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## Articles

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Anna van Duin\*

# Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC

## I. Introduction

In the *Metamorphoses* ('Books of Transformation'), the Roman poet Ovid describes the myth of the seduction of the Phoenician princess Europa by the god Jupiter. Jupiter transforms himself into a white bull, seduces Europa and takes her away to Crete. The tale of Article 47 of the EU Charter of Fundamental Rights (Charter) appears to be one of transformation and seduction as well. Article 47 safeguards the individual right to an effective remedy before a court of law for violations of rights and freedoms guaranteed by EU law.<sup>1</sup> It mirrors the obligation on the part of the EU Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law (Article 19(1) of the Treaty on the European Union (TEU)). At first sight, Article 47 stresses that individuals who can derive rights from EU law must have access to a court, a fair hearing and effective remedies to be able to exercise their rights (*ubi ius ibi remedium*<sup>2</sup>). It highlights the central role of courts in the protection of those rights, also – or perhaps: especially – when they are confronted with a (perceived) gap, shortfall or obstacle in the legislative framework. The Charter grants the right to effective judicial protection constitutional status in EU law: it has been transformed into a EU fundamental right with the same binding legal value as the Treaties, i.e. written primary law.<sup>3</sup> Whether the Charter provides a new frame of reference or whether it only reaffirms pre-existing rights, those rights have become more visible and possibly also more prominent.<sup>4</sup> The high number of references to Article 47 in the case law of the EU Court of Justice (CJEU) demonstrates that it is certainly seductive. But it has yet to reveal its true nature: is the white bull as powerful as it looks?

While the importance of the right to effective judicial protection is widely acknowledged, there is confusion and even controversy about its actual implications, in particular for national civil courts. From the perspective of EU law, national courts are part of the decentralized enforcement system. Article 47 Charter reinforces their obligations in this respect; it emphasizes the link between the harmonization of rights at EU level and the enforcement and protection of those rights at the national level. But it also exposes tension between the role assigned to civil courts within their own legal systems and their obligations as decentralized EU-judges. Article 47 can be invoked only against the Member States and their (civil) courts, not against private parties. Thus, a vertical dimension is inserted in the judicial assessment of horizontal relationships.<sup>5</sup> This article revolves around the question how and why Article 47 may be referred to in European private law adjudication.<sup>6</sup> What is the (added) value of Article 47 in judicial reasoning? Is a reference to Article 47 merely symbolic, is it an additional supporting argument, is it a last resort, or are there other explanations? I will explore the role of Article 47 in preliminary rulings of the CJEU concerning national remedies and procedures under Directive 93/13/EEC (Unfair Contract Terms Directive; UCTD).<sup>7</sup> These rulings mostly pertain to civil

litigation between private parties about matters of private (i.e. contract) law, in which a civil court questions the adequacy of the applicable national (procedural) rules against the background of the UCTD. For example, if national legislation enables the creditor to enforce a loan agreement secured by a mortgage on the debtor's home, the debtor – if she is a consumer – must have an opportunity to challenge the terms of the contract on which the enforcement is based in court.<sup>8</sup> Is it an *effective remedy* if the court does not have the power to suspend the enforcement, and the consumer runs the risk of losing her home pending the decision?

First, I will explain the potential relevance of Article 47 Charter for civil courts, more particularly in the context of the UCTD (part 2). There are relatively many references to Arti-

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\* PhD researcher at the Centre for the Study of European Contract Law (CSECL), University of Amsterdam, Email: j.m.l.vanduin@uva.nl. My research for this article, which is part of my PhD project on the same topic, has benefitted greatly from the opportunity I have been given to cooperate with Prof Chantal Mak and Prof Fabrizio Cafaggi in two transnational projects (ACTIONES and RE-Jus) on the EU Charter of Fundamental Rights and effective remedies in EU law. I would also like to thank Dr Joasia Luzak, Prof Ivo Giesen, Irene Aronstein and my colleagues at CSECL for their valuable comments, as well as the two anonymous reviewers.

- 1 Article 47 Charter reads as follows: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."
- 2 Where there is a right, there is a remedy. See e.g. Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 503.
- 3 Article 6(1) TEU. See also Case C-279/09 *DEB v Bundesrepublik Deutschland* ECLI:EU:C:2010:811, para 30.
- 4 See also Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 Common Market Law Review 1565, 1574–1575. In this article, the principle of effective judicial protection predating the entry into force of the Lisbon Treaty as of 1 December 2009 will not be considered separately.
- 5 Chantal Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' in Hans-Wolfgang Micklitz (ed), *Collected Courses EUI Summer School 'The Constitutionalization of European Private Law'* (Oxford University Press) 242 <<http://ssrn.com/abstract=2126551>>.
- 6 For the purposes of this article, European private law adjudication is understood as (i) the resolution of disputes between private parties on a matter of private law (ii) falling partly or entirely within the scope of EU law (iii) before the national civil courts of the EU Member States and via preliminary rulings from the CJEU in Luxembourg. This article will not address the issue of State liability for violations of EU law. For a recent judgment concerning State liability for judicial decisions in violation of EU law in the context of the UCTD, see: Case C-168/15 *Tomášová v Slovenská republika* ECLI:EU:C:2016:602.
- 7 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
- 8 The term 'enforcement' refers here to a private party effectuating its subjective rights, as opposed to 'enforcement' in a regulatory sense, i.e. securing that a rule or policy is properly followed.

cle 47, read in conjunction with the UCTD.<sup>9</sup> The CJEU has used Article 47 as an argument to strengthen the legal protection of consumers as well as their counterparties, i.e. professional traders who use standard terms and conditions. The case law of the CJEU in this area is a good starting point, because it may shed light on the main characteristics and constraints of Article 47 and give some guidance to national (civil) courts. The next step would be an analysis at the level of the Member States to examine how Article 47 is received there. In this article I will analyse four key judgments of the CJEU to discover how and why Article 47 may be referred to in judicial reasoning (part 3). I will pay special attention to the meaning of Article 47 vis-à-vis the (full) effectiveness of EU law, which is unclear (part 4).<sup>10</sup> A potential difference is the rationale behind a judicial intervention in (national) remedies and procedures. It seems to be no longer about ‘proceduralisation’<sup>11</sup> for the sole purpose of achieving the objectives of the UCTD: Article 47 may shift the focus from the effective enforcement of EU law towards individual rights protection. As such, Article 47 may provide a valuable tool for the interpretation of national remedies and procedures in light of EU law, and possibly even for setting aside conflicting rules and/or filling gaps. Could Article 47 entail a real metamorphosis?

