the authority had found the right balance between data protection and the right to legal aid. In this respect, the Afdeling referred to the CJEU's judgment in the case of *GC and Others*,[111] in which the Court considered that a violation of the fundamental right to privacy of Article 8 EUCFR, notably by processing special personal data, may be justified on the ground of respecting other fundamental rights. According to the Afdeling, this other fundamental right is the right to legal aid, laid down in Article 47(3) EUCFR,[112] which outweighs the right to privacy and should be considered a substantial public interest within the meaning of Article 9(2)(g) GDPR.

In another recent case, the Afdeling is called upon to interpret the phrase 'necessary for the establishment, exercise or defence of legal claims' within the meaning of Article 17(3)(e) GDPR,[113] which may be a ground to reject a person's request to erase their personal data. The question was raised as to whether a public authority as data controller can rely on this rejection ground only if it acts as a claimant in a judicial procedure and needs the personal data to institute the legal claim or also if it acts as defendant in the procedure and needs the data to defend itself. In the judgment, the Afdeling examined several language versions of the GDPR and the GDPR's objective. Moreover, it states that Article 8 EUCFR should not be interpreted as containing unfettered prerogatives, but should be considered in relation to other fundamental rights, such as Article 47 EUCFR. Next, the Afdeling observed, on the basis of the *Otis* case, that Article 47 EUCFR includes the rights of defence as well,[114] and concluded that in order to avoid these rights of the defendant being frustrated, Article 17(3)(e) GDPR should be interpreted as applying to both the claimant and the defendant in a judicial procedure. In addition, it held that in the interests of effective judicial protection, the claimant, the defendant and the court should dispose of a complete case file. Therefore, the Afdeling concludes that the refusal of the erasure request is consistent with Article 17(3)(e) GDPR.

In civil cases, the Gerechtshof (Court of Appeal) of 's-Hertogenbosch has issued a series of decisions on cost orders in the light of the GDPR by referring prominently to

[110] ABRvS 12 May 2021, ECLI:NL:RVS:2021:1028.
[111] Case C-136/17 *GC and Others (De-referencing of Sensitive Data)* EU:C:2019:773.
[112] Explanation relating to the Charter of Fundamental Rights, Explanation on Art 47 EUCFR.
[113] ABRvS 20 July 2022, ECLI:NL:RVS:2022:2065.
[114] Case C-199/11 *Otis NV and Others* EU:C:2012:684.

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Article 47 EUCFR to justify a deviation from the 'loser pays principle' normally adhered to in Dutch civil procedure.[115] This shows how Article 47 can be used to interpret or apply procedural rules in an extensive manner that benefits parties who invoke rights derived from EU law and enhances their access to justice. The Gerechtshof concluded that the applicant could not be ordered to pay the costs of the defendant bank, even though they had lost the case on the merits.[116] In this respect, the Gerechtshof referred to the case of *Puškár* to conclude that the costs of legal proceedings cannot be excessively high.[117] It found that a cost order would impede the applicant's position and obstruct their right to an effective remedy before a court of law. Other courts have subsequently adopted a more formal understanding of the right of access to court in similar cases, holding that the applicant could, and had, exercised this right.[118] They seem to be reluctant to distinguish cost orders in data protection cases from 'regular' civil cases, and emphasise that the Dutch system of court-approved tariff scales (*liquidatietarieven*) does not lead to excessive costs.[119] In response, the Gerechtshof 's-Hertogenbosch has reiterated that the risk of a cost order (in first instance and in appeal) may deter applicants from exercising their rights under Article 79 GDPR. This is all the more pressing when the defendant is a semi-public institution with a social function.

iii. The 'Horizontal' Dimension of Article 47 EUCFR in Private Law

The Dutch civil courts have used Article 47 EUCFR for the interpretation of open norms in the Civil Code, more specifically Article 6:233(a) on unfair contract terms.[120] Article 47 EUCFR was used as a parameter to assess the unfairness of arbitration clauses in consumer contracts, which essentially deprived consumers of their right of access to court. Two Gerechtshoven deemed such clauses to be unfair, even though they were not on the 'blacklist' of unfair terms at the time (Article 6:236 of the Civil Code).[121] Article 47 EUCFR thus provided a justification for going beyond what was strictly required by national provisions implementing Directive 93/13/EEC. However, the Supreme Court held that the court should have taken the special circumstances of the case into account rather than give a general interpretation of the law that applies to all cases.[122] In quashing the judgment, the Supreme Court did not pay regard to the right of access to court, which is exemplary for the overall lack of constitutional reasoning in consumer law. A few years later, in 2015, arbitration clauses in consumer contracts that

[115] Gerechtshof 's-Hertogenbosch 1 February 2018, ECLI:NL:GHSHE:2018:363, Gerechtshof 's-Hertogenbosch 6 August 2020, ECLI:NL:GHSHE:2020:2536. See also van Duin (n 18) 206.

[116] The applicant is not exempted from paying court fees. See Gerechtshof 's-Hertogenbosch 19 April 2018, ECLI:NL:GHSHE:2018:1665.

[117] *Puškár* (n 83).

[118] Rb Den Haag 28 June 2019, ECLI:NL:RBDHA:2019:6302.

[119] Gerechtshof Amsterdam 3 March 2020, ECLI:NL:GHAMS:2020:648; Gerechtshof Den Haag 14 April 2020, ECLI:NL:GHDHA:2020:938, Gerechtshof Arnhem-Leeuwarden 17 December 2020, ECLI:NL:GHARL:2020:10564.

[120] Van Duin (n 18) 207 with further references.

