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The Signalling Function of Article 47 of the Charter of Fundamental Rights in Consumer Debt Collection Cases

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I. CRISIS AS A CATALYST OF PROCEDURAL TRANSFORMATION

In 2020, the world was hit by a pandemic that disrupted society, including the justice system. Courthouses closed, making access to court physically impossible. If there is a silver lining, it is that new challenges gave rise to new opportunities, such as the digitisation of court proceedings.[1] Crisis as a catalyst of procedural transformation is a phenomenon that also occurred in the aftermath of the 2007/2008 credit crunch, in a different way. Civil courts in Spain, Poland, Hungary and other European Union (EU) Member States were confronted with large numbers of cases brought by credit institutions against (over-)indebted consumers. This triggered many preliminary references to the Court of Justice of the European Union (CJEU) on the meaning and scope of EU consumer law as well as the need for effective judicial protection, in particular and most urgently for vulnerable consumer-debtors. The referring courts questioned the adequacy of their own national legal framework, especially where the scope for judicial protection was limited. Examples can be found in the case law on mortgage enforcement and order for payment procedures.[2] The Unfair Contract Terms Directive (UCTD)[3]

* This chapter is based on part of the findings in my PhD thesis (defended on 23 October 2020, Cum Laude), which has been published under the title *Effective Judicial Protection in Consumer Litigation: Article 47 of the EU Charter in Practice* (Cambridge, Intersentia, 2022). The thesis explores the functions of art 47 in the context of the UCTD through a comparative analysis of the case law of the CJEU and civil courts in Spain and the Netherlands.

[1] Digital access to civil justice was accelerated by the COVID-19 crisis, although remote hearings created new difficulties as well. An example of a positive change brought about in the Netherlands is electronic communication with the courts. Due to the lockdown situation, there has been a heightened sense of urgency about the need to introduce digital case files. For an inventory of the response to the global pandemic in respect of civil justice, see HB Krans and A Nylund (eds), *Civil Courts Coping with Covid-19* (The Hague, Eleven International Publishing, 2021).

[2] See, eg, Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164; Case C-169/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria, SA* EU:C:2014:2099; Case C-49/14 *Finanmadrid v Albán Zambrano and Others* EU:C:2016:98; Case C-176/17 *Profi Credit Polska SA w Bielsku Białej v Mariusz Wawrzosek* EU:C:2018:711; Case C-495/19 *Kancelaria Medius SA v RN* EU:C:2020:431; Case C-485/19 *LH v Profi Credit Polska sro* EU:C:2021:313.

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

proved to be one possible avenue, an 'indirect remedy',[4] to address structural imbalances in the civil justice system, both from a legal and a socio-economic point of view; 'a fountain of social justice in times of drought'.[5] As such, the Directive was a portal to the CJEU and the applicability of the EU Charter of Fundamental Rights (hereinafter EUCFR or 'the Charter').

Article 47 of the Charter safeguards the right to an effective remedy and a fair hearing before an independent and impartial tribunal established by law for (alleged) infringements of EU rights and freedoms, including the rights consumers derive from the UCTD.[6] In the context of the UCTD, the number of references to Article 47 in the CJEU's case law has increased over the past decade, which coincided with a wave of crisis-induced litigation. In this chapter, I will focus on one of the many different functions of a reference to Article 47: its signalling function in debt collection cases that fall, or can be brought, within the scope of the UCTD. This function is often overlooked in existing literature that focuses on the status of Article 47 in EU law, its scope of protection and legal requirements, as well as the question whether it entails (additional) positive obligations for the Member States and their national courts. In its signalling function, Article 47 does not immediately change the outcome of a case, which could make a reference to it seem merely ornamental. However, it may still be of significance where it puts the spotlight on a shortfall in judicial remedies or procedural safeguards, and implies an even more pressing need to address the consequences of a potential fundamental rights violation. Whilst its impact may be more indirect, it contributes to 'open constitutionalisation'[7] – ie, the explicit recognition of fundamental rights issues – and may lead to structural changes in the longer run.

Insofar as effective judicial protection as an EU fundamental right has become more manifest in judicial decisions, this is in line with the Charter's aim of strengthening the protection of fundamental rights in the EU by making these rights more visible. Visibility is not just symbolic; when a problem is framed as a fundamental rights issue, the case gets a constitutional dimension. The term 'constitutional' is used here in a narrow sense: it refers to the interpretation and application of EU law in accordance with fundamental rights. It is not (only) about a lack of consumer protection against unfair terms, but (also) about a potential infringement of one of the core components of Article 47, for example, where the right

[4] I Barral-Viñals, 'Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain' (2015) 4 *Penn State Journal of Law & International Affairs* 69, 71.

[5] D Caruso, 'Fairness at a Time of Perplexity' in S Vogenauer and S Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Oxford, Hart Publishing, 2017) 346.

[6] Article 47 of the Charter is binding on national (civil) courts when they adjudicate disputes under the UCTD: see, eg, Case C-472/11 *Banif Plus Bank v Csaba Csipai and Viktória Csipai* EU:C:2013:88, para 29. The UCTD aims to protect consumers against unfair standard terms and conditions that have not been individually negotiated. Consumers have the subjective right to take legal action and request a court to examine whether a certain term of a contract to which they are a party is unfair: see, eg, Joined Cases C-381/14 and C-385/14 *Jorge Sales Sinués and Youssouf Drame Ba v Caixabank SA and Catalunya Caixa SA (Catalunya Banc SA)* EU:C:2016:252, paras 21 and 42. The Directive's system of protection is based on the idea that consumers are in a weak position vis-a-vis their professional counterparties – traders – in terms of knowledge and bargaining power. It aims to replace the formal contractual balance with an effective balance that re-establishes equality: see, eg, Case C-137/08 *VB Pénzügyi Lízing Zrt v Ferenc Schneider* [2010] ECR I-10847, para 47; *Sánchez Morcillo* (n 2) paras 22–24; Joined Cases C-154/14, C-307/15 and C-308/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irles López and Teresa Torres Andreu* EU:C:2016:980, paras 53 and 55.