## II. Setting the scene: Article 47 of the Charter in European private law adjudication

### 1. The potential relevance of Article 47 for national civil courts

Article 47 Charter has a twofold origin. On the one hand, it reflects the case law of the CJEU inspired by Articles 6 and 13 of the European Convention on Human Rights (ECHR).<sup>12</sup>

- 9 Case C-372/10 *Hypoteční banka v Lindner* ECLI:EU:C:2011:745 (*Hypoteční banka*); Case C-433/11 *SKP v Polbošová* ECLI:EU:C:2012:702; Case C-472/11 *Banif Plus Bank v Csaba Csipai* ECLI:EU:C:2013:88 (*Banif Plus Bank*); Case C-470/12 *Pohotovost v Vašuta* ECLI:EU:C:2014:101 (*Pohotovost*); Case C-92/14 *Tudoran v SC Suport Colect* ECLI:EU:C:2014:2051; Case C-169/14 *Sánchez Morcillo v BBVA (Sánchez Morcillo I)*; Case C-34/13 *Kušionová v SMART Capital* ECLI:EU:C:2014:2189 (*Kušionová*); Case C-539/14 *Sánchez Morcillo v BBVA* ECLI:EU:C:2015:508 (*Sánchez Morcillo II*); Case C-49/14 *Finanmadrid EFC SA v Albán Zambrano* ECLI:EU:C:2016:98 (*Finanmadrid*); Case C-7/16 *Banco Popular Español v Giráldez Villar* ECLI:EU:C:2016:523; Case C-380/15 *Garzón Ramos v Banco de Caja España de Inversiones* ECLI:EU:C:2016:112; Case C-119/15 *Biuro podróży ‘Partner’ v Prezes Urzędu Ochrony Konkurencji i Konsumentów* ECLI:EU:C:2016:987 (*Biuro podróży ‘Partner’*); Case C-503/15 *Margarit Panicello v Hernández Martínez* ECLI:EU:C:2017:126 (*Margarit Panicello*).
- 10 See e.g. Sacha Prechal and Rob Widdershoven, ‘Redefining the Relationship between “Rewe-Effectiveness” and Effective Judicial Protection’ (2011) 4 *Review of European administrative law* 31; Koen Lenaerts, ‘The Court of Justice of the European Union and the Protection of Fundamental Rights’ [2011] *Polish Yearbook of International Law* 79; Marek Safjan and Dominik 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; Jasper 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.
- 11 Federico 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, 1010.
- 12 See Article 52(3) Charter and Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02, 29-30. See also e.g. Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alasini v Telecom Italia SpA* ECLI:EU:C:2010:146 (*Alasini*), para 61; Case C-199/11 *European Community v. Otis et al.* ECLI:EU:C:2012:684 (*Otis*), paras 46-47. The CJEU has held that in cases covered by (aspects of) EU law it is necessary to refer only to Article 47 Charter, and not also to Articles 6 and 13 ECHR: Case C-386/10 *Chalkor AE Epexergias Metallon v European Commission* ECLI:EU:C:2011:815, para 51. See on the relationship between Article 47 Charter and the ECHR further: Sacha

Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in C Paulussen and others (eds), *Fundamental rights in international and European law: public and private law perspectives* (TMC Asser Press 2015).

13 Its application relates to the CJEU’s (accessory) competence to provide fundamental rights protection.<sup>13</sup> On the other hand, the origins of Article 47 are related to the judge-made principles of equivalence and effectiveness, which are designed to test the compliance of national (enforcement) measures with EU law.<sup>14</sup> These principles mark the borders of the procedural autonomy of the Member States. The EU legal order relies strongly on the cooperation of the Member States and their courts; there are no general ‘EU remedies’ or ‘EU procedures’. The choice of remedies is primarily a task for the (national) legislature, and then for the parties who bring a claim before a (national) court.<sup>15</sup> Yet it is often left to the judiciary to assess whether the applicable legal norms – both substantive and procedural – are up to standard; this is where Article 47 might come into play. Article 47 may be used to address shortcomings in the protection of EU rights through national remedies and procedures. It could be a signal that the level or scope of protection is insufficient or incomplete and needs to be “upgraded”.<sup>16</sup> Article 47 takes effect indirectly via the application and interpretation of national private law and civil procedure by (civil) courts, in dialogue with the CJEU.<sup>17</sup> Remedies and procedures are (re) interpreted and developed in light of the EU rights they serve to protect, arguably so that they turn into ‘hybrids’ insofar as they take up elements of national law as well as European requirements.<sup>18</sup>

There are numerous areas of private law in which substantive rights have been (fully or partially) harmonized and where a ‘hybridization’ of remedies and procedures is taking place, not only in cross-border cases. Consumer law and in particular the *ex officio* control of unfair terms on the basis of the UCTD have turned into an area of interaction and friction between EU law and national law.<sup>19</sup> Article 47 Charter has an accessory character: its application is connected to (al-

- Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in C Paulussen and others (eds), *Fundamental rights in international and European law: public and private law perspectives* (TMC Asser Press 2015).
- 13 See Articles 51(1) and 52(2) Charter; Case C-617/10 *Åklagaren v Åkerberg Fransson* (Åkerberg Fransson) ECLI:EU:C:2013:105, para 19; Case C-206/13 *Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126, paras 31 and 32. See further Malu Beijer, ‘Active Guidance of Fundamental Rights Protection by the Court of Justice of the European Union: Exploring the Possibilities of a Positive Obligations Doctrine’ (2015) 8 *Review of European administrative law* 127, 136.
- 14 Angela Ward, ‘Article 47 – Right to an Effective Remedy. E. Evaluation’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1273. See e.g. *Sánchez Morcillo I* (n 10), para 35; Case C-61/14 *Orizzonte Salute v Ministero della Giustizia* ECLI:EU:C:2015:655 (*Orizzonte Salute*), para 48.
- 15 Fabrizio Cafaggi and Paola 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.
- 16 Norbert Reich, ‘The Principle of Effectiveness and EU Private Law’ in Ulf Bernitz, Xavier Groussot and Felix Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer Law International 2013) 308–309.
- 17 By its nature, Article 47 Charter cannot be invoked directly against private parties. From a private law perspective, the question is whether and to what extent Article 47 may bring about legal consequences in horizontal relationships.
- 18 Reich (n 16) 308–309. See also Bart Krans, ‘EU Law and National Civil Procedure Law: An Invisible Pillar’ (2015) 23 *European Review of Private Law* 567.
- 19 Hans-W Micklitz and Norbert Reich, ‘The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)’ (2014) 51 *Common Market Law Review* 771. See also Verica Trstenjak, ‘Procedural Aspects of European Consumer Protection Law and the Case Law of the CJEU’ [2013] *European Review of Private Law* 451; Oliver Gerstenberg, ‘Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts’ [2015] *European Law Journal* 599.

leged) violations of EU law.<sup>20</sup> It may be triggered as soon as a case covers aspects of EU law, e.g. as soon as a dispute involves a contract between a trader and a consumer. Therefore, the potential relevance of Article 47 for national civil courts can hardly be ignored: they are expected to provide effective judicial protection in practice to private parties. Despite its potentially wide ramifications, the impact of the Charter on the ‘Europeanization’ of national private law and civil procedure is still unchart(er)ed territory.<sup>21</sup> Article 47 appears to have a universal nature: it safeguards the right to effective judicial protection for everyone against the violation of *all* EU rights and freedoms, not only Charter rights, and regardless of the (vertical or horizontal) nature of the underlying legal relationship. From the perspective of civil courts, however, it is relevant how EU law is embedded in their own national law. Judges perform different tasks in civil proceedings than in administrative or criminal proceedings, because the position of the parties vis-à-vis each other is different, as well as the rules governing the legal relationship between the parties and the resolution of disputes arising out of it. In civil litigation, there is always a tension between one party’s right to an effective remedy and the other party’s rights of the defence, which are both protected by Article 47.<sup>22</sup> Not everything constitutes a violation of (EU) fundamental rights. The right to effective judicial protection, or rather a lack thereof, may nevertheless become an issue when, for instance, a rule obstructs a party’s access to justice or when there is no provision that links a remedy to a rights violation, which means that EU rights cannot be enforced and protected. Some examples will be discussed below.

