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Effective judicial protection under Article 47 of the EU Charter of Fundamental Rights and the Unfair Contract Terms Directive

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1. ARTICLE 47 IN UNFAIR TERMS CASES: UNCHART(ER)ED TERRITORY

"Article 47 of the Charter seems to be a 'sleeping beauty' which has not really been 'kissed awake'".[1]

1.1 ARTICLE 47 OF THE CHARTER: ON FIRST ACQUAINTANCE

1.1.1 Visibility of effective judicial protection as an EU fundamental right

On 1 December 2019, the EU Charter of Fundamental Rights (**Charter**) – the EU's very own fundamental rights catalogue – celebrated its 10th anniversary as a legally binding instrument.[2] Pursuant to its preamble, the Charter seeks to strengthen the protection of fundamental rights in the EU by making these rights more visible. The Charter provision most often referred to by the Court of Justice of the European Union (**CJEU**) and by national courts in requests for preliminary rulings, is Article 47.[3] Article 47 of the Charter safeguards the right to an effective remedy and a fair hearing before a court of law for (alleged) infringements of EU rights and freedoms. It reads:

> "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."

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1 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) 321.

2 The Charter is legally binding as of 1 December 2009, the date of entry into force of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (**Lisbon Treaty**), signed in Lisbon, 13 December 2007 (2007/C 306/01).

3 European Commission, *2018 Report on the Application of the EU Charter of Fundamental Rights*, 12. The report can be consulted via ec.europa.eu.

According to the European Commission, "[p]romoting access to justice and the right to effective redress under Article 47 of the Charter is a precondition for the effective enjoyment of all rights under EU law".[4] Article 47 confirms that where there is a right, there must be a remedy – *ubi ius, ibi remedium*,[5] the *condicio sine qua non* of "a Union subject to the rule of law".[6] The CJEU has recognised that Article 47 can be directly invoked by individuals: the effective judicial protection of their rights under EU law must be provided by national courts, also in horizontal disputes between private parties.[7]

Since Reich referred to Article 47 as a "sleeping beauty" in 2013, it is no longer dormant. EU consumer law is one of the areas of private law where the fundamental rights dimension of effective judicial protection has become visible in the past decade. The present study focuses on the meaning of Article 47 in European private law adjudication,[8] more specifically cases concerning the Unfair Contract Terms Directive (**UCTD** or **Directive**)[9] – where the number of references to Article 47 is relatively high. The rise of Article 47 in this context coincided with the aftermath of the 2008 financial crisis. Civil courts in Spain, Poland, Hungary and other

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4 European Commission, 2017 *Report on the Application of the EU Charter of Fundamental Rights*, 10.

5 See e.g. Walter Van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 Common Market Law Review 501, 503.

6 Case C-682/15 *Berlioz Investment Fund v Directeur de l'administration des contributions directes*, Opinion of AG Wathelet, point 66. See also Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02, 29-30. See also Case C-14/08 *Roda Golf & Beach Resort*, Opinion of AG Ruiz-Jaracob Colomer, point 29: "Access to justice is a fundamental pillar of western legal culture. 'To no one will we sell, to no one will we deny right of justice' proclaimed the Magna Carta in 1215, expressing an axiom which has remained in force in Europe to the extent that it features in the European Convention of Human Rights, the Charter of Fundamental Rights of the European Union and the case law of the Court." Article 47 of the Charter "constitutes one of the fundamental guarantees for the respect of the rule of law and democracy and is inextricably linked to civil procedure as a whole": European Parliament resolution of 4 July 2017 with recommendations to the Commission on common minimum standards of civil procedure in the European Union (2015/2084(INL)).

7 Case C-414/16 *Egenberger v Evangelisches Werk Diakonie und Entwicklung*, paras 78-79.

8 European private law adjudication is understood as litigation between private parties in a dispute on a matter of private law – e.g. contract law – that falls (partly or entirely) within the scope of EU law, before national civil courts of the EU Member States.

9 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21 April 1993, p. 29).

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 CJEU on the meaning and scope of EU consumer protection legislation 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 CJEU's case law on the (im)possibility for Spanish civil courts to intervene in mortgage enforcement proceedings preceding an eviction.[10] Courts were seen as a last resort – the "last trench"[11] – to provide protection against the enforcement of (mortgage) loan agreements that could be challenged in light of e.g. the UCTD. Procedural safeguards, such as the right of access to court and the principle of equality of arms, are considered to be of special importance in this respect.

The UCTD proved to be one possible avenue, an "indirect remedy",[12] to address structural imbalances between the parties, both from a legal and a socio-economic point of view; "a fountain of social justice in times of drought".[13] For litigants as well as courts, the Directive was a portal to EU law and the applicability of the Charter, Article 47 in particular, which provided a level of judicial protection that would otherwise not have been guaranteed in the national civil justice system.

The central question in this study is what a reference to Article 47 of the Charter in judicial decisions can do in the context of the UCTD. With 'reference', I mean that Article 47 is explicitly mentioned or alluded to by courts. Such a reference could be purely ornamental, but it could also have a specific purpose. Article 47 adds a constitutional dimension to the adjudication of consumer cases, which this study will further explore. The term 'constitutional' is used here in a narrow sense: it refers to the interpretation and application of EU law in accordance with EU fundamental rights, i.e. the Charter. Article 47 holds the promise of an

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10 See further sections 3.3-3.4 and 4.3-4.4.

11 Javier Álvarez and Luis Fernando Rodríguez, *La última trinchera* (Planeta 2016) 107.

12 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, 71.

13 Daniela Caruso, 'Fairness at a Time of Perplexity' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 346.

"autonomous standard of effective judicial protection"[14] that superimposes on national (procedural) law in all cases falling within the scope of EU law. At the same time, it reinforces the link between substantive and procedural protection of EU rights. It emphasises the key role of (national) courts in the enforcement and protection of those rights. Such a court-centred approach is not necessarily new; Article 47 could be seen as a confirmation, not a transformation, of a long-standing judicial practice.[15] Still, Article 47 grants constitutional status to the right to effective judicial protection in EU law. Its codification in the Charter, which has the same legal value as the Treaties,[16] could be seen as a "substantial upgrade" in status.[17]

Whether Article 47 provides a new frame of reference or whether it reaffirms pre-existing rights, those rights have become more manifest and possibly also more prominent.[18] Under Article 47, a shortfall in judicial remedies or procedural safeguards may give rise to a fundamental rights violation, which implies an even more pressing need to address its consequences. Such a shortfall will be harder to overlook for all actors involved – at both EU and national level. This study nevertheless shows that, at least in the context of the UCTD, the "sleeping beauty" has not fully woken up yet. Moreover, it reveals another side (*altera parte*) of Article 47 that may seem counterintuitive from a consumer protection perspective: it is often invoked for the protection of the professional counterparties of consumers, even though they cannot derive rights from the Directive itself. Article 47 is not one-dimensional;

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14 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, 31, 36.