[7] HW Micklitz and N Reich, 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 *Common Market Law Review* 771, 801; F Della Negra, 'The Uncertain Development of the Case Law on Consumer Protection in Mortgage Enforcement Proceedings: *Sánchez Morcillo* and *Kušionová*' (2015) 52 *Common Market Law Review* 1009, 1024; HW Micklitz, 'The Constitutional Transformation of Private Law Pillars through the CJEU' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge, Intersentia, 2017) 74.

of consumers to take legal action or to defend themselves is severely restricted or entirely excluded.[8] A reference to Article 47 in judicial decisions may signify a call for change, a transformation, of national (procedural) law. National civil courts may thus play a transformative role.[9] I submit that Article 47 can empower them in at least two ways. First, Article 47 emphasises their key position in the protection of EU (consumer) rights, which presupposes a genuine opportunity for consumers to exercise their rights *in court* and the possibility for courts to adjudicate those rights; ie, *justiciability* in a broad sense.[10] It reinforces a court-centred approach that goes beyond the effectiveness of specific instruments of EU law, like the UCTD. Second, Article 47 places the responsibility to ensure that effective judicial protection is available in practice and to set aside contrary provisions, if necessary, on the *judiciary*.[11] This turns Article 47 into a potential correction mechanism, even if the choice and design of remedies and procedures for the decentralised enforcement of EU law are primarily the prerogative of the Member States' legislatures.[12]

To illustrate the signalling function of Article 47 in this respect, I will single out one case: *Finanmadrid*.[13] A closer examination of the background of this case reveals it has a clear constitutional dimension (section II), even if the CJEU did not address the referring court's question regarding Article 47. The case touches on the role of civil courts in the EU legal order (section III), which crystallises in the field of unfair terms, but concerns a more fundamental issue: the balance between providing justice for both creditors, who seek to enforce their claims, and consumer-debtors, who may be in need of additional protection in light of their weaker position. A lack of procedural safeguards may aggravate inequalities between the parties.[14] The referring Spanish court in *Finanmadrid* mentioned Article 47 to indicate that the procedure at stake was flawed, which led to a debate about legislative reforms at the national level. Whereas the reference to Article 47 may not have been the *trigger* for these reforms, it was a clear *signal* that change was due. *Finanmadrid* shows how such a reference may enhance the visibility of systemic issues by flagging gaps and obstacles in, and creating space for, the effective judicial protection of EU (consumer) rights at the national level. This may inform judicial practices in other Member States too,

[8] Most requirements arising from art 47 of the Charter have been interpreted and construed judicially; see, eg, M Beijer, *The Limits of Fundamental Rights Protection by the EU: The Scope for the Development of Positive Obligations* (Cambridge, Intersentia, 2017) 309. To the extent that there is consensus, art 47 encompasses the right of access to court and an effective (judicial) remedy, the principle of equality of arms, the rights of the defence (in particular, the right to be heard), the right to legal aid and the right to adjudication within a reasonable time; see, eg, L Pech and D Sayers, 'Article 47 – Right to an Effective Remedy. D. Analysis. VII–VIII. Article 47(2)' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014).

[9] See also C Mak, JML van Duin and LE Burgers, 'Judges in Utopia The Transformative Role of the Judiciary in European Private Law' (2020) 28 *European Review of Private Law* 865, 871.

[10] See also JML van Duin and C Leone, 'The Real (New) Deal: Levelling the Odds for Consumer-Litigants' (2019) 27 *European Review of Private Law* 1227, 1229. This understanding of justiciability is broader than the direct effect of (subjective) EU rights or the existence of a (procedural) means of recourse. It includes rights originating from directives that have been implemented in national legal systems. Practical and legal obstacles – such as a lack of knowledge or financial means, as well as restrictive procedural conditions – may equally stand in the way of the justiciability of those rights.

[11] Case C-414/16 *Egenberger v Evangelisches Werk Diakonie und Entwicklung eV* EU:C:2018:257, paras 78–79.

[12] F Cafaggi and P Iamiceli, 'The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions' (2017) 25 *European Review of Private Law* 575, 580.

[13] *Finanmadrid* (n 2).

[14] M González Pascual, 'Social Rights Protection and Financial Crisis in Europe: The Right to Housing, a Cautionary Tale' (2016) 9 *Inter-American and European Human Rights Journal* 260, 269–72.

for instance, in The Netherlands (section IV), where Article 47 is less visible. I conclude this chapter with a plea for 'open constitutionalisation' in order to raise further awareness about the importance of effective judicial protection in consumer cases and the (added) value of Article 47 in this respect.

II. ARTICLE 47 AND ORDERS FOR PAYMENT ISSUED AGAINST CONSUMERS IN SPAIN

In the wake of the 2007/2008 financial crisis, many creditors in Spain resorted to special expedited procedures for the collection of outstanding debts. One of these so-called 'privileged procedures'[15] is the order for payment procedure (*proceso monitorio*), aimed at granting creditors easy and rapid access to justice for uncontested pecuniary claims up to €250,000.[16] Compared to the ordinary model of adversarial court proceedings with corresponding procedural safeguards, the court only plays a limited role. The creditor must provide prima facie evidence of the claim, ie, the existence of a debt. The burden is placed on the defendant to initiate a contentious debate. If the defendant does not dispute the claim, it will only be ascertained whether the formal requirements are met. As it transpired, this was problematic where consumers were involved, who were seen as regular debtors, but often did or could not stand up for their own rights.

In *Banesto*, which pertained to the same order for payment procedure as *Finanmadrid*, the CJEU had already found there was a significant risk that consumer-debtors would not lodge an objection due to the short (20–day) period provided for that purpose, the costs of legal proceedings in relation to the debt, a lack of knowledge and/or the incomplete nature of the information available to them. This meant that creditors could deprive consumers of the protection intended by the UCTD by simply requesting an order for payment, whilst counting on the consumer's passivity and thus circumventing judicial control.[17] The CJEU held that the national court must therefore assess of its own motion – ie, *ex officio* – whether the claim is based on contractual terms that are unfair.[18] In 2014, two years after *Banesto*, the referring court in *Finanmadrid* raised a follow-up issue by reference to Article 47 of the Charter: the order for payment was no longer given by a judge, but by a court registrar (Secretario Judicial, presently called Letrado de la Administración de Justicia). Decision-making was removed from the judicial realm, whereas the order for payment had the same status as a judicial decision for the purposes of enforcement. Even though creditors still needed leave to

[15] H Díez García, 'Igualdad de Armas y Tutela Judicial Efectiva En El Art. 695.4 LEC Tras El Real Decreto-Ley 11/2014, de 5 de Septiembre: Crónica de Una Reforma Legislativa Anunciada (de Los AATC 70/2014, 71/2014, 111/2014, 112/2014 y 113/2014 a La STJUE de 17 de Julio de 2014)' (2014) *Derecho Privado y Constitución* 230; M Aguilera Morales, '¿Quo vadis "jura de cuentas"? ¿Quo vadis Europa? El estatus y función de los Secretarios Judiciales a examen por el TJUE' (2017) 41 *Revista General de Derecho Procesal* 3.