## 2. A multi-faceted provision

Article 47 Charter is a multi-faceted provision: it comprises both the right to an effective remedy before a court of law (first paragraph) and fair trial or due process rights (second and third paragraph). It stresses the need for both *remedies* capable of redressing violations of EU rights, and *procedures* allowing actual access to a court and granting fair prospects for a case to be adjudicated.<sup>23</sup> The substantive and procedural components of Article 47 are intertwined. An effective judicial remedy presupposes access to a court, which implies a fair hearing; it includes the right to a reasoned decision; and it requires effective, proportionate and dissuasive sanctions.<sup>24</sup> The distinction between rights, remedies and procedures is not clear-cut.<sup>25</sup> Rights create material legal positions for individuals, but without accompanying remedies they remain illusory. Remedies are intended to enforce rights or to redress infringements of rights.<sup>26</sup> Procedures are intended to make remedies operational: they facilitate the litigating parties as well as the court.<sup>27</sup> Because procedures determine how much substance can be achieved by whom,<sup>28</sup> they are as important as substantive remedies from the perspective of effective judicial protection. For instance, if a (domestic) court far away from the consumer’s place of residence cannot examine *ex officio* the unfairness of a clause conferring exclusive territorial jurisdiction on that court, this could cause the consumer “to forgo any legal remedy or defence”.<sup>29</sup> This could even become a fundamental rights issue if consumers are effectively denied the opportunity to present their case before the court.<sup>30</sup>

In its case law on the UCTD, the CJEU does not make a strict distinction between remedies and procedures. The bottom-line is that there must be national measures in place to enable the enforcement of the UCTD in court.<sup>31</sup> An example of a substantive remedy would be the provision in the Dutch Civil Code that a stipulation in standard terms and conditions is

voidable (“*vernietigbaar*”) if it is unreasonably burdensome.<sup>32</sup> The CJEU’s interpretation of the UCTD also includes procedural elements and influences the substantive remedy as well as the powers and duties of the civil court in consumer cases.<sup>33</sup> However, the judgments referring to Article 47 Charter – read in conjunction with the UCTD – suggest that there is a distinction, and that the term ‘remedy’ in Article 47 should be understood in a purely *procedural* sense, relating to the availability of a means to initiate proceedings (a judicial remedy). The judgments discussed below all relate to procedural rules and safeguards, in particular the right to be heard as a core element of the right to a fair hearing. In general terms, procedural rules pertain to judicial organization, jurisdiction and the conduct of proceedings before courts.<sup>34</sup> Thus, the focus on procedures ties in with the vertical dimension of Article 47.

## 3. Article 47 in the context of Directive 93/13/EEC

The UCTD is a minimum harmonization directive that has been implemented in national legal systems in different ways.<sup>35</sup> There is no ‘common core’ of rules governing its enforcement. The UCTD requires that unfair terms in a contract concluded between a trader and a consumer are “not binding” (Article 6(1) UCTD) and that “adequate and effective means” exist to prevent the continued use of unfair contract terms (Article 7(1) UCTD), but it is silent as to specific remedies and procedures that must be followed to obtain those remedies. These are, in principle, governed by national law. In settled case law that predates the entry into force of the Charter, the CJEU has developed a set of require-

20 See e.g. Herwig Hofmann, ‘Article 47 – Right to an Effective Remedy. D. Analysis. III. Specific Provisions (Meaning)’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1215.

21 Chantal Mak, ‘Unchart(er)ed Territory: EU Fundamental Rights and National Private Law’ in AS Hartkamp and others (eds), *The Influence of EU Law on National Private Law* (Kluwer 2014).

22 See e.g. *Otis* (n 12), para 48; *Hypotečni banka* (n 9), para 46.

23 Hofmann (n 20) 1216.

24 See respectively: *Alassini* (n 12), para 62; *Otis* (n 12), paras 48-49; *Pobotovost* (n 9), para 53; Case C-112/13 *A. v B.* ECLI:EU:C:2014:2195, para 51; Case C-437/13 *Unitrading v Staatssecretaris van Financiën* ECLI:EU:C:2014:2318, para 20; *Kušionová* (n 9), para 59.

25 See further Van Gerven (n 2) 502, 525; Martin Ebers, *Rechte, Rechtsbehelfe Und Sanktionen Im Unionsprivatrecht* (Mohr Siebeck 2016) 52.

26 Johanna Engström, ‘The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat’ (2011) 23 *European Review of Public Law* 577, 577, 582–583; Van Gerven (n 2) 502–503.

27 Nina Pótorak, *European Union Rights in National Courts* (Wolters Kluwer 2015) 9–10.

28 Hanna 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* (Springer 2014) 853.

29 Case C-137/08 *VB Pénzügyi Lízing v Schneider* ECLI:EU:C:2010:659, para. 54. See also Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial v Murciano Quintero* ECLI:EU:C:2000:346, para 22, referring to para 1(q) of the Annex to the UCTD.

30 See e.g. *DEB* (n 3), para 45.

31 Pótorak (n 27) 10 defines remedies even more broadly as “all substantive, procedural or technical principles and provisions which are to ensure protection or rights derived from EU law”.

32 Article 6:233(a) of the Dutch Civil Code (*Burgerlijk Wetboek*).

33 See for a more elaborate overview: Arthur S Hartkamp, ‘Ex officio Application in Case of Unenforceable Contracts or Contract Clauses: EU Law and National Laws Confronted’ in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law, Essays in Honour of Hugh Beale* (Hart Publishing 2014) 467-484.

34 Van Gerven (n 2) 524; Magdalena Tulibacka, ‘Europeanization of Civil Procedure: In Search of a Coherent Approach’ (2009) 46 *Common Market Law Review* 1527, 153.

35 As shown by e.g. the Report of the Fitness Check on Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, published by the European Commission (Brussels, 29 May 2017): [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59332](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332).

ments on the basis of the principles of equivalence and effectiveness – in particular the full effectiveness (*effet utile*) of the UCTD – that demand positive action from the Member States and their (civil) courts. The CJEU's case law has been called rather invasive and purpose-oriented.<sup>36</sup> There is a delicate balance between the Scylla of reducing the Member States' discretion through judicial interpretation and the Charybdis of leaving consumers completely defenseless.<sup>37</sup> The stream of preliminary references has not yet come to a halt. Those references expose diverging views on the role, powers and duties of civil courts in the enforcement and protection of EU rights. For instance, should the court be able to correct a procedural inequality between the parties, even where that would be at odds with the limited scope of the proceedings? To what extent do consumers need special protection when they are involved in litigation? How can the rights and interests of the litigating parties be balanced against each other?