15 Stephen Weatherill, Stefan Vogenauer and Petra Weingerl, 'Private Autonomy and Protection of the Weaker Party', *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 263.

16 Article 6(1) of the Treaty of the European Union (**TEU**). See also Case C-279/09 *DEB v Bundesrepublik Deutschland* ECLI:EU:C:2010:811, para 30; 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) 145.

17 Dorota Leczykiewicz, '"Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?' (2010) 35 European Law Review 326, 333.

18 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.

it covers both the claimant's right of access to court and the defendant's rights of defence and contributes to ensuring procedural justice.[19] How the rights and interests on both sides and at different levels must be balanced, also in the procedural sphere, is a key question for civil courts in their role of European courts.[20]

The title of this study reflects that ultimately, it is the judge (justice) who must ensure justice for both.

1.1.2 A unique perspective on the role of civil courts in consumer litigation

This study focuses on the role of national civil courts in providing effective judicial protection under the UCTD. For rights guaranteed by EU law, the premise is that effective legal protection must be ensured by the Member States and their national courts,[21] even – or especially – if remedies and procedures are not (fully) harmonised. For private parties, civil courts are the gateway to the enforcement of their subjective (EU) rights against each other. Courts operate as an 'intermediary' to prevent them from being deprived of their rights.[22] National civil courts are decentralised EU judges:[23] they are part of the EU's judicial system and play an important part in the enforcement of EU law. While the choice

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19 See further subsections 2.3.1 and 2.4.1. Procedural justice is generally understood as the fairness of the process resulting in a (judicial) decision, which legitimises the outcome: Nina Półtorak, *European Union Rights in National Courts* (Wolters Kluwer 2015) 11–12. See for further references Iris Benöhr, *EU Consumer Law and Human Rights* (First edition, Oxford University Press 2013) 96.

20 Civil justice has a substantive and a procedural component: it means, in short, that a private party can obtain redress for a violation of their rights from the party responsible for that violation through civil litigation: Jason M Solomon, 'What Is Civil Justice' [2010] William & Mary Law School Scholarship Repository - Faculty Publications. Paper 1149 317, 322–323, 329. The term 'EU civil justice' is mainly used to refer to (cross-border) civil proceedings. For the purposes of this study, the terms 'civil justice', 'civil procedure' and 'civil proceedings' refer to private law adjudication by civil (i.e. non-administrative and non-criminal) courts.

21 See e.g. Article 19(1) TEU, also mentioned in subsection 2.1.1.

22 Fernanda Nicola and Evelyne Tichadou, 'Océano Grupo: A Transatlantic Victory for the Consumer and a Missed Opportunity for European Law', *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press) 378.

23 Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Martinus Nijhof Publishers 2014) 47.

and design of remedies and procedures are primarily the prerogative of the (national) legislature, it is left to the judiciary to provide a solution in a concrete case and to assess whether national law is up to standard.[24] Courts must not only interpret and apply national law in conformity with EU law, they must also review its compatibility with EU law and if necessary, set it aside – for instance, in case it conflicts with Article 47 of the Charter.[25]

Article 47 has been part of the Charter from the moment it was first proclaimed.[26] However, its (potential) relevance for national civil courts is still largely unchart(er)ed territory.[27] Studies on Article 47 in the context of cross-border civil justice[28] typically do not account for the effect of (substantive) EU law in purely domestic cases. Studies on the 'horizontal' implications of the Charter[29] mostly do not focus on procedural safeguards, which distinguish Article 47 from other fundamental rights. Moreover, studies on 'private enforcement'[30] and *ex*

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24 See also 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; Fabrizio Cafaggi, 'Towards Collaborative Governance of European Remedial and Procedural Law?' (2018) 19 Theoretical Inquiries in Law 235, 237.

25 See further subsection 2.3.2.

26 Official Journal of the European Communities 18 December 2000, 2000/C 364/01.

27 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).

28 See e.g. Giangiuseppe Sanna, 'Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights* (Springer 2011); Monique Hazelhorst, *Free Movement of Civil Judgments in the European Union and the Right to a Fair Trial* (TMC Asser Press 2017).

29 The term 'horizontal' concerns the legal relationship between individuals, i.e. private parties. See e.g. Sonja Walkila, *Horizontal Effect of Fundamental Rights in EU Law* (Europa Law Publishing 2016); Eleni Frantziou, 'The Horizontal Effect of Fundamental Rights in the European Union - A Constitutional Analysis' (Oxford University Press 2019).

30 See e.g. Folkert Wilman, *Private Enforcement of EU Law Before National Courts* (Edward Elgar Publishing 2015); 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); Irene Aronstein, *Remedies for Infringements of EU Law in Legal Relationships between Private Parties* (Wolters Kluwer 2019).

officio application[31] of EU (consumer) law usually do not take a fundamental rights perspective.[32]

Article 47 is open-ended and phrased broadly; it may give rise to different issues and it may be applied differently in different circumstances. Most studies on effective judicial protection in EU law[33] abstract from the specific factual and legal context of a case[34] – in particular its subject-matter, the EU instrument(s) at hand and the applicable national (substantive and procedural) rules, as well as the nature of the underlying (vertical or horizontal) relationship, which determine the court's competence. For civil courts, it matters how EU law has been implemented in the national legal system. The level of judicial protection in civil proceedings, and in particular the balance between the claimant's right of access to justice on the one hand and the defendant's rights of defence on the other, are not harmonised across the EU[35] – at least not for all types of cases that fall within the scope of EU law, such as unfair terms cases. The adjudication of consumer disputes is, first and foremost, governed by rules of national private law and civil procedure, which constitute the primary frame of reference for civil courts. National procedural modalities – e.g. when the parties have access to a particular procedure, what powers the court has in the course of the proceedings

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31 See e.g. Anthi Beka, *The Active Role of Courts in Consumer Litigation: Applying EU Law of the National Courts' Own Motion* (Intersentia 2018); Vicente Pérez Daudí, *La protección procesal del consumidor y el orden público comunitario* (Atelier 2018); Alain Ancery, *Ambtshalve toepassing van EU-recht* (Kluwer 2012).

32 A recent report by the Max Planck Institute Luxembourg for Procedural Law deals extensively with procedural protection and access to justice for consumers from a comparative perspective, but not specifically with the fundamental rights dimension, let alone Article 47 of the Charter: Burkhard Hess and Stephanie Law (eds), *Implementing EU Consumer Rights by National Procedural Law. Luxemburg Report of European Procedural Law: Volume II* (Beck 2019). This will hereinafter be referred to as **2019 Max Planck report**.