[16] Articles 812–816 of Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (LEC). See further I Díez-Picazo Giménez, 'Civil Justice in Spain: Present and Future, Access, Cost, and Duration' in A Zuckerman (ed), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford, Oxford University Press, 1999) 410; J Picó i Junoy, 'Requiem por el proceso monitorio' (2015) 2 *Justicia* 523, 524.

[17] Case C-618/10 *Banco Español de Crédito, SA v Joaquín Calderón Camino* (*Banesto*) EU:C:2012:349, paras 54–55. See also O Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' (2015) 21 *European Law Journal* 599, 610.

[18] *Banesto* (n 17) para 57. On the compensatory role of courts in this respect, see, eg, Micklitz and Reich (n 7) 803–04; JM Bech Serrat, 'Cláusulas suelo y autonomía procesal en la Unión Europea: ¿por qué no hacer una excepción a la cosa juzgada?' (2018) *InDret 55*; A Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Cambridge, Intersentia, 2018) 129.

enforce the title they had obtained against the debtor, there was no (full) judicial review or examination on the merits, let alone unfair terms control.

In essence, *Finanmadrid* revolved around four problems. First, the court registrar could only check whether the formal admissibility requirements were met. The matter would only come before a court when the documents suggested that the claimed amount was incorrect or when the debtor contested the claim.[19] Second, the order was endowed with effects analogous to those of a judicial decision. Third, adjudicative competences – ie, decision-making powers – were outsourced to a court registrar, who is not an independent judicial authority and does not enjoy the same constitutional status as courts. And, fourth, there appeared to be procedural defects in the case at hand, which cast doubt on the defendants' possibility to exercise their rights of defence guaranteed by Article 47 of the Charter. There were three guarantors alongside the main debtor; for two of those, it was unclear whether they had actually been notified of the pending procedure against them.

The CJEU only dealt with the first and second problems. It held that the court ruling on enforcement of the order must have the power to perform *ex officio* control as a last resort.[20] In the words of Advocate General Szpunar, a balance must be struck 'between the notion that a court should compensate for a procedural omission on the part of a consumer who is unaware of his rights and the notion that it should make up fully for the consumer's total inertia'.[21] The mere fact that the consumer has not challenged the claim (in time) cannot justify the complete absence of judicial review. Moreover, time limits must be sufficient in practical terms to enable the concerned parties to prepare and bring an action.[22] The referring court had also mentioned the additional obstacle of mandatory legal representation, but the CJEU did not take this into consideration.

The question regarding Article 47 remained unanswered, which could be considered a blind spot. From the perspective of the UCTD's effectiveness, the possibility of judicial control at the enforcement stage might be sufficient. However, it neither addresses a potential violation of the rights of defence in the preceding stage, nor does it diminish the fact that disputes are resolved in a procedure of a (quasi-)judicial nature *outside* the judicial system. As Advocate General Kokott has pointed out in *Margarit Panicello*, the pressure that the very existence of an enforceable title exerts on consumers to discharge their (alleged) payment obligations must not be underestimated.[23] Consumers may not be able to tell the difference between a real judicial decision and an order for payment issued by a court registrar. In *Margarit Panicello*, a court registrar questioned his own competence to exercise judicial tasks by reference to Article 47. Paradoxically, this was precisely why the CJEU declared the case inadmissible: the court registrar was not a tribunal within the meaning of Article 267 of the Treaty on the Functioning of the European Union (TFEU).[24]

[19] Articles 815.3, 816.1 and 818 LEC (*Banesto* had not yet been implemented).

[20] *Finanmadrid* (n 2) paras 46 and 55.

[21] Case C-49/14 *Finanmadrid EFC SA v Jesús Vicente Albán Zambrano and Others*, Opinion of AG Szpunar, EU:C:2015:746, para 43. The term 'inertia' misleadingly implies an indifference that does not correspond with the notion of over-indebted and vulnerable consumers; it should not be equated with a renouncement of rights: Beka (n 18) 298–99.

[22] Case C-8/14 *BBVA SA v Peñalva López and Others* EU:C:2015:731, para 29.

[23] Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez*, Opinion of AG Kokott, EU:C:2016:696, paras 136–37.

[24] Case C-503/15 *Ramón Margarit Panicello v Pilar Hernández Martínez* EU:C:2017:126, para 35. See also Aguilera Morales (n 15) 13, 16; J Bonet Navarro, 'La necesaria reforma de la mal llamada "jura de cuentas"' (2017) *Revista de Derecho UNED* 73, 100; MJ Garot, 'Acerca del concepto de "independencia judicial" en la reciente jurisprudencia del Tribunal de Justica de la Unión Europea' in M Aguilera Morales (ed), *Tribunal de Justicia de la Unión Europea, justicia civil y derechos fundamentales* (Pamplona, Thomson Reuters Aranzadi, 2020) 202.