Here we may set our sights on Article 47 Charter. Some believe that Article 47 could serve as a justification for more (CJ)EU interference in national legal systems, others argue that it could give a further impulse to the 'Europeanization' of remedies and procedures.<sup>38</sup> This gives rise to the question whether Article 47 Charter can be used as a basis to pose requirements to (judicial) remedies and procedures, and if so, to what extent and to what end. Article 47 contains the overarching fundamental right to effective judicial protection, but it does not prescribe any specific measures. Due to its accessory character, potential issues may emerge in connection with the protection of substantive EU rights. Pursuant to Article 52(1) Charter, the test is whether a limitation of a right recognised by the Charter is necessary and proportionate in light of the objectives of general interest pursued. This presumes (a certain degree of) procedural autonomy. One explanation for the focus on procedures could be that Article 47 is seen as separate from the *effet utile* of EU law, which leaves (much) less room for the Member States' discretion.<sup>39</sup> The CJEU has, for instance, interpreted Article 6(1) of the UCTD as meaning that national courts cannot revise the content of unfair terms, and that the right of consumers to full restitution of amounts paid on the basis of unfair terms cannot be limited in time.<sup>40</sup> The emphasis appears to be placed on dissuasiveness (i.e. deterrence) in light of the public interest to eliminate unfair terms from consumer contracts. Article 47 Charter could shift the focus from sanctions to actual redress for the party whose (EU) rights have been infringed. The right to an effective judicial remedy could be seen as an extra guarantee of the full effect of those rights.<sup>41</sup> In this respect, the question is not only to what extent limitations are permitted, but also whether Article 47 may be advanced as an argument to broaden the scope of (judicial) remedies and the legal consequences attached to them.

### III. Effective judicial protection and unfair contract terms

#### 1. Key judgments

Now I will analyse four judgments that stand out the most in the context of the UCTD, because the CJEU gives quite extensive consideration to Article 47 Charter. Two of those judgments (*Kušionová* and *Sánchez Morcillo I*) relate to consumers, the other two (*Banif Plus Bank* and *Biuro podróży 'Partner'*) to traders. Article 47 applies to all national schemes that are an implementation of the UCTD.<sup>42</sup> Whereas it appears that Article 47 can be raised *ex officio*,<sup>43</sup> the question is still open if and when courts must or should do so. Despite the binding legal status of Article 47, the CJEU's

case law seems to be quite arbitrary so far. The CJEU does not always (explicitly) refer to Article 47, even where the right to an effective judicial remedy is at stake.<sup>44</sup> Whether or not it is mentioned in the request for a preliminary ruling is not an indicator. In *Kušionová*, the referring court had framed its request on the basis of the UCTD and Article 38 Charter, which lays down the principle that EU policies shall ensure a high level of consumer protection. The CJEU nevertheless considered that the request "in essence" related to Article 47.<sup>45</sup> By contrast, in another case, the CJEU found that it was "not necessary" to answer the questions relating to the Charter.<sup>46</sup> As a consequence, it is hard to identify what the essence of Article 47 is according to the CJEU.

In line with its twofold origin, Article 47 Charter appears to have two main aims: (i) individual rights protection, and (ii) the effective enforcement of EU law. These aims do not necessarily coincide. National courts are not only obliged to ensure the effectiveness of the protection afforded by the UCTD, they must *also* respect the requirements of effective judicial protection, as guaranteed by Article 47.<sup>47</sup> These two types of protection overlap to a large extent as far as the effective (judicial) protection of consumers is concerned, although they serve different purposes.<sup>48</sup> In *Sánchez Morcillo I*, the CJEU held that the obligation for the Member States to ensure the effectiveness of rights that parties derive from the UCTD *implies* a requirement of judicial protection, guaranteed by Article 47 Charter.<sup>49</sup> The two types of protection do not (entirely) overlap if certain measures would be justified to enhance the (full) effectiveness of the UCTD, but where that would be at the expense of essential procedural safeguards. In *Biuro podróży 'Partner'*, the CJEU confirmed that *any* person whose rights guaranteed by EU law – of

36 See e.g. Verica Trstenjak and Erwin Beysen, 'European Consumer Protection Law: Curia Semper Dabit Remedium?' (2011) 48 Common Market Law Review 95, 123–124. It has even been said that Member States no longer have any procedural autonomy: Michal Bobek, 'Why There Is No Principle of "Procedural Autonomy" of the Member States' in Hans-Wolfgang Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 320–321.

37 Gerstenberg (n 19) 601.

38 Dorota Leczykiewicz, "'Where Angels Fear to Tread': The EU Law of Remedies and Codification of European Private Law" [2012] European Review of Contract Law 47, 47, 58; Hans-W 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* (Intersentia 2012) 362–363. See also Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 99 and Van Gerven (n 3), who has argued for a test of 'adequacy' rather than effectiveness.

39 Janek Tomasz Nowak, 'De bevoegdheid van EU-Lidstaten voor de aanneming van regels van nationaal procesrecht: grenzen in de rechtspraak van het Hof van Justitie' in N Cariat and JT Nowak (eds), *Le droit de l'Union européenne et le juge belge – Het recht van de Europese Unie en de Belgische rechter* (Bruylant 2015) 36.

40 Case C-618/10 *Banco Español de Crédito v Calderón Camino* ECLI:EU:C:2012:349 (*Banesto*); Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo v Cajasur Banco* ECLI:EU:C:2016:980.

41 L. Cariolou and A. Demetriades, 'Article 47. Right to an Effective Remedy and to a Fair Trial', in EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, 2006, 359–371 (available on [http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf)), 360. See also Case C-198/13 *Hernández v Reino de España* ECLI:EU:C:2014:2055, para 47.

42 See e.g. *Biuro podróży 'Partner'* (n 9), para 25.

43 See *DEB* (n 3), para 33.

44 See e.g. Case C-415/11 *Aziz v CatalunyaCaixa* ECLI:EU:C:2013:164.

45 *Kušionová* (n 9), para 45.

46 *Finanmadrid* (n 9), para 58.

47 See e.g. *Banif Plus Bank* (n 9), paras 27 and 29.

48 See also *Della Negra* (n 9) 1026.

49 *Sánchez Morcillo I* (n 9), para 35.

which Article 47 forms a part – might be infringed is entitled to an effective remedy, even if there is no other basis in EU legislation that provides for a scheme of effective judicial protection.<sup>50</sup> Traders cannot derive any rights from the UCTD, but that does not deprive them of procedural safeguards. Of course, the case must still fall within the scope of EU law for Article 47 to apply: there must be a connecting link to substantive EU rights such as those enshrined in the UCTD. This link exists when those rights are enforced against a trader, who can then rely on Article 47.