33 See e.g. Johanna Engström, 'The Europeanisation of Remedies and Procedures through Judge-Made Law – Can a Trojan Horse Achieve Effectiveness?' (European University Institute 2009); Alison Östlund, *Effectiveness versus Procedural Protection. Tensions Triggered by the EU Law Mandate of Ex Officio Review* (Nomos 2019).

34 See also 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) 399.

35 See e.g. the above-mentioned 2019 Max Planck report. See also Magdalena Tulibacka, 'Europeanization of Civil Procedure: In Search of a Coherent Approach' (2009) 46 Common Market Law Review 1527, 1532–1533.

and whether there is room for appeal – are essential for the level and scope of protection which courts can provide in practice. However, the distinct features of civil proceedings have been given surprisingly little attention so far in the literature on judicial protection in EU law, perhaps because they vary significantly across the Member States or because they are less relevant from an enforcement perspective.[36]

As a result, the (added) value of Article 47 of the Charter in European private law adjudication remains unclear. This study aims to address this, by concentrating on a specific area of private law – unfair terms in consumer contracts – and the legal systems of two selected Member States: Spain and the Netherlands. An in-depth case study will be conducted that accounts for the dynamics between different levels – EU vs. national; systemic vs. case-specific – and actors – judiciary vs. other branches of government; courts vs. litigating parties – on the crossroads of EU fundamental rights, consumer law and civil procedure. As such, it provides a unique perspective on the role of civil courts in consumer litigation, in light of effective judicial protection as an EU fundamental right.

1.2 AN IN-DEPTH CASE STUDY: ARTICLE 47 IN UNFAIR TERMS CASES

1.2.1 A 'civil justice gap'

The reason to conduct an in-depth case study is threefold.[37] First, Article 47 is a 'chameleon' provisionthat may change colour according to

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[36] The national qualification of measures (sanctions) as criminal, administrative or civil is not relevant for the purposes of EU law enforcement, see e.g.: Martin Ebers, *Rechte, Rechtsbehelfe Und Sanktionen Im Unionsprivatrecht* (Mohr Siebeck 2016) 291–292. Furthermore, the CJEU has held that the specific characteristics of court proceedings cannot constitute a factor liable to affect the legal protection of consumers under the UCTD: see e.g. Case C-169/14 *Sánchez Morcillo and Abril García v BBVA* ECLI:EU:C:2014:209**9** (***Sánchez Morcillo I***), para 47 and Case C-34/13 *Kušionová v SMART Capital* ECLI:EU:C:2014:2189, para 53.

[37] By case study, I mean an in-depth analysis of the relevant case law, legislation and literature on a specific area of law as one of the many to which Article 47 of the Charter is applicable; see infra for my reasons to adopt this approach. Furthermore, the scope of this study is limited to two specific legal systems, chosen for the reasons provided below. On case studies in legal scholarship, see further Lisa L Miller, 'The Use of Case Studies in Law and Social Science Research' (2018) 14 Annual Review of Law and Social Science 381.

the context within which an action is brought.[38] In order to identify when an issue is considered to have a constitutional dimension under Article 47 it is important to understand the factual and legal context of a case, including the specific EU instrument Article 47 is read together with. This informs the implications of effective judicial protection, especially in comparison with the notion of (full) effectiveness in EU law. Second, the application of Article 47 is connected to (other) EU rights. The requirement of an *effective* remedy highlights the link between substantive and procedural protection. Indeed, the effectiveness of remedies and procedures can only be understood in relation to the sector where they operate.[39] And third, a comparison between the CJEU's approach and that of Spanish and Dutch civil courts requires detailed knowledge of the applicable legal framework, as well as an awareness of other (legal) factors that might influence the application of EU law and Article 47 of the Charter in a specific legal system.[40]

The main reason to select the UCTD as a case study is that after the Charter's entry into force, the CJEU – and national courts in its wake – started referring to Article 47 more and more frequently in this context.[41] The number of references to Article 47 is relatively high. Moreover, there is already an extensive body of case law,[42] which allows for a comparison of cases with and without a reference to Article 47.

The regulation of unfair terms in consumer contracts is one of the fields where the legal discourse crystallises on the 'Europeanisation' of national private law and civil procedure, as well as the interaction

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38 The term 'chameleon' is used to indicate that the meaning of a certain legal concept is context-related; see e.g. Monica Claes, 'The National Courts' Mandate in the European Constitution' (Maastricht University 2004) 339; Henk Snijders, 'Openbare orde, rechtspersonen en mensenrechten' [2014] Nederlands Juristenblad; Stefan Grundmann, 'The Fault Principle as the Chameleon of Contract Law: A Market Function Approach' (2009) 107 Michigan Law Review 1583.

39 See further Michael Dougan, *National Remedies before the Court of Justice* (Hart Publishing 2004) 220–226.

40 See also Herman van Harten, 'Autonomie van de nationale rechter in het Europees recht: een verkenning van de praktijk aan de hand van de Nederlandse Europeesrechtelijke rechtspraak over de vestigingsvrijheid en het vrijedienstenverkeer' (2011) 18, 74.

41 See subsection 1.3.3 for an overview.

42 Further discussed in section 2.1.

between national (civil) courts and the CJEU.[43] The CJEU's case law has had a big impact on national remedies and procedures, which was hard to foresee when the UCTD was adopted in 1993. Over time, the CJEU has developed several judge-made requirements for the effective (judicial) protection – on which the Directive itself is silent – of the rights consumers derive from the Directive, in response to a wide range of issues raised by national (civil) courts. The CJEU's case law has unearthed ways in which national rules of civil procedure hinder the effectuation of consumer rights.[44] Examples of procedural issues that have arisen under the UCTD are the (un)availability of interim relief in mortgage enforcement proceedings,[45] the scope for judicial review of arbitral awards[46] and third-party effects of collective actions.[47]

These issues may have, at first sight, nothing to do with unfair terms in consumer contracts, but they can still be brought within the scope of the Directive on the basis of the subject-matter of the case. The justification for this is that national remedies and procedures constitute the corollary to EU rights, including the rights consumers derive from the UCTD.[48] Consumer rights are only as effective as their enforcement.[49] European consumer protection is not only about conferring (substantive) rights on consumers, but also about enforcing and protecting those rights through effective remedies and adequate procedures.

Despite the CJEU's progressive and consumer-friendly interpretation of EU consumer protection legislation, however, EU-wide reports suggest there is still an 'enforcement deficit' or 'civil justice gap'.[50]

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43 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, 808.

44 See also Joanna ML Van Duin and Candida Leone, 'The Real (New) Deal: Levelling the Odds for Consumer-Litigants' [2019] European Review of Private Law 1227, 1236.

45 See further section 3.4.

46 See further section 3.3.

47 See further subsection 4.5.3.

48 Verica Trstenjak and Erwin Beysen, 'European Consumer Protection Law: Curia Semper Dabit Remedium?' (2011) 48 Common Market Law Review 95, 110.