In *Finanmadrid*, the signalling function of Article 47 clearly emerges in the request for a preliminary ruling. The referring court was well aware of the constitutional dimension of the case, accentuated by an explicit reference to Article 47:

> All this could constitute a violation of Directive 93/13/EEC, where judicial *ex officio* control of unfair terms is not allowed – neither in the decision-making phase nor in the enforcement. It could also be contrary to the right to effective judicial protection recognised in Article 47 of the Charter of Fundamental Rights, because the order for payment procedure without opposition is a procedure in which the court does not intervene.[25]

Article 47 signalled the lack of court involvement in the procedure at issue. This must be read against the background of the institution of a new Judicial Office (Oficina Judicial) in 2009. Court registrars were attributed decision-making powers in matters 'collateral to the jurisdictional function' – eg, to assess the admissibility of a case – for the purpose of streamlining civil and administrative proceedings.[26] The court registrar is not a judge, but a public servant who supports the court in its task to adjudicate cases in a timely manner. Pursuant to Article 117 of the Spanish Constitution, justice must be administered by independent judges and magistrates who are members of the judiciary, and the exercise of judicial authority is vested exclusively in courts and tribunals foreseen by law. The process of 'dejudicialisation'[27] deprived courts of their jurisdictional competence, and parties of their access to an independent tribunal. Therefore, it could be a problem from the perspective of Article 47 of the Charter as well.[28]

Furthermore, the referring court in *Finanmadrid* found that the course of the proceedings jeopardised the defendants' right to be heard. Their only opportunity to contest the claim was in the order for payment procedure itself, where legal representation was mandatory. They needed to exercise their right to be heard within 20 days, otherwise an order would be issued. And if they did not lodge an objection, they could no longer claim restitution.[29] In its written observations about the case, the European Commission noted that a violation of Article 47 could have occurred in respect of the two defendants who had not been duly notified.[30] As Advocate General Szpunar observed, there might be a violation in cases where the defendant did not have access to an effective remedy due to, for example, a restrictive calculation of the time period for lodging an objection, the prohibitive costs of the procedure or the absence of recourse against an order adopted without the defendant's knowledge.[31] This can be framed as an infringement of the rights of defence, or as a restriction of the right of access to court or an effective remedy, understood as a procedural means of recourse. Actual access to a court is a necessary prerequisite for judicial protection. Indeed, any judicial intervention is based on the

[25] Juzgado de Primera Instancia No 5 de Cartegena, order of 23 January 2014 in case no 352/2013, para 56 (not published; copy obtained from the court upon request). Translated from Spanish: 'Todo esto podría suponer una vulneración de la Directiva 93/13/CEE, no se permite el control judicial de oficio sobre las cláusulas abusivas – ni en fase declarativa ni en ejecución. Además podría ser contrario al derecho a tutela judicial efectiva reconocido en el artículo 47 de la Carta de Derechos Fundamentales, pues el proceso monitorio sin oposición es un procedimiento en el que no interviene el Juez, sin embargo su resolución final produce efectos de cosa juzgada.'

[26] Ley 13/2009, de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, preamble II.

[27] F Gascón Inchausti, 'Procesos judiciales para tutela de los consumidor' in S Díaz Alabart (ed), *Manual de Derecho de consumo* (Madrid, Editorial Reus, 2016) 138.

[28] Aguilera Morales (n 15) 5–6; Bonet Navarro (n 24) 90.

[29] Article 816.2 LEC.

[30] See the Commission's written observations of 19 May 2014 (sj.c(2014)1686122), para 33. The Commission also concluded that the court registrar could not be considered as an 'independent and impartial tribunal, established by law' (para 67).

[31] Opinion of AG Szpunar (n 21) para 95.

premise that a case can be, and is, brought before a competent court by one of the parties.[32] Excessively restrictive procedural conditions may constitute a violation of Article 47 of the Charter, as four more recent preliminary rulings in cases originating from Poland confirm.[33]

The problems with the procedure at stake in *Banesto* and *Finanmadrid* were subsequently addressed by the Spanish legislature and the Constitutional Court. As a result, the character of the order for payment procedure has fundamentally changed, at least in consumer cases.[34] In 2015, Spanish procedural law was changed to the extent that the court should perform unfair terms control (*ex officio*) at the enforcement stage.[35] A right to be heard was introduced for both parties in the order for payment procedure itself; legal representation was no longer required and the decision can now be appealed. The legislative reforms were meant to prevent a denial of justice (*indefensión*) in the sense of Article 24 of the Spanish Constitution, which could be seen as the national equivalent of Article 47 of the Charter.[36] The reference to the Charter in *Finanmadrid* thus resonates with national constitutional language. In 2016, the Spanish Constitutional Court held that a complete lack of judicial review of decisions of court registrars is unconstitutional, because it amounts to jurisdictional immunity.[37]

All of this did not have a direct impact on the outcome in *Finanmadrid*, where the referring court did perform unfair terms control in the end.[38] That does not make the case any less interesting. The diverging solutions show that how the problem is framed – either as an unfair terms issue or as a signal of unconstitutionality – defines how it is perceived. This could also be seen as a dichotomy between a functional approach to ensure the effectiveness of EU (consumer) law and the application of fundamental rights across the board.[39]

III. A SIGNAL OF UNCONSTITUTIONALITY

The case of *Finanmadrid* demonstrates that a reference to Article 47 may highlight systemic issues that transcend individual cases, such as the outsourcing of adjudicative competences. Insofar as these issues arise in cases covered by the UCTD, the fundamental rights guaranteed by the Charter are applicable.[40] The UCTD provides the connection with EU law, but these

[32] Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers*, Opinion of AG Sharpston, EU:C:2017:928, para 32.

[33] *Profi Credit Polska* (n 2); Case C-266/18 *Aqua Med sp z oo v Irena Skóra* EU:C:2019:282; *Kancelaria Medius* (n 2).

[34] Picó i Junoy (n 16) 525–26; MP Calderón Cuadrado, 'Derechos, proceso y crisis de la justicia' (2015) 37 *Revista General de Derecho Procesal* 43; L Gómez Amigo, 'Control de las cláusulas abusivas y garantías procesales en los procesos con técnica monitoria, a la luz de la jurisprudencia reciente' (2019) *Revista General de Derecho Procesal* 11.

[35] Articles 552.1 and 815.4 LEC; Ley 42/2015, de reforma de la Ley de Enjuiciamiento Civil.

[36] See, eg, Case C-869/19 *L v Banco de Caja España de Inversiones*, request for a preliminary ruling from the Tribunal Supremo (currently pending before the CJEU). See also, eg, Audiencia Provincial de Barcelona (Sección 15ª), judgment no 407/2014 of 15 December 2014, JUR\2015\86196 (in the national proceedings following *Aziz* (n 2)); Audiencia Provincial de Madrid (Sección 10ª), order no 452/2016 of 22 December 2016, JUR\2017\25699.