## 2. *Kušionová vs Aziz*: interim relief as an effective judicial remedy

Before *Kušionová*, the CJEU had already required on a few other occasions that Member States made legislative changes to provide for interim relief, where that was the only way to ensure the protection of EU rights. This has sparked a debate about judicial law-making and the CJEU's competence to conceive 'new' remedies. The Treaties (and the Charter)<sup>51</sup> are not meant to create remedies other than those already laid down by national law, unless the structure of the national legal system is such that there is no remedy making it possible, not even indirectly, to ensure respect for the rights which individuals derive from EU law.<sup>52</sup> In *Kušionová*, the CJEU insisted on the availability of interim relief as a cornerstone of effective (judicial) protection against violations of EU law, in this case: the UCTD.<sup>53</sup> Article 47 Charter was used to stress the need for an effective judicial remedy against the (extrajudicial) enforcement of a loan secured by a charge on the consumer's family home.<sup>54</sup> The UCTD is silent as to the enforcement of charges.<sup>55</sup> While the choice of remedies remains within their discretion, the Member States must ensure that (i) remedies exist and (ii) those remedies are effective, proportionate and dissuasive (the duty of sincere cooperation laid down in Article 4(3) TEU). The CJEU held that a judicial remedy must be available to the consumer to challenge an enforcement based on potentially unfair contract terms, which allows the national court to adopt interim measures to prevent the sale from going ahead. This is especially important if the consumer risks losing her family home (Article 7 Charter), which places her family in a vulnerable position. The lack of an effective judicial remedy would seriously undermine the rights afforded to consumers under the UCTD.<sup>56</sup> The CJEU considered *inter alia* that in Slovakia, *ex ante* and *ex post* remedies were available to the consumer to contest the sale, albeit under time-limits. Moreover, it was possible for the court to adopt interim measures and to declare the sale void, which retrospectively placed the consumer in a situation almost identical to her original situation. It was ultimately for the referring Slovakian court to determine whether the applicable procedural rules were adequate.<sup>57</sup>

It is difficult to say what distinguishes the reasoning of the CJEU on the basis of the Charter from a reasoning based on (full) effectiveness. The CJEU basically examined whether the available interim measures were an adequate and effective means to protect consumers against (allegedly) unfair contract terms. Consumer protection is, however, not absolute. It has been observed that the CJEU should have assessed instead whether a restriction (i.e. time-limit) of the consumer's right to bring an action (Article 47 Charter) could be justified by the need to ensure the efficiency of enforcement proceedings, or whether an interference with the consumer's right to respect for private and family life (Article 7 Charter) was necessary and proportionate in light of the creditor's interest in a swift enforcement of the debt.<sup>58</sup> This would indeed appear to be more in line with the test under Article 52

(1) Charter. The outcome could very well be the same (i.e. national law is or is not compatible with EU law), but the reasoning is different. The CJEU's reasoning in *Kušionová* does not show that a balance has been struck:<sup>59</sup> it focuses more on (full) effectiveness and dissuasiveness. A possible explanation for this is the accessory character of Article 47: it appears to be instrumental to achieve the UCTD's objectives, i.e. to ensure a high level of consumer protection under the UCTD. This finding lays bare the legal-political question: what the main purpose of effective judicial protection is: individual rights protection, or the effective enforcement of EU law? And if it is the former, then protection to what end and for whom?

Remedies must not only be available, they must also be effective. In *Aziz*, a case from Spain, the CJEU already made clear that the possibility for the consumer to claim compensation in declaratory proceedings after the sale had already taken place did not offer sufficient protection against an unlawful eviction. The UCTD precluded a procedural regime where it was impossible for the court to grant interim relief capable of staying or terminating the enforcement proceedings in order to guarantee the full effectiveness of its final decision about the (un)fairness of the contract terms on which the enforcement was based.<sup>60</sup> Like in *Kušionová*, the CJEU focused on the procedural means at the disposal of consumers to take legal action and to exercise their rights, not on the question to what extent a restriction of the consumer's grounds for opposition against enforcement could be justified. In this respect, it is interesting to note that the Spanish Constitutional Court had come to a different conclusion than the CJEU. It had found that the regime at issue did *not* violate the right to effective judicial protection (Article 24 (1) of the Spanish Constitution), due to the limited scope of the enforcement proceedings. A restriction of the debtor's opposition grounds was justified in light of the creditor's right to claim payment. The debtor had consented to the mortgage arrangement and thus, to a limitation of her defence possibilities; besides, the door to declaratory proceedings was left open.<sup>61</sup> Spanish courts then turned to EU consumer law, which entailed a switch in perspective from the constitutional rights of Spanish citizens to their rights as

50 *Biuro podróży 'Partner'* (n 9), para 26. In the words of Advocate General Wathelet: "to require that a rule of EU law, which entails the applicability of the Charter, should also confer a specific subjective right capable of having been breached in the case of the person concerned seems to me to contradict the liberal intention that underpins Article 47 of the Charter" (Case C-682/15 *Berlioz Investment Fund*, Opinion of AG Wathelet, ECLI:EU:C:2017:2, para. 63).

51 Explanations relating to the Charter of Fundamental Rights (n 12), 29. See also Article 6(1) TEU and Article 52(2) Charter.

52 Case C-158/80 *Rewe-Handelsgesellschaft Nord v Hauptzollamt Kiel* [1981] ECR 1805, para 44; Case C-432/05 *Unibet v Justitiekanslern* ECLI:EU:C:2007:163, para 40; Case C-583/11 *Inuit v European Parliament and Council of the European Union* ECLI:EU:C:2013:625, paras 103-104.

53 *Kušionová* (n 9), para 59. See also *Aziz* (n 44), paras 59 and 62; *Alassini* (n 12), para 59; *Unibet* (n 52), para 67.

54 *Ibid*, para 47.

55 *Ibid*, para 49. See also Case C-280/13 *Barclays Bank v Sánchez García* ECLI:EU:C:2014:279, para 37; *Banesto* (n 40), para 45.

56 *Ibid*, paras 63-64 and 66.

57 *Ibid*, para 68.

58 *Della Negra* (n 11) 1024, 1030. By comparison, see e.g. *Buckland v the United Kingdom*, App no 40060/08 (ECtHR, 18 September 2012) and *Sajó et al. v Slovenia*, App no 31371/12 (ECtHR, 25 April 2017).

59 *Ibid* 1030.

60 *Aziz* (n 44), paras 59-61.

61 *Tribunal Constitucional de España*, order 113/2011 of 19 July 2011 ECLI:ES:TC:2011:113A. See also Sara Iglesias Sánchez, 'Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: *Aziz v. Catalunya*' (2014) 51 *Common Market Law Review* 955, 970.

European consumers, including the fundamental right to effective judicial protection.<sup>62</sup> *Aziz* could be seen as an example of so-called “hidden constitutionalisation”:<sup>63</sup> although no (explicit) reference was made to Article 47 Charter, the judgment indirectly set a higher standard of fundamental rights protection, in a similar way as *Kušionová*.