49 Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (Aldershot 2005) 660.

50 See the aforementioned 2019 Max Planck report and *Study for the Fitness Check of EU consumer and marketing Law – Final report Part 1: Main report*, European Commission 29 May 2017 (**REFIT report**), available at http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332. See also Benöhr (n 19) 177; Stefan Wrbka, *European Consumer Access to Justice Revisited* (Cambridge University Press 2015) 33.

Examples include a lack of incentives or opportunities for consumers to bring a claim; barriers, such as legal costs; uncertainty about the scope of the national court's (*ex officio*) powers; and inadequate mechanisms for the protection of collective interests. The CJEU's case law is ample but scattered, and appears to create more confusion than clarity – as evidenced by the continuing stream of preliminary references and a *Guidance Notice on the interpretation and application of Directive 93/13/EEC*, issued by the Commission last year.[51] This *Notice* is intended to present the CJEU's case law in a structured manner, to increase awareness and to facilitate its application in practice. The *Notice* mentions the relevance of Article 47 of the Charter, in particular as regards procedural safeguards,[52] but it does not discuss the constitutional dimension of the CJEU's case law, which this study aims to address.

1.2.2 Justiciability of EU (consumer) rights

This study revolves around the function(s) of Article 47 in the context of the UCTD. The potential significance of Article 47 in European private law adjudication has already been noted by other authors. However, there is no comprehensive academic study yet on the question of what the actual (added) value is, if any, of Article 47 read in conjunction with the UCTD – despite the high number of references in this context. This is not just a theoretical question; access to justice has become a key issue in EU consumer law.[53] Access to justice is a broader concept than access to court, just as legal protection is broader than judicial protection. Whereas the role of courts in providing substantive protection to consumers is inherently limited,[54] and in any case part of a bigger enforcement palette,

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51 Commission notice – Guidance on the interpretation and application of Council Directive 93/13/EEC on unfair terms in consumer contracts (2019/C 323/04).

52 Commission notice, p. 53.

53 See e.g. Eva Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press 2008) 28; Benöhr (n 19) 105; Marco Loos, 'Access to Justice in Consumer Law' (2015) 36 Recht der Werkelijkheid 113; Remo Caponi and Janek Tomasz Nowak, 'Access to Justice' in Burkhard Hess and Stephanie Law (eds), *Implementing EU Consumer Rights by National Procedural Law. Luxembourg Report on European Procedural Law: Volume II* (Beck 2019).

54 See e.g. Irina Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts* (Hart Publishing 2017) 105–106.

the importance of effective judicial protection – if only as a last resort – is widely acknowledged.

This study ties in with the strand of literature on the meaning of effective judicial protection vis-à-vis, in particular, the general principle of effectiveness in EU law and the *ex officio* application of EU consumer protection legislation, more specifically the UCTD. Effective judicial protection neither begins nor ends with *ex officio* control, as will be further elaborated in this study. Any judicial intervention is based on the premise that a case can be, and actually is brought before a competent court by one of the parties.[55] Therefore, (access to) judicial remedies and procedural safeguards – such as equality of arms – are deemed to be essential for the enforcement and protection of EU consumer rights by national civil courts.

> The case of *Sánchez Morcillo* is a prominent example of a case where Article 47 of the Charter, read in conjunction with the UCTD, was used – by the referring court, and subsequently the CJEU – to indicate the incompatibility of Spanish procedural law with the requirements of EU (consumer) law. Two Spanish citizens, Mr. Sánchez Morcillo and Ms. Abril García (the debtors), entered into a loan agreement with BBVA, a Spanish bank, secured by a mortgage on their home. When the debtors failed to meet their payment obligations, BBVA demanded accelerated repayment of the entire loan and initiated mortgage enforcement proceedings. The debtors' opposition against the enforcement was dismissed. Under Spanish civil procedure, (consumer-)debtors could not bring an appeal, not even if the enforcement was based on unfair terms in the loan agreement or in case of the court's failure to perform *ex officio* control. By contrast, the creditor could have appealed a decision that would have terminated the enforcement. The CJEU found that such an asymmetrical restriction of the right to appeal was contrary to the principle of equality of arms, which is an integral element of the right to effective judicial protection as guaranteed by Article 47.[56]

In the *Sánchez Morcillo* case, the CJEU held that equality of arms required the possibility of appeal for consumer-debtors as well as for creditors. When consumers in the position of Mr. Sánchez Morcillo and Ms. Abril García cannot bring an appeal, the appellate court cannot perform unfair

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55 Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen v Kuijpers*, Opinion of AG Sharpston, point 32.

56 Case C-169/14 *Sánchez Morcillo*, para 48; further discussed in sections 3.4 and 4.4.

terms control either and thus, it cannot remedy an infringement of their rights in the first instance if necessary.

This study shows that the application of Article 47 in unfair terms cases is linked to (problems with) the enforceability and justiciability of consumer rights. Both terms refer to the possibility for private parties to effectuate their rights recognised by the law, but justiciability specifically relates to the capacity (i.e. standing) to invoke a right *in court*. Understood broadly, justiciability also means that courts must be able to take EU consumer rights into account when they adjudicate consumer cases.[57] Article 47 places the emphasis on the responsibility of courts to enforce and protect EU consumer rights, which presupposes a genuine opportunity for consumers to exercise their rights in court. If access to court is a mere formality, if consumers are denied a proper chance to take legal action or if there is no remedy available at all, the fundamental right to effective judicial protection might be at stake. As this study shows, a reference to Article 47 may indicate – signal – systemic issues that transcend the UCTD, such as the above-mentioned limited scope for judicial intervention in (mortgage) enforcement proceedings against consumers.

1.3 RESEARCH QUESTIONS AND METHODOLOGY

1.3.1 Research questions, aims and scope

Function(s) of a reference to Article 47 in judicial decisions

The main research question this study aims to answer is what function(s) Article 47 of the Charter can fulfil in European private law adjudication, more particularly cases concerning the UCTD. A 'function' expresses how a particular concept works or operates in a certain way, and reveals its purpose or (intended) role.[58] This question ties in with other studies

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57 See also Van Duin and Leone (n 44) 1229. This understanding of 'justiciability' is broader than the direct effect of (subjective) EU rights or the mere 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.

58 This use of the term 'function' must be distinguished from the functionality of the EU single market, which is associated with instrumentality; see e.g. Christoph Schmid, 'The Instrumentalist Conception of the Acquis Communautaire in Consumer Law

on fundamental rights in private law and general principles of EU law, which refer to 'functions' as well.[59]

Against the background of these studies, the present study aims to identify, analyse and classify the functions of a reference to Article 47 by the CJEU and by national civil courts when they adjudicate cases under the UCTD. This study rests on the premise that the functions of Article 47 cannot be analysed in isolation, apart from the EU rights it pertains to and the national setting of a case. Therefore, these functions will be addressed as part of an in-depth case study on the UCTD and two specific legal systems: Spain and the Netherlands.