[37] Tribunal Constitucional, judgment no 58/2016 of 17 March 2016, ES:TC:2016:58; see also Bonet Navarro (n 24) 101; P Concellón Fernández, 'Dialogando con Luxemburgo: Los órganos jurisdiccionales españoles y la cuestión prejudicial (1986–2017)' (PhD thesis, Universidad de Oviedo, 2018) 57–58, http://digibuo.uniovi.es/dspace/handle/10651/46902. In 2019, the Constitutional Court declared a similar type of procedure (*jura de cuentas*) to be unconstitutional due to the lack of judicial review: Tribunal Constitucional, judgment no 34/2019 of 14 March 2019, ES:TC:2019:34.

[38] Juzgado de Primera Instancia No 5 de Cartagena, order of 23 January 2014 in case no 352/2013 (not published).

[39] See also E Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 *European Law Journal* 657, 665–66.

[40] See, most recently, *Profi Credit Polska* (n 2) para 54.

issues are more fundamental than the Directive's effectiveness. Procedural difficulties may deter or prevent consumers from going to court. This is especially problematic when they are the defendant, and the possibility of judicial intervention depends on them lodging an objection against (the enforcement of) a claim. *Ex officio* control is only part of the solution; it neither removes procedural obstacles, such as time limits or costs, nor does it remedy an infringement of the right to be heard. Article 47 has its own identity and rationale.[41] It not only pertains to the effective enforcement of EU (consumer) rights, but also to the concept of EU citizenship and expectations of a fair and efficient justice system.[42] It reflects the importance attached by the EU legal order to court-based justice for EU citizens, who have individually enforceable rights that must be upheld by courts.[43] Access to court comes with procedural guarantees, such as judicial independence, and ensures the application of national and EU law.[44] Moreover, due process could be viewed as an end in itself.[45]

The fundamental right to effective judicial protection is not absolute, but it may not be denied altogether either.[46] In this respect, a differentiation could be made between, on the one hand, rules that obstruct (access to) an effective judicial remedy and thus impinge on the core components of Article 47, and, on the other hand, rules that merely regulate (and complicate) legal proceedings.[47] Not all procedural issues are fundamental rights issues. The fact that consumers must take certain steps to assert their rights does not automatically mean they do not enjoy effective judicial protection. If procedural rules preclude consumers from exercising their rights or prevent courts from protecting them, it may nevertheless become a fundamental rights issue. Pursuant to Article 52(1) of the Charter, the essence of Charter rights must always be respected; Dougan refers to 'an irreducible core of protection'.[48] Tridimas and Gentile argue that EU fundamental rights have their own identity (essence) that

[41] See, eg, Case C-69/10 *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, Opinion of AG Cruz Villalón, EU:C:2011:102, para 39; S Prechal and R Widdershoven, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection' (2011) 4 *Review of European Administrative Law* 31, 50; M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU' (2014) 33 *Yearbook of European Law* 3, 37–38; J Krommendijk, 'Is There Light on the Horizon? The Distinction between Rewe Effectiveness and the Principle of Effective Judicial Protection in Article 47 of the Charter after Orizzonte' (2016) 53 *Common Market Law Review* 1395, 1405.

[42] M Tulibacka, 'Europeanization of Civil Procedure: In Search of a Coherent Approach' (2009) 46 *Common Market Law Review* 1527, 1535; E Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford, Oxford University Press, 2008) 83.

[43] HW Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Oxford, Hart Publishing, 2016) 41; H Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' in HW Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham, Edward Elgar, 2011) 156–57.

[44] See, eg, Case C-284/16 *Slovak Republic v Achmea BV* EU:C:2018:158, paras 42 and 50; Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* EU:C:2018:117, paras 37–38 and 41.

[45] See also A Östlund, *Effectiveness versus Procedural Protection. Tensions Triggered by the EU Law Mandate of Ex Officio Review* (Baden-Baden, Nomos, 2019) 250, 290; N Półtorak, *European Union Rights in National Courts* (New York, Wolters Kluwer, 2015) 11–12; Z Vernadaki, 'Civil Procedure Harmonization in the EU: Unravelling the Policy Considerations' (2013) 9 *Journal of Contemporary European Research* 298, 310; I Benöhr, *EU Consumer Law and Human Rights* (Oxford, Oxford University Press, 2013) 96.

[46] Prechal and Widdershoven (n 41) 36; H Ellingsen, 'Effective Judicial Protection of Individual Data Protection Rights: Puškár' (2018) 55 *Common Market Law Review* 1879, 1893.

[47] J Nowak, 'Considerations on the Impact of EU Law on National Civil Procedure: Recent Examples from Belgium' in V Lazić and S Stuij (eds), *International Dispute Resolution: Short Studies in Private International Law* (The Hague, TMC Asser Press, 2018) 34–35; Krommendijk (n 41) 1413.

[48] M Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 2011) 431.

signals a minimum of protection and serves as a limitation on legislative discretion. They observe a strong signalling effect of constitutional language, paying tribute to the rule of law.[49] A similar signalling function is ascribed to fundamental rights in (European) private law, which may indicate that an essential social issue is at stake and incite a desired legal development.[50] According to Mak, fundamental rights may mediate between the legal and the political sphere, where they raise policy questions or make the deliberation of policy choices more explicit. The interplay between fundamental rights and private law may help to 'open up' fixed or established rules that do not provide satisfactory solutions.[51] Fundamental rights may thus be used by courts as a check on law-making powers and processes where national (procedural) law is deemed to offer insufficient protection.[52]

The reference to Article 47 as a signal of unconstitutionality in *Finanmadrid* is not an isolated instance; other Spanish courts have picked it up as well. They have acknowledged that Spanish civil procedure is very rigid and should be made more flexible following the CJEU's case law on the UCTD.[53] To the extent that there was a missing link between the substantive and procedural protection of consumers, Article 47 empowered courts to step in.[54] Another example is the case of *Sánchez Morcillo*. The referring court brought up Article 47 to point out that creditors enjoyed an unjustified procedural advantage in mortgage enforcement proceedings, because consumer-debtors could not bring an appeal under the same conditions.[55] This seems to have been a response to the Constitutional Court's formalistic interpretation of access to court.[56] The CJEU held that, as long as the case concerned unfair terms, the proceedings were subject to the requirements of effective judicial protection under Article 47, read in conjunction with the UCTD.[57] It found the asymmetric right of appeal to be contrary to the principle of equality of arms or procedural equality.[58] The provision was subsequently changed.[59]

The signalling function of effective judicial protection as an EU fundamental right also resonates with the meaning of rights and 'rights talk' as a discursive framework.[60] There is a difference between fundamental rights protection by means of structural (legislative and policy) reforms and adjudication on a case-by-case basis. Civil courts may be hesitant to

[49] T Tridimas and G Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 *German Law Journal* 794, 815–16. See also D Farber, 'Rights as Signals' (2002) 31 *Journal of Legal Studies* 83, 84.