### 3. *Sánchez Morcillo*: procedural equality

*Aziz* provoked the creation of a ‘new’ remedy in the sense that a new opposition ground on the basis of (alleged) unfair terms was introduced in the Spanish Code of Civil Procedure.<sup>64</sup> The legislative reform gave rise to new issues. While the creditor could bring an appeal against a decision which, upholding an objection raised by the debtor, terminated the enforcement proceedings, the debtor was not allowed to bring an appeal vice versa if her objection was dismissed. This meant that the debtor, if she was a consumer, could not even base an appeal on the (alleged) unfairness of the terms of the mortgage agreement. In *Sánchez Morcillo I*, the CJEU held that the UCTD, read in conjunction with Article 47 Charter, must be interpreted as precluding such a system of enforcement.<sup>65</sup> This system offered incomplete and insufficient protection to consumers, who must have a reasonable opportunity to present their case in conditions that do not place them in a clearly less advantageous position compared with their opponent. The applicable rules did not sufficiently respect the right to an effective remedy, a fair trial and equality of arms.<sup>66</sup> It has been observed that the real problem was irreversibility, like in *Aziz*.<sup>67</sup> Article 47 in itself does not guarantee a right to appeal.<sup>68</sup> An asymmetric restriction of the recourse to appeal could perhaps have been justified in light of the creditor’s privileged position as a mortgage holder and the fact that the decision in the enforcement proceedings does not have substantive *res judicata* effect. However, even though the consumer-debtor still has access to declaratory proceedings, that does not suspend the enforcement. This meant that the consumer-debtor would be in the same situation pre-*Aziz* once her objection was dismissed in the enforcement proceedings. The provision at issue was subsequently adjusted, so that the consumer-debtor could bring an appeal on the basis of unfair terms.<sup>69</sup>

In *Aziz*, the imbalance between the parties – a consumer vis-à-vis a bank – was considered in view of the potential unfairness of the contract terms at issue (Article 3(1) UCTD), not from a procedural point of view.<sup>70</sup> *Sánchez Morcillo I* suggests that Article 47 Charter could be used as an argument to correct a lack of procedural equality between the parties, albeit to a limited extent. In *Sánchez Morcillo II*, a follow-up order,<sup>71</sup> the CJEU held that due to the limited scope of the UCTD, the grounds for an appeal brought by the consumer-debtor could be restricted to unfair contract terms review. The UCTD pursues the specific objective of re-establishing equality between consumers and traders.<sup>72</sup> The principle of equality of arms did not extend the scope of consumer protection beyond the UCTD, so Spain was not required to put the parties on an equal footing in terms of their right to appeal.<sup>73</sup> Like *Kušionová*, *Sánchez Morcillo I* shows that Article 47 Charter may function as a correction mechanism when national civil procedure is deemed to offer incomplete or insufficient protection in light of EU law.<sup>74</sup> At the same time, *Sánchez Morcillo II* reveals the main constraint of Article 47: its accessory character. Neither Article 47 nor the full effectiveness of the UCTD can be stretched so far that a procedural inequality between the parties is completely removed. The CJEU took a restrained approach in *Pohotovost’* as well.<sup>75</sup> There was

no EU legislation governing the role of consumer protection associations in individual proceedings and whether they must be entitled to intervene in support of an individual consumer. The CJEU held that Article 47 could not by itself serve as a basis for the extension of the right to an effective judicial remedy to consumer protection associations, which do not enjoy the same protection as individual consumers.<sup>76</sup> A judicial remedy was still available to individual consumers. Otherwise, Article 47 might have been triggered; the possibility of bringing an action cannot be denied solely on the ground that EU law does not make express provision for it.<sup>77</sup> The CJEU’s approach could be subject to criticism. However, it shows that there are boundaries as to how much space the judiciary has for correcting an error or failure to act on the part of the legislature.<sup>78</sup>

### 4. *Banif Plus Bank* and *Biuro podróży ‘Partner’*: a counterbalance

There is typically one party who benefits more from EU legislation, such as the consumer who enjoys protection against unfair contract terms under the UCTD. That does not mean that the rights and interests of the other party no longer matter. In *Banif Plus Bank*, the CJEU held that the national court must respect the requirements of effective judicial protection by observing the principle of *audi alteram partem*. In the context of the UCTD, this means that both parties must be given the opportunity to present their views before a contract term can be found to be unfair and declared to be

- 62 Ibid 971. See also Fernando Gómez Pomar and Karolina Lyczkowska, ‘Spanish Courts, the Court of Justice of the European Union and Consumer Law. A Theoretical Model of Their Interaction’ (2014) 4 *Indret* <www.indret.com/pdf/1093.pdf>; Esther 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* (Marcial Pons 2016).
- 63 Hans-W Micklitz, ‘Unfair Contract Terms – Public Interest Litigation before European Courts’ in E Terry, G Straetmans and V Colaert (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia 2013) 649; Micklitz and Reich (n 19) 800; Iglesias Sánchez (n 4) 970.
- 64 Article 695.1.4 of the *Ley de Enjuiciamiento Civil*, insterted by *Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social* of 14 May 2013.
- 65 *Sánchez Morcillo I* (n 9), para 51.
- 66 Ibid, paras 49-51.
- 67 Helena 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* 229-230, 241, 249.
- 68 See e.g. Case C-169/14 *Sánchez Morcillo I* (n 9), Opinion of Advocate General Wahl ECLI:EU:C:2014:2110, para 43.
- 69 Article 695.4 of the *Ley de Enjuiciamiento Civil*, adapted by *Ley 9/2015 de medidas urgentes en materia concursal* of 25 May 2015.
- 70 *Aziz* (n 44), paras 68, 73 and 75. See also Immaculada Barral-Viñals, ‘Aziz Case and Unfair Contract Terms in Mortgage Loan Agreements: Lessons to Be Learned in Spain’ (2015) 4 *Penn. St. J. L. & Int’l Aff.* 69, 79, 83.
- 71 *Sánchez Morcillo II* (n 9), para 50.
- 72 Ibid, para 56.
- 73 See also Case C-543/14 *Ordre des barreaux francophones et germanophone v Conseil des ministres* ECLI:EU:C:2016:605, paras 40 and 42.
- 74 See also Pótorak (n 27) 50.
- 75 Case C-470/12 *Pohotovost’ v. Vašuta* (see n 10), as distinct from Case C-76/10 *Pohotovost’ v. Korčkovská* ECLI:EU:C:2010:685.
- 76 *Pohotovost’* (see n 9), paras 53-54.
- 77 See e.g. Case C-47/07 *Masdar v Commission of the European Communities* ECLI:EU:C:2008:726, para 50.
- 78 This (again) depends on the context. For example, in the context of administrative proceedings in the area of environmental law, the CJEU appears to be willing to use Article 47 Charter to provide greater access to justice to non-governmental organizations: Case C-243/15 *LZ v Obvodný úrad Trenčín* ECLI:EU:C:2016:838 (also referred to as “Brown Bears II”).

not binding.<sup>79</sup> The right to be heard cannot simply be bypassed by reference to the (full) effectiveness of the UCTD. This was confirmed in *Biuro podróży 'Partner'*, a case about a national register of unlawful standard contract terms aimed at enhancing the effectiveness of the prohibition on the use of unfair contract terms in Poland. A trader on whom a fine was imposed for the use of a term deemed to be equivalent to a term in the register, without having been a party to the proceedings culminating in the entry of that term in the register, must have the opportunity to challenge both the assessment of the conduct considered to be unlawful and the amount of the fine.<sup>80</sup> In the absence of a scheme of effective judicial protection for the trader, the UCTD must be interpreted in light of Article 47 Charter.<sup>81</sup> Although *Biuro* concerned administrative proceedings, it is relevant for civil proceedings as well. The effective protection of consumers under the UCTD cannot justify national legal measures at any cost; Article 47 Charter may provide a counterbalance.