In order to answer the main research question, a number of sub-questions are formulated that provide a roadmap into the case law and literature on Article 47 in the context of the UCTD:

1. *What is Article 47's normative content?*
2. *What triggers a reference to Article 47 in the decisions of the CJEU, Spanish and Dutch civil courts in unfair terms cases?*
3. *What is the effect of such a reference to Article 47, both in judicial reasoning and in the outcome of a case?*
4. *To what extent and on what grounds do the CJEU's approach and the approaches followed by Spanish and Dutch civil courts converge or diverge?*
5. *Where lies the (unfulfilled) potential of Article 47, if any, in respect of the (judicial) assessment and development of national remedies and procedures under the UCTD?*

The fifth sub-question refers in particular to the above-mentioned 'civil justice gap'. This question has three dimensions: a *structural* dimension, pertaining to the division of competences between the (CJ)EU on the one hand and the Member States (and their national courts) on the other; an *institutional* dimension, pertaining to the position of the judiciary vis-à-vis the legislature; and a *procedural* dimension, pertaining to the role of civil courts in proceedings that involve (at least) two private parties on opposite sides, i.e. the claimant and the defendant. As regards the structural dimension, the question is to what extent the CJEU can

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and Its Implications on a European Contract Law Code' [2005] European Review of Contract Law 211.

[59] See further subsections 2.4 and 2.5.

interfere in the choice and design of national remedies and procedures and/or impose any (additional) requirements. As regards the institutional dimension, the question is whether and if so, in what way(s) a shortfall in existing remedies and procedures can be addressed by *courts* on the basis of Article 47. As regards the procedural dimension, the question is what the courts must do to provide effective judicial protection: which rights need to be protected, and to what end?

Bottom-up, case-driven approach

This study explores these questions from an internal, comparative perspective.[60] It examines the EU's multi-level legal order from within, i.e. on its own terms, and describes the functions of Article 47 of the Charter as they emerge from the literature review and the analysed case law in its factual, legal and national context. The normative background provided by the objectives of the UCTD and the Charter is taken as a given. The analytical framework for this study will be set out in chapter 2, including the emergence of Article 47 in the context of the UCTD, its status in EU law and the normative content of effective judicial protection as an EU fundamental right. The normative content of Article 47 translates into the functions ascribed to it in the literature and identified in the analysed case law.

This study adopts a bottom-up, case-driven approach by looking at the practice of courts as exposed by their judicial decisions. It compares all references to Article 47 – the common denominator[61] – in the case law of the CJEU, Spanish and Dutch civil courts on the UCTD (chapters 3, 4 and 5 respectively). In so far as courts explicitly refer to Article 47 and/or effective judicial protection as a fundamental right, this tells us, firstly, what type of cases they are confronted with and which issues they consider as constitutional. Secondly, this reflects, at least to some extent, the perceived (added) value of a reference to Article 47 when it is read in conjunction with the UCTD. For each case, answers are sought to the questions of how and why a reference to Article 47 is made; what the

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60 Martijn Hesselink, 'A European Legal Method? On European Private Law and Scientific Method' (2009) 15 European Law Journal 20, 33.

61 Marieke Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research - Sense and Nonsense of "Methodological Pluralism" in Comparative Law' (2015) 79 Rabels Zeitschrift für ausländisches und internationales Privatrecht 589, 610.

meaning of such a reference is vis-à-vis, in particular, the notion of (full) effectiveness in EU law; and whether it makes a difference in outcome and/or judicial reasoning. From this, various functions of Article 47 can be inferred, which will be placed in the broader debate outlined above. The exact labelling of certain functions is mostly semantic. What matters for the purposes of this study, is what a reference Article 47 can do; what it pertains to, what is behind it, and what the commonalities or disparities are in the way it is used.

This study builds on previous studies into the status of Article 47 of the Charter, the functions of fundamental rights in private law and (full) effectiveness in EU (consumer) law, which has been the main parameter in the CJEU's case law so far. There may be parallels with other instruments, such as the European Convention on Human Rights (**ECHR**) or national constitutional rights, but those are not the focus of this study and will only be discussed in so far as they are relevant for an understanding of the analysed case law.

A follow-up question for future (empirical or socio-legal) research would be whether the findings of this study are consistent with the views and experiences of the judges involved. In addition to a contextual analysis of the cases in which judges *do* refer to Article 47, it could then be examined why they *do not* in other cases – within and beyond the scope of the UCTD. This study forms a steppingstone for such future research. The doctrinal analysis I have conducted makes a vital contribution to the conceptualisation and explanation of Article 47 as a legal phenomenon. In the words of Van Gestel and Micklitz:

> "[W]e may not forget that doctrinal legal expertise is often crucial in order to be able to raise the right questions and determine which variables should be tested in attempting to explain a particular legal phenomenon. (…) One will always need interpretation and argumentation to bridge the gap between facts and norms."[62]

This study aims to bridge the gap between theory and practice in respect of the application of Article 47 at EU and national level. I presented my preliminary findings to expert panels consisting of academics, judges and practitioners during workshops/conferences in 2017, 2018 and 2019.

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62 Rob Van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' EUI Working Papers Law 2011/05 25.

This served to test those findings and helped to shape this study. I also had the opportunity to participate in two transnational judicial training projects aimed at sharing knowledge, insights and experiences between national judges.[63] As one of the Dutch judges who attended a meeting in Warsaw observed: exploring the possibilities of Article 47 as a common 'EU-tool' was "no superfluous luxury".[64] In this sense, the projects' aims and those of the present study are aligned.

Scope and delimitations

The scope of this study extends to the functions of Article 47 of the Charter in the context of the UCTD and the two selected Member States. Whereas the findings cannot be automatically extrapolated to other areas of (private) law or other Member States, this study may still provide clues or lessons learned to national civil courts on how to apply Article 47. The CJEU's interpretation of EU law is binding for them, even if it is given in preliminary rulings pertaining to other legal systems. Moreover, judicial decisions from other Member States may provide an example or inspiration for the application of Article 47 as an EU fundamental right.

As mentioned above, other fundamental rights instruments than the Charter are not the focus of this study. No separate analysis has been carried out of the case law of the European Court of Human Rights (**ECtHR**) in Strasbourg or the Spanish Constitutional Court in Madrid. The ECtHR is sometimes asked to rule upon issues adjoining EU law, such as State liability for a national court's failure to make a preliminary reference[65] or national legislation that implements (the CJEU's case law on) the UCTD.[66] Indirectly, State liability may be of influence on the application of the UCTD, for instance when a court fails to comply with its duty to perform *ex officio* control.[67] However, State liability as such falls outside the scope of this study. Almost all CJEU cases analysed for

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63 ACTIONES, an EU-funded project under the coordination of the EUI Centre for Judicial Cooperation (see cjcj.eui.eu/projects/actiones), and Re-Jus, coordinated by the University of Trento (see rejus.eu).