[50] JM Smits, 'Constitutionalisering van het vermogensrecht' in *Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking* (Deventer, Kluwer, 2003) 51, 65.

[51] C Mak, *Fundamental Rights in European Contract Law* (Alphen aan den Rijn, Kluwer Law International, 2008) 282, with reference to D Kennedy, *A Critique of Adjudication* (Cambridge, MA, Harvard University Press, 1997) 319–20.

[52] D Wielsch, 'The Function of Fundamental Rights in EU Private Law' (2014) 10 *European Review of Contract Law* 365, 365, 368, 382; Półtorak (n 45) 50.

[53] Tribunal Supremo (Sala de lo Civil), judgment no 1916/2013 of 9 May 2013, ES:TS:2013:1916; Audiencia Provincial de Barcelona (Sección 15ª), judgment no 407/2014 of 15 December 2014, JUR\2015\86196; Audiencia Provincial Toledo (Sección 2ª), order no 297/2018 of 12 December 2018, JUR\2019\72784, with reference to art 47 of the Charter.

[54] See, eg, the above-mentioned order of the Audiencia Provincial de Toledo (n 53); Audiencia Provincial de Castellón (Sección 3ª), order no 171/2014 of 29 July 2014, JUR\2015\10598, ES:APCS:2014:55A; Audiencia Provincial de Madrid (Sección 10ª), order no 223/2015 of 9 July 2015, JUR\2015\186525.

[55] Audiencia Provincial de Castellón (Sección 3ª), order of 2 April 2014, JUR\2014\179524.

[56] See, eg, Tribunal Constitucional, order no 70/2014 of 10 March 2014, ES:TC:2014:70A; Díez García (n 15) 225. See also Mak, van Duin and Burgers (n 9) 875.

[57] *Sánchez Morcillo* (n 2) paras 25 and 35.

[58] ibid paras 50–51.

[59] Article 695.4 LEC, as amended by Real Decreto-ley 11/2014, de medidas urgentes en materia concursal.

[60] B Oomen, 'The Contested Homecoming of Human Rights in the Netherlands' (2013) 31 *Netherlands Quarterly of Human Rights* 41, 72.

directly interfere in the law-making process on the basis of fundamental rights, but a reference to those rights in judicial decisions can indirectly play a role in public discussions about rights implementation. In Spain, courts were seen as the 'last trench'[61] to provide protection against the enforcement of claims that were based on unfair terms or otherwise unfounded.[62] They questioned the balance struck between the creditors' interests and those of consumer-debtors in light of their weaker position.[63] Procedural inequalities – in terms of knowledge or financial means, or a difference in procedural rights – exacerbated the contractual imbalance between the parties. Some courts conceived this as a constitutional problem, which highlighted shortfalls that were more profound than a failure to perform unfair terms control (*ex officio*) – in particular, a lack of (access to) judicial remedies and procedural safeguards for consumers, which could result in a denial of justice. This cannot be justified by reference to the creditor's interest in a swift recovery of the debt or the efficient administration of justice.[64] As we have seen in, for example, *Finanmadrid* and *Sánchez Morcillo*, it can be problematic if consumer debt collection cases are dealt with only summarily, especially when the claim is based on unfair terms or there are procedural defects which cannot be remedied in appeal or subsequent proceedings on the merits. Expedited procedures should not turn into an avenue for depriving consumers of effective judicial protection.

The Spanish experience shows that unfair terms control may be a stepping stone for courts to exercise extra scrutiny with regard to procedural guarantees. Article 47 inserts a vertical dimension in the adjudication of horizontal disputes between consumers and their professional counterparties.[65] It amplifies their duty to counterbalance the weaker position of consumers, which extends into the procedural realm.[66] In addition, Article 47 authorises them – as protectors of the subjective rights of EU citizens, here in the capacity of consumers[67] – to call out errors or omissions in the procedural framework.[68] Whereas a

[61] J Álvarez and LF Rodríguez, *La última trinchera* (Madrid, Planeta, 2016) 107.

[62] In this respect, Beka has rightly noted that there is a fundamental distinction between a debt that is owed but the consumer is unable or unwilling to pay, and a debt that results from an unfair term and/or consumer protection legislation not having been observed: Beka (n 18) 252.

[63] F Gómez Pomar and K Lyczkowska, 'Spanish Courts, the European Court and Consumer Law: Some Thoughts on Their Interaction' in F Cafaggi and S Law (eds), *Judicial Cooperation in European Private Law* (Cheltenham, Edward Elgar, 2017) 116.

[64] Gómez Amigo (n 34) 8. The creditor's expectations to get away with a breach of EU (consumer) law can hardly be classified as legitimate and worthy of protection: see P Rott, 'The Court of Justice's Principle of Effectiveness and its Unforeseeable Impact of Private Law Relationships' in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford, Hart Publishing, 2013) 198. See also *Merkantil Car Zrt v Hungary and Four Other Applications* App No 22853/15 (ECtHR, 20 December 2018), para 66.

[65] C Mak, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in HW Micklitz (ed), *The Constitutionalization of European Private Law* (Oxford, Oxford University Press, 2014) 242; O Cherednychenko, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in H Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Cambridge, Intersentia, 2017) 145.

[66] M Medina Guerrero, 'Derecho a la vivienda y desahucios: la protección del deudor hipotecario en la jurisprudencia del TJUE' (2015) *Teoría y Realidad Constitucional* 261, 273.

[67] M Ebers, *Rechte, Rechtsbehelfe Und Sanktionen Im Unionsprivatrecht* (Tübingen, Mohr Siebeck, 2016) 123–24; G Soler Solé, 'Las ejecuciones hipotecarias en España, ante la cuestión prejudicial europea' (2013) *Revista Xuridica Galega* 25, 30; JH Sahián, 'Dimensión constitucional de la tutela de los consumidores. Progresividad y control de regresividad de los derechos de los consumidores' (PhD thesis, Universidad Complutense de Madrid 2017) 455, https://eprints.ucm.es/43562.