In *Banif Plus Bank*, the CJEU held that the national court's obligation to observe the principle of *audi alteram partem*, which was an element of the basic principles of the domestic judicial system, was not incompatible – note the double negation – with the principle of effectiveness. This obligation was not an obstacle that compromised the effectiveness of the protection provided by the UCTD for the benefit of consumers.<sup>82</sup> Indeed, upholding procedural safeguards for traders does not automatically lead to a lower level of consumer protection, which would run counter to the objectives of the UCTD. In its negative, controlling or eliminatory function, the principle of effectiveness removes obstacles to the enforcement of EU law.<sup>83</sup> Article 47 Charter appears to be phrased more positively: it encompasses the right to be heard as a 'positive' requirement. It could also be used constructively where it entails supplementing existing instruments or filling gaps.<sup>84</sup> In this respect, *Kušionová* suggests that Article 47 and the (consumer-oriented) full effectiveness of the UCTD are two sides of the same coin. However, *Biuro podróży 'Partner'* demonstrates that they are not. Article 47 protects both parties, not only consumers. This brings us back to the question how the rights and interests of the parties are to be balanced against each other.

#### IV. The correlation between Article 47 of the Charter and the (full) effectiveness of EU law

##### 1. What is in the balance...

It has been submitted that the classical proportionality test for fundamental rights (see Article 52(1) Charter) concentrates too much on the rights of only one party, and does not sufficiently take account of the rights and interests of both sides.<sup>85</sup> Article 47 Charter protects both parties to the proceedings. It comprises both the horizontal and the vertical dimension at the same time. As we have seen in *Kušionová*, Article 47 could have been used to strike a balance between the creditor's interest in a swift debt enforcement and the consumer-debtor's right to take legal action, and between the need for legal certainty and a critical assessment of rules that may adversely affect one of the parties (whether a consumer or a trader). The application of Article 47, read in conjunction with substantive EU rights such as those embodied in the UCTD, allows courts to take the parties' position vis-à-vis each other and their socio-economic circumstances into account.<sup>86</sup> In *Kušionová*, the CJEU could have paid more attention to the rights and interests of the creditor. Even though that might not have significantly changed the outcome, it would have acknowledged the private-law nature of the legal

relationship between the parties. In *Sánchez Morcillo I*, the imbalance between the parties was taken into consideration. The enforcement regime at issue favoured the creditor too much, to the detriment of the consumer. Both judgments also have a social dimension where they refer to the consumer's family home.<sup>87</sup> EU consumer law may provide an indirect remedy against foreclosure and the over-indebtedness of consumers.<sup>88</sup> Article 47 highlights the role of civil courts in providing effective judicial protection, in particular to consumers as weaker parties. A traditional private law approach would push the vertical dimension to the background. By contrast, the principle of effectiveness allows for a balancing between the objectives of EU law – i.e. its effective enforcement – and the (procedural) interests of the Member States, but it would do less justice to the horizontal dimension.<sup>89</sup> Article 47 appears to be not so much aimed at solving conflicts between EU law and national law as it is geared towards individual rights protection. It could shift the focus from the (full) effectiveness of EU law on a systemic level to the protection of (procedural) rights on the level of the parties to the dispute.<sup>90</sup> However, it is too early to say that such a shift in focus is taking place.

##### 2. An extra guarantee

It is still unclear if and to what extent Article 47 Charter and the (full) effectiveness of EU law overlap, and it is difficult to predict which test will be applied in which case.<sup>91</sup> Last year, the CJEU missed an opportunity to give more clarity about the correlation between Article 47 and the principle of effectiveness in *Finanmadrid*. The referring court wanted to know whether Spanish legislation governing the (national) order-for-payment procedure was compatible with the Charter. The creditor could obtain an order issued by a court registrar, without judicial involvement. A judge would only be involved in the case when the amount was incorrect or when the debtor contested the claim. The order would have *res judicata* effect. At the enforcement stage, the court could no longer examine whether there were any unfair contract terms. The CJEU concluded that the procedural arrangement at issue was liable to undermine the effectiveness of the protection intended by the UCTD, but did not find it necessary to answer the questions regarding the Charter.<sup>92</sup> This is curious in view of the CJEU's own statement that, when requested to

79 *Banif Plus Bank* (n 9), paras 28-31.

80 *Biuro podróży 'Partner'* (n 9), para 40.

81 *Ibid*, para 26.

82 *Banif Plus Bank* (n 9), paras 33-34.

83 See e.g. Reich (n 16) 302-303; Arthur Hartkamp, *European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (2nd edition, Intersentia 2016) 100.

84 See e.g. Krommendijk (n 10) 1401-1405; Hartkamp (n 83) 99. For a national example, see Leeuwarden Court of Appeal (the Netherlands), judgment of 5 July 2011 ECLI:NL:GHLEE:2011:BR2500, para 3.6.

85 Hugh Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' in Hans-W Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar Publishing 2011) 146.

86 Mak (n 5) 242. See also Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in Hans-Wolfgang Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 126.

87 Della Negra (n 11) 1021.

88 Barral-Viñals (n 70) 71. See also Irina Domurath, Guido Comparato and Hans-W Micklitz (eds), *The over-indebtedness of European consumers: a view from six countries* (EUI LAW 2014/10) 114 <<http://cadmus.eui.eu/handle/1814/32451>>.

89 The so-called 'procedural rule of reason'. See e.g. Bobek (n 36) 310; Hofmann (n 20) 1216; Schebesta (n 28) 856-857; Prechal (n 12) 151.

90 See also Engström (n 26) 592.

91 See also Nowak (n 39) 31-32.

92 *Finanmadrid* (n 9), paras 46 and 56-57 respectively.

give a preliminary ruling, it must provide all the guidance as to interpretation the national court needs in order to determine whether legislation falling within the scope of EU law is compatible with EU fundamental rights.<sup>93</sup> There may be various explanations as to why the CJEU did not assess the compatibility of the legislation at issue with the requirements of the UCTD in light of the Charter, as it had been requested to do.<sup>94</sup> *Finanmadrid* could be regarded as an example of “hidden constitutionalisation” where it improved the judicial protection of consumers. There was a significant risk that they would not contest the claim in time. Advocate General (AG) Szpunar had observed in his Opinion that a significant burden was thus placed on consumers as defendants, requiring them – and not the claimant – to initiate contradictory proceedings. Therefore, the enforcement court must have the power of *ex officio* control as a last resort.<sup>95</sup>

Perhaps the CJEU found that Article 47 Charter had nothing to add to the (full) effectiveness of EU law. Perhaps it agreed with the view of AG Szpunar that Article 47 constitutes only a minimum level of protection. Then Article 47 would only apply to (procedural) rules which obstruct access to court, i.e. in case a remedy is completely absent.<sup>96</sup> To support his view, AG Szpunar referred to the CJEU’s case law on Regulation 44/2001.<sup>97</sup> It can nevertheless be contended that due to its accessory character, Article 47 cannot simply be disconnected from the substantive EU rights it pertains to; its implications may vary across different areas of law. Effective judicial protection in consumer law – where the notion of an imbalance between the parties is key – may entail different requirements than in private international law, where different instruments of EU law apply and thus, different considerations and objectives.<sup>98</sup> This requires a different balancing exercise. A restriction of the rights of the defence that would be justifiable under Regulation 44/2001 may not be justified in the context of the UCTD, where consumers are involved. The fact that the defendant is a consumer may necessitate a higher level of protection. Indeed, in another Spanish case with regard to a similar type of procedure, the risk that consumers would be pressured into paying instead of lodging an objection before a court was one of the reasons for AG Kokott to conclude that the procedural rules at issue were contrary to the UCTD as well as Article 47 Charter.<sup>99</sup> Article 47 does not only require the existence of a judicial remedy, it also relates to the effects of that remedy and the way it can be obtained (due process). Article 47 is more than a last resort: it may operate as an extra guarantee of consumer rights. That it might not always change the outcome does not reduce the requirements of effective judicial protection to a minimum level.