64 Roland de Moor, 'Hoe effectief is onze consumentenbescherming?' [2017] Tijdschrift voor Consumentenrecht en handelspraktijken 154, 156.

65 ECtHR 8 April 2014, Appl. No. 17120/09 *Dhahbi v Italy*.

66 ECtHR 20 December 2018, Appl. No. 22853/15 *Merkantil Car Zrt. v Hungary*; further discussed in subsection 3.3.3.

67 Case C-168/15 *Tomášová v Slovenská republika – Ministerstvo spravodlivosti SR and Pohotovosť*.

the purposes of this study concern horizontal disputes between private parties. The CJEU hardly refers to the ECHR in the context of the UCTD at all.

While this is a study on the impact of Article 47 on national procedural law, its focus is specifically on civil procedure. Administrative enforcement falls outside the scope of this study. It should be noted that the term 'enforcement' may refer to a public (administrative or judicial) authority securing that a rule or policy is properly followed, but it may also refer to private parties realising their subjective rights against each other. Broadly speaking, enforcement in the former meaning is geared towards *law* enforcement, compliance and deterrence in the public interest, whereas in the latter meaning it predominantly revolves around *rights* enforcement in the (private) self-interest of the right-holder.[68] Whereas the legal protection and vindication of subjective rights could be seen as the primary function of civil procedure, it also has a regulatory dimension.[69] Law enforcement and rights enforcement are not opposites; rather, they co-exist and interact.[70] Individual litigants may thus contribute to the public interest of upholding EU law, especially where mandatory rules or fundamental rights are at stake.[71] Wilman has called this a "duality" of purpose:

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68 Colin Scott, 'Enforcing Consumer Protection Laws' in Geraint Howells, Ian Ramsay and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 539; 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, 593–594; Candida Leone, *The missing stone in the Cathedral: of unfair terms in employment contracts and coexisting rationalities in European contract law* (2020) 13.

69 See e.g. Storskrubb, 296. See also Laura Ervo, 'Party Autonomy and Access to Justice', *Europeanization of Procedural Law and the New Challenges to Fair Trial* (Europa Law Publishing 2009) 24–25; Gerhard Wagner, 'Harmonisation of Civil Procedure: Policy Perspectives' in XE Kramer and CH Van Rhee (eds), *Civil Litigation in a Globalising World* (Springer/TMC Asser Press 2012) 109; Simon Whittaker, 'Who Determines What Civil Courts Decide? Private Rights, Public Policy and EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 89–90.

70 Zampia Vernadaki, *EU Civil Procedure and Access to Justice after the Lisbon Treaty: Perspectives for a Coherent Approach* (University College London (doctoral thesis) 2013) 21 <http://discovery.ucl.ac.uk/1399838/>; Wilman (n 30) 457; Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 591; Beka (n 31) 80.

71 Östlund (n 33); Norbert Reich, *General Principles of EU Civil Law* (Intersentia 2014) 122; Olha Cherednychenko, *Fundamental Rights, Contract Law and the Protection of the*

offering redress to private parties for infringements of EU law is expected to contribute to enhancing compliance with EU law.[72] In the context of the UCTD, both meanings of enforcement are relevant: the enforcement of the UCTD and the achievement of its objectives largely depends on the justiciability of (EU) rights and private parties enforcing them in court.[73]

This study gives rise to follow-up questions that do not fall within the present scope, but could be addressed in future research, such as the influence of judicial culture and civil courts' familiarity with reasoning on the basis of fundamental rights. In particular, the interplay between Article 47 of the Charter on the one hand and the ECHR (Articles 6 and 13) and national constitutions on the other could be further investigated in other areas than the UCTD. Furthermore, this study does not question the legitimacy of judicial law-making as such. It is neutral towards the functions of Article 47, in the sense that it does not seek proof or confirmation of any added value. It does not necessarily strive for consistency, coherence or integration either.[74] Rather, this study attempts to explain Article 47 as a legal phenomenon by uncovering the variables at play when it comes to its (potential) application in practice.

1.3.2 Selection of national legal systems: Spain and the Netherlands

This study aims to explain how and why the impact of (the CJEU's case law on) Article 47 may differ between Member States; it does not seek to identify a common core. From a top-down perspective, all national (civil) courts are equally bound by Article 47. However, different issues arise in different settings. The explanations for these issues are not purely legal; other dimensions, e.g. political, cultural and socio-economic, are relevant as well.

This study focuses on the legal and factual context of the analysed case law, in particular (i) the implementation of the UCTD and reception

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Weaker Party (European Law Publishers 2007) 63.Reich 2014, 122; Cherednychenko, 63.

72 Folkert Wilman, 'The End of the Absence? The Growing Body of EU Legislation on Private Enforcement and the Main Remedies It Provides For' (2016) 53 Common Market Law Review 887, 931.

73 Ebers (n 36) 319.

74 See also Jan Vranken, 'Methodology of Legal Doctrinal Research' in MAA Hoecke (ed), *Methodologies of legal research. Which kind of method for what kind of discipline* (Hart Publishing 2010).

of the CJEU's case law in national private law and civil procedure, and (ii) specific issues with judicial protection that have arisen in this context. Different remedies have been recognised with a great variety of modalities in the Member States' legal systems. The role of courts and the litigating parties also varies significantly. Moreover, whether and to what extent fundamental rights are used in judicial reasoning is related to the institutional position, tasks and powers of civil courts in their respective jurisdictions. Their willingness to frame an issue in terms of (EU) fundamental rights also depends on systemic factors such as monist or dualist views on the interplay between EU law, fundamental rights and private law.[75] Colombi Ciacchi has distinguished a legal family of states that have become totalitarian at some point in the 20th century, such as Germany, Spain and Poland, which in her view explains "judicial activism" by civil courts that often apply national constitutional norms.[76] By contrast, in the Netherlands, there is no centralised system of constitutional review by the judiciary, and the ECHR plays a much bigger role than the national constitution.[77] This may shape the perception of the (added) value of Article 47, which is why (iii) the role of civil courts in the protection of fundamental rights is a relevant factor on the national level as well.

Spain was selected for this study because it has the highest number of references to Article 47 in the CJEU's case law. An analysis of the functions of Article 47 requires an understanding of the national background and impact of the case law, not only in the relation between the CJEU and Spanish civil courts, but also in order to infer its meaning for civil courts in other Member States. The Spanish experience informs the CJEU's interpretation of the UCTD, read in conjunction with Article 47. Spanish civil courts have contributed significantly to the constitutionalisation of consumer protection under the UCTD, i.e. the integration of fundamental rights reasoning – and more specifically the

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75 On the structural relation between fundamental rights and private law, see Hugh Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014).