[121] Gerechtshof Leeuwarden 5 July 2011, ECLI:NL:GHLEE:2011:BR2500; Gerechtshof Amsterdam 17 April 2012, ECLI:NL:GHAMS:2012:BX3835. See also Rb Leeuwarden 3 August 2011, ECLI:NL:RBLEE:2011:BR4256.

[122] HR 21 September 2012, ECLI:NL:HR:2012:BW6135.

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deprive consumers upfront of the choice to go to court were 'blacklisted' by the Dutch legislature, with reference to the above-mentioned national cases and CJEU case of *Asturcom*,[123] because such clauses take away the court protection assigned to consumers by law.[124]

These cases could be seen as giving Article 47 EUCFR a 'horizontal' dimension. Another example of such a horizontal dimension can be found in the area of intellectual property. In one case, the claimant's intellectual property rights and the right to effective judicial protection were balanced against the defendant's right to protect the privacy and personal information of its clients; the defendant was an internet provider whose clients allegedly infringed intellectual property rights. The Gerechtshof Arnhem-Leeuwarden held that an unlimited and unconditional protection of their privacy would lead to a serious violation of not only the claimant's intellectual property rights, but also of the right to an effective remedy (Article 47) which could not be exercised effectively.[125] Accordingly, Article 47 EUCFR was a relevant factor to consider when striking a fair balance between the conflicting (fundamental) rights at stake.

V. Conclusion

When drawing a conclusion on the impact of Article 47 EUCFR from a quantitative point of view, it is important to distinguish between the different areas of Dutch law. Especially in the area of administrative law, the Dutch courts frequently refer to Article 47 EUCFR. The same can be said for its use in proceedings with regard to the EAW. At the same time, other subfields of criminal law are simply eclipsed by the omnipresence of EAW proceedings. In contrast, in private law, the use of Article 47 EUCFR is rather modest. When Article 47 EUCFR *is* applied, this often results from the civil court giving effect to a preliminary ruling that refers to that provision. The CBb also makes limited use of Article 47 EUCFR. The focus seems to be more on Article 6 ECHR, and this is also the case if situations clearly fall within the scope of EU law.

From a quantitative point of view, the number of cases in which Article 47 EUCFR plays a role is rising. There is an increase in the number of judgments making a reference for a preliminary ruling as well. Also, it was seen that Article 47 is used independently – ie, it increasingly sets a standard of protection that is not derived from Articles 6 and 13 ECHR.

The research nevertheless provides an indication that Dutch courts still prefer to rely on Articles 6 and 13 ECHR rather than (or at least in combination with) Article 47 EUCFR. We see a tension here. On the one hand, it is understandable that a coordinated approach between the different sources of fundamental rights protection is comfortable and straightforward for national courts. On the other hand, it can be a missed

[123] Case C-40/08 *Asturcom* EU:C:2009:615.

[124] Amendments to Book 6 and Book 10 of the Civil Code and the fourth book of the Civil Procedure Code in connection with the modernisationn of the Arbitration Act (*Wijziging van Boek 6 en Boek 10 van het Burgerlijk Wetboek en het vierde Boek van het Wetboek van Burgerlijke Rechtsvordering in verband met de modernisering van het Arbitragerecht*) (Kamerstukken II, 2012/2013, 33 611, no 3, p 7).

[125] Gerechtshof Arnhem-Leeuwarden 5 November 2019, ECLI:NL:GHARL:2019:9352.

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opportunity if courts do not explore whether Article 47 EUCFR might be of added value. Additionally, we believe that certain courts could more often acknowledge that the Charter is applicable. In this respect, there is still a world to win. Presumably, the parties to the proceedings have a role to play here too.[126]

Albeit not entirely surprisingly, the research clearly confirms that the use of Article 47 EUCFR is the most extensive if an area of law is harmonised substantially, eg, in migration law, the law on the surrender of persons and data protection law. This often goes hand in hand with Article 47 EUCFR being the primary reference point in the CJEU's case law – which is subsequently applied by the Dutch courts. The use of Article 47 EUCFR in case law concerning surrender proceedings to Poland is also triggered by CJEU case law. This is now settled case law and no longer seems to depend on the courts being prompted by the CJEU to do so.

What can be said about the impact of Article 47 EUCFR from a qualitative point of view? As a preliminary remark, it should be mentioned that those judicial institutions which, from a quantitative point of view, 'underperform' when it comes to applying Article 47 EUCFR are less likely to provide a qualitative impetus to the development of Article 47 EUCFR. While our research provides some support for this hypothesis, the picture is more nuanced. In the dominant area of administrative law, most cases in which the provision had a conspicuous impact on litigants' rights and obligations resulted from preliminary rulings. Interestingly, if preliminary rulings are not present, such an impact is less visible in this area of law. In the area concerned, a prevalent feature of the case law is rather the coordinated approach (vis-a-vis the ECHR).

Also in the other areas of law, a link can be discerned between Article 47 EUCFR having a clear normative impact and a prior preliminary ruling (triggered by Dutch courts referring questions or otherwise). Areas in which this clear normative impact can be witnessed are cooperation between courts in surrender procedures and asylum transfers, the *ex officio* application of EU law in migration law and in relation to unfair terms in consumer contracts, and the admissibility of new grounds and evidence in court proceedings concerning a request for international protection. However, this does not mean that the Dutch courts always require a push from Luxembourg to 'do something' with Article 47 EUCFR. Important 'autonomous' judgments, based on Article 47 EUCFR, were delivered in relation to the determination of judicial competence for reviewing governmental action and in the area of data protection law. These judgments shed light on the potential of Article 47 EUCFR and also show there is still a world to win in applying the provision autonomously.

[126] *cf* T Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press, 2022).

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