### 3. A positive function?

In all four key judgments discussed in this article, the CJEU has formulated ‘positive’ requirements as to the content of (judicial) remedies and procedural safeguards. Such a positive function is not uncontroversial. It has, for instance, been argued that the concept of effectiveness has no internal limits, so that it could be used to legitimize almost any result; therefore, it should not be overextended.<sup>100</sup> The same is true for Article 47 Charter: its application cannot be stretched too far, as illustrated by *Sánchez Morcillo II* and *Pohotovost*. As a self-standing provision, it may not be specific enough to provide a yardstick against which national law can be tested. It is phrased broadly, and it is less clearly defined than the substantive provisions of EU law it pertains to. Article 47 entails an obligation for the Member States to create and maintain a system safeguarding the right to an effective reme-

dy and a fair trial,<sup>101</sup> parallel to Articles 6 and 13 ECHR. In this respect, Mak recalls the ‘*Schutzgebotsfunktion*’ of fundamental rights, which refers to a duty to guarantee effective protection and which depends on positive action from public authorities, including the courts.<sup>102</sup> It is nevertheless unclear whether Article 47 Charter is sufficient in itself to confer an individual right on private parties which may be invoked as such.<sup>103</sup> It could be said that Article 47 intensifies the duty of national (civil) courts to interpret national law in accordance with EU law.<sup>104</sup> Directives like the UCTD do not have direct effect and do not warrant a *contra legem* interpretation of national law.<sup>105</sup> However, if consistent interpretation with the UCTD is not possible, Article 47 may provide a basis to set aside national law as far as it is incompatible with the fundamental right to effective judicial protection.<sup>106</sup> Even though the Member States have procedural autonomy, the UCTD must still be applied in conformity with Article 47. When EU law precludes a certain national legislative scheme because it offers insufficient or incomplete protection, the question remains how that scheme should be changed and whether the necessary (structural) changes should be brought about by the national court or by the legislator and what impact that has on the legal relationship between the parties.

## V. Conclusion

In this article I have explored the role of Article 47 Charter in cases concerning national remedies and procedures under the UCTD. On the one hand, *Kušionová* and *Sánchez Morcillo (I and II)* indicate that Article 47 is mainly used as an additional supporting argument when it comes to the procedural position of consumers. On the other hand, *Banif Plus Bank* and *Biuro podróży ‘Partner’* show that it is not only about the (full) effectiveness of EU law: Article 47 protects *both* parties, and it may tip the balance towards individual rights protection over the effective enforcement of EU law. It seems to go beyond providing a minimum level of protection: the CJEU has referred to Article 47 as an extra argument to pose requirements as to the content of judicial remedies and procedural safeguards that must be available in the context of the UCTD. The case law sketches a picture of Article 47 having the characteristics to play a large(r) role in European private law adjudication, while simultaneously having some major

93 *Åkerberg Fransson* (n 13), para 19.

94 In a similar case, AG Kokott has argued that an interpretation of Article 47 Charter would be relevant to the judgment to be given by the CJEU: Case C-503/15 *Margarit Panicello* (n 9), Opinion of AG Kokott ECLI:EU:C:2016:696, paras 112-118.

95 Case C-49/14 *Finanmadrid* (n 9), Opinion of AG Szpunar ECLI:EU:C:2015:746, paras 62 an 72.

96 Krommendijk (n 10) 1412–1413.

97 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation 44/2001, often also referred to as “Brussels I Regulation”). As per 10 January 2015, Regulation 44/2001 has been replaced by Regulation 1015/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

98 Compare e.g. *A. v. B.* (n 24), para 51 and *Hypotečni banka* (n 9), paras 48-53 with the Opinion of AG Szpunar (n 95), paras 72 and 94.

99 Case C-503/15 *Margarit Panicello* (n 10), Opinion of AG Kokott (n 94), para 136.

100 See also Engström (n 26) 588; Bobek (n 36) 316; Micklitz (n 38) 379; Gerstenberg (n 19) 614.

101 Beijer (n 13) 138.

102 Mak (n 5) 243. See also Collins (n 85) 160.

103 See Article 52(5) Charter; Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* ECLI:EU:C:2014:2, para 47.

104 Collins (n 85) 156.

105 See Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique* ECLI:EU:C:2012:33, para 42.

106 Collins (n 85) 157. For an example outside the context of the UCTD, see *Vidal-Hall v Google Inc.* [2015] EWCA Civ 311.

constraints. Article 47 might provide a more solid, constitutional basis than the judge-made principles of equivalence and effectiveness for the judicial assessment (and development) of national remedies and procedures.<sup>107</sup> Read in conjunction with substantive EU rights, such as those laid down in the UCTD, Article 47 can be used to upgrade and fine-tune national remedies and procedures in light of the EU rights they serve to protect. Article 47 may perform a signaling function in case the protection offered is insufficient or incomplete, plus a controlling and possibly a supplementing function. It has even been argued that Article 47 should be the 'anchor point' or 'umbrella provision' for any judicial assessment in cases covering (aspects of) EU law.<sup>108</sup> The level or scope of protection can then be limited or extended on a case-by-case basis. However, the accessory character of Article 47 is also its main constraint: its application cannot be overextended. It cannot be said (yet) that a real metamorphosis is taking place. The CJEU seems reluctant to acknowledge the potential of Article 47 as a weighty source for interpreting

national law, let alone for setting it aside or filling gaps. There is an obvious contrast between this reluctance, and the binding nature and the wide scope of application of Article 47. In the end, the impact of Article 47 will depend on the factual and legal context of each case, and the willingness of courts to take it into account (explicitly or implicitly). Whether effective judicial protection is realized, ultimately depends on the cooperation of the Member States and their (civil) courts. It is up to those courts to put flesh on the bones of Article 47. ■

<sup>107</sup> See also Beijer (n 13) 135–138; Prechal (n 12) 156.

<sup>108</sup> Prechal and Widdershoven (n 10); Safjan and Dürstherhaus (n 10) 11; Nowak (n 39) 36; Krommendijk (n 10) 1416. See also Case C-562/12 *MTÜ Liivimaa Lihaveis v Eesti-Läti programmi 2007-2013 Seirekomitee*, Opinion of AG Jääskinen ECLI:EU:C:2014:155, para 47, repeated in Case C-61/14 *Orizzonte Salute* (see n 15), Opinion of AG Jääskinen ECLI:EU:C:2015:307, para 24; Case C-93/12 *ET Agrokonsulting v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' – Razplashiatelna agentsia*, Opinion of AG Bot ECLI:EU:2013:172, paras 29-30.