76 Aurelia Colombi Ciacchi, 'European Fundamental Rights and Private Law: The Dutch System in the Context of Different Legal Families' in Bettina Heiderhoff, Sebastian Lohsse and Reinier Schulze (eds), *EU-Grundrechte und Privatrecht: EU Fundamental Rights and Private Law* (Nomos 2016) 209.

77 Colombi Ciacchi (n 76) 218.

Charter – in the adjudication of unfair terms cases. It could even be said they have been catalysts of the development of the CJEU's case law in this respect.[78] This study aims to place the Spanish cases in their national setting, and to connect the Spanish and the European debate on effective judicial protection in unfair terms cases.

The Netherlands represents a legal system where Article 47 is less visible, at least in the case law on the UCTD. A comparison between Spain and the Netherlands may reveal how different court systems can impact the role of Article 47. For instance, unlike Spain, the Netherlands does not have (centralised) constitutional review. And unlike in Spain, no clear (added) value of Article 47 seems to be recognised in unfair terms cases. Dutch civil courts seem to have found other ways to achieve effective judicial protection of consumers than a fundamental rights approach, which could be informative for courts in other Member States as well. Perhaps Dutch courts do not see a need to refer to Article 47, or perhaps they are not aware of its (potential) functions – despite their perceived "loyalty" to the CJEU.[79] This study therefore aims to contribute to creating more awareness about these functions.

1.3.3 Selection of case law

In the EUR-Lex database, there are at least 69 CJEU judgments and 30 orders on the UCTD.[80] There are 25 cases with an explicit reference to Article 47 of the Charter, made by either the referring court, the CJEU or

78 Juan Antonio Mayoral Díaz-Asensio, Dimitri Berberoff Ayuda and Ordóñez Solís, 'El juez español como juez de la Unión Europea' [2013] Revista española de derecho europeo 127, 129.

79 Jasper Krommendijk, 'De civiele kamer en de prejudiciële procedure: kritisch doch loyaal aan het Hof van Justitie' [2019] Tijdschrift voor Civiele Rechtspleging 1, 13–14.

80 As of 15 June 2020. This is the number of judgments with "Directive 93/13/EEC" or "Directive 93/13" in the title, which apparently does not include e.g. cases in which the CJEU found it had no jurisdiction (such as *Margarit Panicello* and *Garzón Ramos*; see below). Therefore, the total number may be even higher. All cases before the CJEU cited in this study can be found in the *Répertoire de jurisprudence* (Digest of case-law) on curia.europa.eu.

the Advocate General (**AG**).[81] These cases originate from Spain (9),[82] Poland (5),[83] Slovakia (4),[84] Hungary (4),[85] Italy (1),[86] and Romania (1).[87] In 8 cases, the CJEU found either the UCTD to be inapplicable, or that it lacked jurisdiction and/or the reference for a preliminary ruling was inadmissible.[88] In 5 cases, the (in)compatibility of national legislation with Article 47 in light of the UCTD was only discussed by the AG, not by the CJEU.[89] In 1 case, neither the CJEU nor the AG addressed a question regarding Article 47, presumably because they deemed it

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81 Case C-40/08 *Asturcom Telecomunicaciones v Rodríguez Nogueira*; Case C-433/11 *SKP v Polhošová*; Case C-472/11 *Banif Plus Bank v Csaba Csipai*; Case C-470/12 *Pohotovosť v Vašuta*; Case C-153/13 *Pohotovosť v Soroka*; Case C-92/14 *Tudoran v SC Suport Colect*; Case C-169/14 *Sánchez Morcillo I* (cited above); Case C-34/13 *Kušionová* (cited above); Case C-539/14 *Sánchez Morcillo v BBVA* (***Sánchez Morcillo II***); Case C-49/14 *Finanmadrid v Albán Zambrano*; Case C-380/15 *Garzón Ramos v Banco de Caja España de Inversiones*; Case C-7/16 *Banco Popular Español v Giráldez Villar*; Case C-119/15 *Biuro podróży 'Partner' v Prezes Urzędu Ochrony Konkurencji i Konsumentów*; Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo v Cajasur Banco, Palacios Martínez v BBVA, Banco Popular Español v Irles López and Torres Andreu*; Case C-503/15 *Margarit Panicello v Hernández Martínez*; Case C-344/17 *IJDF Italy Srl v Fernando Dionisio*; Case C-483/16 *Sziber v ERSTE Bank Hungary*; Case C-176/17 *Profi Credit Polska v Wawrzosek*; Case C-51/17 *OTP Bank v Ilyés*; Case C-426/17 *Barba Giménez v Carrión Lozano*; Case C-632/17 *PKO Bank Polski v Michalski*; Case C-118/17 *Dunai v ERSTE Bank Hungary*; Case C-266/18 *Aqua Med v Skóra*; Case C-34/18 *Lovasné Tóth v ERSTE Bank Hungary*; Case C-495/19 *Kancelaria Medius v RN*. The dates and ECLI-numbers of the CJEU decisions and AG Opinions can be found in the case law index at the end of this study.

82 Case C-40/08 *Asturcom*, Case C-169/14 *Sánchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case), Case C-49/14 *Finanmadrid*, Case C-433/11 *Banco Popular Español*, Case C-380/15 *Garzón Ramos*, Case C-308/15 *Irles López* (part of the CJEU's judgment in Joined Cases C-154/14, C-307/15 and C-308/15 *Gutiérrez Naranjo*), Case C-503/15 *Margarit Panicello*, Case C-426/17 *Barba Giménez*.

83 Case C-119/15 *Biuro*, Case C-632/17 *Profi Credit Polska*, Case C-632/17 *PKO Bank Polski*, Case C-266/18 *Aqua Med*, Case C-495/19 *Kancelaria Medius*.

84 Case C-433/11 *SKP*, Case C-34/13 *Kušionová*, Case C-470/12 *Pohotovosť*, Case C-433/11 *Soroka*.

85 Case C-472/11 *Banif Plus Bank*, Case C-483/16 *Sziber*, Case C-118/17 *Dunai*, Case C-34/18 *Lovasné Tóth*.

86 Case C-344/17 *IJDF Italy*.

87 Case C-433/11 *Tudoran*.

88 Case C-433/11 *SKP*, Case C-433/11 *Soroka*, Case C-433/11 *Tudoran*, Case C-433/11 *Banco Popular Español*, Case C-380/15 *Garzón Ramos*, Case C-503/15 *Margarit Panicello*, Case C-344/17 *IJDF Italy*, Case C-426/17 *Barba Giménez*.