[68] H Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-national Law' in S Worthington, A Robertson and G Virgo (eds), *Revolution and Evolution in Private Law* (Oxford, Hart Publishing, 2018) 327; HW Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' in HW Micklitz and B de Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Antwerp, Intersentia, 2012) 363.

reference to Article 47 does not necessarily change the outcome of a case, it has discursive or rhetorical value: it underlines the seriousness of the issue as well as the urgency of remedying it. As such, it may incite a debate on the need for procedural reforms. In Spain, this debate has been largely court-driven, but courts do not 'make law' by prescribing structural solutions. The judicial protection of consumers can be characterised as a continuous interaction between the legislature and the judiciary, with Article 47 as one of the parameters in the 'trialogue' – as Cafaggi has aptly called it[69] – between courts, law-makers and the CJEU about an upgrade of national (procedural) law.[70] In this respect, the signalling function of Article 47 can be said to have institutional[71] and transformative aspects as well.[72]

IV. ARTICLE 47 AND ARBITRATION CLAUSES IN THE NETHERLANDS

Spanish civil courts have contributed significantly to the constitutionalisation of consumer protection under the UCTD, ie, the integration of fundamental rights reasoning – and more specifically the Charter – in the adjudication of unfair terms cases. It could even be said that they have been catalysts of the development of the CJEU's case law in this respect.[73] What happened in Spain is not unique: procedural bottlenecks have also surfaced in other Member States. In the Netherlands, EU consumer law provided a reason for civil courts to exercise more scrutiny in consumer debt collection cases as well. However, Article 47 of the Charter plays a much less visible role than in Spain. An important difference is that the Netherlands does not have a constitutional tradition.[74] Dutch civil courts might see no need to refer to Article 47 if the required level of protection can be achieved via other means, in particular consistent interpretation of existing norms. But it could also be that they fail to recognise the discursive value of Article 47, as exemplified by its signalling function. This would be a missed opportunity; a reference to Article 47 may enhance the visibility of procedural inequalities and show awareness of the fundamental rights at stake.

There is no separate order for payment procedure under Dutch law. However, creditors – especially if they are 'repeat players' that bring large numbers of claims – may count on the fact that many (consumer-)debtors do not contest the claim, which could undermine the protection of consumer rights and lead to the enforcement of unfounded claims. Dutch civil courts have become more (pro)active in default proceedings, ie, in case the defendant does not appear in court.[75] They try to put a check on opportunistic debt collection practices by

[69] F Cafaggi, 'On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues, Instruments and Effects' in F Cafaggi and S Law (eds), *Judicial Cooperation in European Private Law* (Cheltenham, Edward Elgar, 2017) 228, 237.

[70] N Reich, 'The Principle of Effectiveness and EU Private Law' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Alphen an de Rijn, Kluwer Law International, 2013) 305–07.

[71] F Cafaggi, 'Towards Collaborative Governance of European Remedial and Procedural Law?' (2018) 19 *Theoretical Inquiries in Law* 235, 257.

[72] Gerstenberg (n 17) 603, 613.

[73] JA Mayoral Díaz-Asensio, D Berberoff Ayuda and D Ordóñez Solís, 'El juez español como juez de la Unión Europea' (2013) *Revista española de derecho europeo* 127, 129.

[74] 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) *Nederlands Tijdschrift voor Burgerlijk Recht* 547, 547.

[75] JML van Duin and C Leone, 'Doubling down on debt? Legal responses to private debt as a business model in the Netherlands' in C Stănescu (ed), *Regulation of Debt Collection in Europe* (London/New York, Routledge, 2022) 119.

asking the creditor to provide specific information. They dismiss the claim when it is not sufficiently substantiated or they issue a higher cost order on the basis of abuse of process. The situation differs from *Finanmadrid*, because the case is adjudicated by a court and the defendant has an opportunity to challenge the claim on the merits. Still, there are a few parallels: it is not only about *ex officio* control in the event of default on the part of consumers, but also about the balance between the procedural position of both parties as well as the deterrent effect of costs.[76]

The persuasive power of Article 47 as to the rationale of judicial protection in this context becomes clear when courts are sidelined altogether. Creditors have resorted to arbitration as an extrajudicial route for debt collection, because it is easier, faster and cheaper than the judicial system.[77] This may cause tension with the effective judicial protection of consumer-debtors, which has emerged as a fundamental rights issue in cases about arbitration clauses that exclude consumers' right to take legal action or exercise any other remedy. Before arbitration clauses were placed on the 'blacklist' of standard terms and conditions in consumer contracts in 2015,[78] two Dutch courts of appeal referred to Article 47 of the Charter as a factor in the (substantive) unfairness assessment.[79] In a way, this could be seen as an instance of the signalling function: a call for blacklisting arbitration clauses ahead of legislative change. Both courts held that such clauses withhold from consumers the protection of the courts, often without having been the subject of contractual negotiations and without consumers being aware that access to court is precluded. There are no equivalent safeguards for the independence of the arbitral tribunal – notwithstanding its presumed expertise – or the application of national and EU law. A similar point was made by Advocate General Trstenjak in *Asturcom*, who found that courts must always be able to assess the validity of an arbitration clause to fully guarantee the judicial impartiality required in a state governed by the rule of law.[80] The Dutch Supreme Court recently confirmed that the fundamental nature of the right of access to court entails that when a court is requested to grant leave for enforcement of an arbitral award, it should check whether the award is based on a valid arbitration clause.[81] This means that consumers must have been given a period of at least one month from the moment an arbitration clause is invoked against them to decide whether they prefer to go to court instead. If not, enforcement of the award must be refused. The question whether and to what extent consumer arbitration is acceptable is a sensitive one.[82] In my view, there is a crucial difference between cases where consumers are the claimant and where they are the defendant. In respect of the latter, it should

[76] See further JML van Duin, 'Wie betaalt de rekening? De kostenveroordeling in de context van het EU-consumentenrecht' (2018) *Tijdschrift voor Consumentenrecht en handelspraktijken* 177.

[77] E van Gelder, 'Online Dispute Resolution: een veelbelovend initiatief voor toegang tot het recht?' (2018) *Maandblad voor Vermogensrecht* 262.