89 Case C-40/08 *Asturcom*, Case C-49/14 *Finanmadrid*, Case C-503/15 *Margarit Panicello* (no jurisdiction), Case C-51/17 *OTP Bank*, Case C-34/18 *Lovasné Toth*.

unnecessary to give an answer.[90] In 12 decisions, the CJEU gave substantive consideration to Article 47, which will be elaborated in chapter 3.[91] In 6 of those, it was the CJEU that brought up Article 47 – not the referring court – and thus, the CJEU itself that acknowledged a fundamental rights dimension.[92]

Chapters 2 and 3 also contain references to case law on the UCTD with no mention of Article 47, and, vice versa, case law on Article 47 in other cases that do not pertain to the UCTD. Those references fall outside the scope of this study. They only serve to place the analysed case law in a broader setting, in order to get a better understanding of the distinguishing features of Article 47 in the context of the UCTD.

For chapter 4, several hundred (published) decisions of Spanish civil courts that refer to Article 47 in unfair terms cases have been analysed.[93] All decisions I have encountered date from March 2013 onwards, i.e. after *Banif Plus Bank* (21 February 2013). Most decisions date from July 2014 or later, i.e. after *Sánchez Morcillo I* (17 July 2014) and *Kušionová* (10 September 2014). *Sánchez Morcillo* is the CJEU judgment that is referred to the most in the analysed case law from Spain.

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90 Case C-308/15 *Irles López*.

91 Case C-472/11 *Banif Plus Bank*, Case C-470/12 *Pohotovosť*, Case C-34/13 *Kušionová*, Case C-169/14 *Sánchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case), Case C-119/15 *Biuro*, Case C-483/16 *Sziber*, Case C-632/17 *Profi Credit Polska*, Case C-632/17 *PKO Bank Polski*, Case C-118/17 *Dunai*, Case C-266/18 *Aqua Med*, Case C-495/19 *Kancelaria Medius*.

92 Case C-472/11 *Banif Plus Bank*, Case C-470/12 *Pohotovosť*, Case C-34/13 *Kušionová*, Case C-632/17 *Profi Credit Polska*, Case C-632/17 *PKO Bank Polski* and Case C-266/18 *Aqua Med*. In *Kušionová*, the referring court had mentioned only Article 38 Charter but the CJEU found the request related in essence to Article 47 of the Charter.

93 The database used for the Spanish case law analysis is Aranzadi, with the following search terms: "*art. 47*" or "*artículo 47*" + "*Carta*" or "*Carta de los Derechos Fundamentales*" + "*consumidor*" or "*consumidores*". Aranzadi is a database operated by Thomson Reuters; it is said to be the most widely used database by legal professionals in Spain for searching and citing case law. A similar search was conducted in CENDOJ, the public database of the Spanish Judiciary (*Poder Judicial*), but the earliest decision that appeared in this search was dated 18 December 2014, whereas the earliest decision in Aranzadi dated from 25 March 2013. Aranzadi has more filter options than CENDOJ; it also provides short summaries in the overview of search results and references to related decisions. In both databases, almost all published decisions are from *Audiencias Provinciales* (Courts of Appeal). Due to the high number of cases and the names of natural persons being mostly anonymised, only the names of high-profile cases will be mentioned. The other cases can be identified by the Aranzadi reference (JUR\) or the ECLI-number if available.

In chapter 5, the few (published) decisions of Dutch civil courts that refer to Article 47 of the Charter in unfair terms cases are discussed.[94] The low number of explicit references to Article 47 and the Netherlands being my home jurisdiction allowed me to cast a wider net and look for decisions referring to only the principle of effectiveness or Article 6 ECHR as well. The findings shed some light on possible explanations for the lack of references to Article 47 by Dutch civil courts in unfair terms cases.

Both chapters also give a brief description of the impact of the UCTD on national civil procedure, and the role of civil courts in the system of constitutional review and the protection of fundamental procedural rights and safeguards. This provides relevant background information and places the analysed case law in their national context.

The cut-off date for the case law analysis in this study is 31 July 2019, with the exception of two CJEU decisions, a Spanish Supreme Court judgment and and a Dutch Supreme Court judgment that came out afterwards.[95]

1.4 OUTLOOK

Chapter 2 sets out the analytical framework for this study. Firstly, it briefly places the emergence of Article 47 in the context of the CJEU's case law concerning the UCTD, which will be further elaborated in chapter 3. Secondly, it examines the normative content of Article 47 – its

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94 The database used for the Dutch case law analysis is rechtspraak.nl, the public database of the Dutch Judiciary (*De Rechtspraak*), with the following search terms: "artikel 47" of "art. 47" + "Handvest" of "Grondrechtenhandvest" + "consument". Some judgments are also published in legal journals, sometimes with an annotation. References to these journals are provided on rechtspraak.nl as well. In this study, annotations are only mentioned when they have been consulted as a separate source. Due to the names of natural persons being mostly anonymised, only the names of high-profile cases will be mentioned. The other cases can be identified by the ECLI-number.

95 Case C-34/18 *Lovasné Toth* and Case C-459/19 *Kancelaria Medius*. On 6 November 2019, after the cut-off date, the CJEU announced that all requests for preliminary rulings from 1 July 2018 would be published in a central database, as well as selected decisions of national courts. This allowed me to include a pending preliminary reference from the Spanish Supreme Court which expressly refers to Article 47 of the Charter in the context of the UCTD. For the Spanish and Dutch Supreme Court judgments, see subsections 4.3.3 and 5.2.2 respectively.

core components, on which the structure of the three subsequent chapters is modelled – as well as its scope of application and direct effect. And thirdly, the chapter catalogues the (potential) functions ascribed to Article 47 by other authors, which provides a basis for the case law analysis that forms the core of this study.

Chapter 3 examines all decisions of the CJEU and AG Opinions that explicitly refer to Article 47 in the context of the UCTD. It concentrates on the cases where the CJEU, the AG or both have given extensive consideration to Article 47. Chapter 4 maps out the references to Article 47 by Spanish civil courts, against the background of several procedural issues that have arisen under the UCTD. A particular focus will be on the cases that led to a preliminary ruling of the CJEU. Chapter 5 focuses on the references to Article 47 by Dutch civil courts, or rather: the lack thereof.

Chapter 6 contains a synthesis and the key findings of this study, in answer to the research questions. It critically evaluates the analysed case law in light of the normative content of Article 47 and its functions identified in the context of the UCTD. It takes a comparative perspective that sheds light on discrepancies between the CJEU's case law on Article 47 and the way Spanish civil courts refer to it in unfair terms cases, which leads to valuable insights for Dutch civil courts as well. The findings from chapters 4 and 5 are contrasted with the functions of Article 47 as mapped out in chapter 2 and further identified in the CJEU's case law discussed in chapter 3. The chapter closes with a few observations as to the unfulfilled potential of Article 47 and considerations for its (future) application by national civil courts.