[78] Article 6:236 sub (n) of the Dutch Civil Code (Burgerlijk Wetboek).

[79] Gerechtshof Leeuwarden, 5 July 2011, NL:GHLEE:2011:BR2500; Gerechtshof Amsterdam, 17 April 2012, NL:GHAMS:2012:BX3835.

[80] Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Opinion of AG Trstenjak, EU:C:2009:305, para 66. See also N Reich, 'Party Autonomy and Consumer Arbitration in Conflict: A "Trojan Horse" in the Access to Justice in the EU ADR-Directive 2013/11?' (2015) 4 *Penn State Journal of Law & International Affairs* 290, 320.

[81] Hoge Raad, 8 November 2019, NL:HR:2019:1731. The Supreme Court had already held that the fundamental nature of the right of access to court entails that the question whether a valid arbitration agreement has been concluded must ultimately be answered by a court: Hoge Raad, 26 September 2014, NL:HR:2014:2837.

[82] See also C Mak, 'Judgment of the Court (First Chamber) of 6 October 2009, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, Case C-40/08' (2010) 6 *European Review of Contract Law* 437, 443; H Schebesta, 'Does the National Court Know European Law? A Note on *Ex Officio* Application after *Asturcom*' (2010) 18 *European Review of Private Law* 847, 871.

be noted that Article 47 is put forward as a *legal* argument for judicial protection; it is not solely a matter of policy or politics, but a signal in a broader debate on the role of courts in the light of EU (consumer) law.

These developments are reminiscent of what happened in Spain, to the extent that there is a wider scope for courts to intervene in consumer cases. At the same time, the justiciability of consumer rights appears to be less of a problem in the Netherlands than in Spain. Restrictive procedural conditions that affect the core components of Article 47 appear to be non-existent, so there is no need to make legislative changes. Unlike their Spanish counterparts, Dutch civil courts do not question the applicable rules themselves; they find ways within the system to achieve effective judicial protection for consumers. A failure to perform unfair terms control in a concrete case is not the same as the structural inability to do so. However, Dutch civil courts should not shy away from the constitutional dimension of consumer adjudication, which may get obfuscated by an exclusive focus on *ex officio*. Like their Spanish counterparts, they have a responsibility to address not only situational but also systemic issues, especially as regards extrajudicial enforcement.[83] Referring to Article 47 is a way to make such issues more visible.

V. A CALL FOR 'OPEN CONSTITUTIONALISATION'

The cases discussed in this chapter illustrate a signalling function of Article 47 in consumer debt collection cases. Courts may use Article 47 to deliberate about (perceived) tensions between the requirements of EU law and fundamental rights on the one hand, and national (procedural) law on the other. As Sieburgh has noted, judicial reasoning in a discursive manner is important where national law meets EU law; conflicts and discrepancies should be openly discussed to motivate why and on what basis a certain path is chosen.[84] The question whether or not there is a violation of Article 47 is not black and white; Article 47 has discursive value. In my PhD thesis I discuss other functions that exemplify this, such as a reconciliatory function where Article 47 operates as a hinge between EU and national exigencies.[85] Again in Spain, courts have resolved the alleged conflict between *ex officio* control and the so-called dispositive principle[86] by reference to Article 47 and the right to be heard. Indeed, it could be argued that there is no conflict at all, as long as both parties have the opportunity to present their views and adapt their arguments if necessary.[87]

[83] See further JML van Duin, 'Effectieve rechtsbescherming van consumenten door de civiele rechter: een procesrechtelijk perspectief' (2019) *Tijdschrift voor de Procespraktijk* 138.

[84] CH Sieburgh, 'Legitimiteit van de confrontatie van Europees recht en burgerlijk recht van nationale origine' in WJM Voermans, MJ Borgers and CH Sieburgh (eds), *Controverses rondom legaliteit en legitimatie* (Deventer, Kluwer, 2011) 240.

[85] See also H Schebesta, 'Procedural Theory in EU Law' in K Purnhagen and P Rott (eds), *Varieties of European Economic Law and Regulation: Liber Amicorum for Hans Micklitz* (Cham, Springer, 2014) 862; Bech Serrat (n 18) 12.

[86] That is the principle that the subject matter of the case is delimited by the parties: Case C-618/10 *Banesto*, Opinion of AG Trstenjak, EU:C:2012:74, para 33. See also E Arroyo Amayuelas, 'No vinculan al consumidor las cláusulas abusivas: del Derecho civil al procesal y entre la prevención y el castigo' in E Arroyo Amayuelas and A Serrano de Nicolás (eds), *La Europeización del Derecho privado: cuestiones actuales* (Madrid, Marcial Pons, 2016) 71–72; V Pérez Daudí, *La protección procesal del consumidor y el orden público comunitario* (Barcelona, Atelier, 2018) 161.

[87] AF Carrasco Perera and MC González Carrasco, 'La doctrina casacional sobre la transparencia de las cláusulas suelo conculca la garantía constitucional de la tutela judicial efectiva' (2013) *Revista CESCO de Derecho de Consumo* 150–52; J Nieva Fenoll, 'La actuación de oficio del juez nacional europeo' (2017) *Justicia* 181, 204–05. An example can be found in the above-cited judgment of the Audiencia Provincial de Barcelona of 15 December 2014 (n 36).

How far the judicial protection of consumers should go in light of EU law and fundamental rights is far from settled. Open questions concern, inter alia, the scope of protection, the extent to which Article 47 entails positive obligations, limitations to (CJ)EU interference in the decentralised enforcement of EU rights, and limitations to the role of courts in providing (access to) justice. Insofar as there is still a 'civil justice gap', Article 47 is not a universal remedy. However, it may provide a source of inspiration for the ongoing discourse on effective judicial protection under EU (consumer) law. It does not impose specific solutions from above, but it empowers courts (and litigants) from below to expose potential fundamental rights issues. The (added) value of Article 47 is in the eye of the beholder: it is ultimately determined by the meaning attached to it by courts themselves, as reflected in their decisions. In its signalling function, a reference to Article 47 is a first step towards 'open constitutionalisation', which can clarify where the threshold is put and/or how the balance between competing rights and interests is struck. We need courts to show awareness about when effective judicial protection as an EU fundamental right is at stake. Otherwise, when there is a real issue with the justiciability of EU (consumer) rights, we may remain in the dark.