Justice for both

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

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2. ANALYTICAL FRAMEWORK: BACKGROUND, NORMATIVE CONTENT AND FUNCTIONS ASCRIBED TO ARTICLE 47

Chapter outline
This chapter places the emergence of Article 47 of the Charter in the context of the UCTD. It introduces the main legal characteristics and constraints of Article 47, which inform its (potential) functions in unfair terms cases. It also outlines the views and expectations voiced in the literature as to these functions. The questions and issues raised in this chapter stem directly from the research questions and will be revisited and further explored in the following chapters.

The first part briefly describes the development of the CJEU's case law concerning national remedies and procedures under the UCTD, a judge-made proceduralisation process that requires courts to take an active role (section 2.1). The second part examines the normative content of Article 47: its core components (section 2.2), as well as its scope of application and direct effect (section 2.3). Article 47's normative content translates into the (potential) functions ascribed to it in legal doctrine, which will be considered in the third part. These range from a function largely parallel to the notion of (full) effectiveness, to a positive standard of effective judicial protection with a separate identity (sections 2.4 and 2.5). The different views are distilled into five main categories (section 2.6), which will be referenced throughout this study: a legitimising function, a strengthening or empowering function, an eliminatory function, a signalling or transformative function, and a generative function.

2.1 BACKGROUND: REMEDIES AND PROCEDURES UNDER THE UCTD

2.1.1 In principle: procedural autonomy of the EU Member States

Rights, remedies and procedures

Article 47 of the Charter guarantees an effective remedy and a fair hearing to everyone whose EU rights and freedoms are violated. The term 'remedy' has many meanings: a medicine that alleviates, eliminates or prevents disease; a cure; a right "born of a wrong" or "injustice"; a cause of action; or an enforceable court order or judgment.[96] The CJEU does not use the term 'remedy' univocally. In general, it could be said that *rights* create substantive legal positions for individuals and *remedies*

[96] Peter Birks, 'Rights, Wrongs and Remedies' (2000) 20 Oxford Journal of Legal Studies 1, 9.

are intended to enforce rights or to redress infringements of rights.[97] As Zuckerman has put it:

> "In a society governed by the rule of law, we all have an interest in rights being respected and wrongs being remedied. For in the absence of redress for wrong there is no value to rights and no reason to behave according to the law."[98]

In this respect, a distinction can be made between primary remedies, intended to enforce a right, and secondary remedies, which constitute new claims (secondary rights) in response to the infringement of a (primary) right.[99] The term 'remedy' may refer to a substantive remedy, i.e. a claim-right or cause of action – e.g. the provision that unfair terms are voidable. It may also refer to a procedural remedy, i.e. a means of recourse giving access to court – e.g. the possibility of requesting interim relief or bringing an appeal.[100]

Whereas substantive remedies are generally considered as part of private law (e.g. one party must pay damages to the other), procedural remedies could be regarded as part of public law. Civil courts are public institutions that perform the public function of the administration of civil justice.[101] Civil procedure pertains to a State's judicial organisation, jurisdiction and the conduct of court proceedings.[102] The distinction between substantive and procedural remedies is nevertheless not clear-

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97 Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 577, 582–583; Van Gerven (n 5) 502–503. This reflects the view that enforcement is a consequence of subjective rights, but not a precondition for their existence: Ebers (n 36) 96.

98 Adrian Zuckerman, Professor of Civil Procedure at the University of Oxford, 'Comment on: The principle of effective judicial protection in EU law', 18 June 2010; see ukael.org/past-events/past_events_24_3656132649.pdf.

99 Thomas Eilmansberger, 'The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link' (2004) 41 Common Market Law Review 1199, 1199.

100 Reich, *General Principles of EU Civil Law* (n 71) 123; Ebers (n 36) 52–53.

101 Peter Rott, 'The Court of Justice's Principle of Effectiveness and Its Unforeseeable Impact of Private Law Relationships' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 89–90. See also Storskrubb (n 53) 296; Zampia Vernadaki, 'Civil Procedure Harmonization in the EU: Unravelling the Policy Considerations' (2013) 9 Journal of Contemporary European Research 298, 298.

102 Tulibacka (n 35) 1532.

cut, and not uniformly established across all EU Member States.[103] It can be said that, taken together, remedial and procedural rules determine when, for what, by whom and how – i.e. under what conditions – a legal action can be brought.[104] The CJEU mainly refers to Article 47 of the Charter as encompassing procedural rights and safeguards, as this chapter and the next will show. Therefore, the term 'remedy' will hereinafter be used to refer to *procedural* or *judicial* remedies, unless indicated otherwise.[105]

No harmonised enforcement mechanism

The UCTD is a minimum harmonisation directive that has been received and transposed in national legal systems in different ways.[106] It contains only minimum requirements, and it does not regulate the detailed remedial and procedural rules governing its decentralised enforcement. The Directive was adopted in 1993 on the basis of Article 100A of the EEC Treaty.[107] This is the predecessor of Article 114 of the Treaty on the Functioning of the European Union (**TFEU**), which calls for the adoption of harmonisation measures in order to achieve a high level of consumer protection for the establishment and functioning of the internal market. The Directive aims to protect consumers against unfair standard terms and conditions that have not been individually negotiated when they enter into a contract. As the CJEU has repeatedly held, the system of protection introduced by the Directive is based on the idea that consumers are in a weak position vis-à-vis their professional

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103 See further Van Gerven (n 5) 502, 525; Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 323; Ebers (n 36) 52; Olivier Dubos, 'The Origins of the Proceduralisation of EU Law: A Grey Area of European Federalism' (2015) 8 Review of European administrative law 7, 8.

104 Van Gerven (n 5) 524; 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; Półtorak (n 19) 9–10.

105 On substantive remedies in private law from an EU law perspective, see further Aronstein (n 30).

106 See e.g. the 2019 Max Planck report and the REFIT report mentioned in n 32 and n 50 respectively.

107 Treaty Establishing the European Economic Community, signed in Rome, 25 March 1957.

counterparties – i.e. traders[108] – as regards both bargaining power and level of knowledge. The Directive aims to replace "the formal balance which the contract establishes between the rights and obligations of the parties with *an effective balance that re-establishes equality between them*" (italics added).[109]

Article 6(1) of the UCTD provides that unfair terms are not binding on consumers.[110] Whilst Article 6(1) also shows the correlation between rights of consumers and obligations of traders, it does not constitute a private-law remedy as such; consumers must still rely on national private law and civil procedure to effectuate their rights vis-à-vis traders. Article 7(1) obliges the Member States to provide for adequate and effective means to prevent the continued use of unfair terms in consumer contracts, but the Directive itself does not define what measures may constitute such means (apart from injunctions, see Article 7(2) UCTD).

In the absence of (full) harmonisation, the Member States have, in principle, procedural autonomy in respect of the choice and design of remedies for (alleged) infringements of EU law.[111] The assumption behind this seems to be that all Member States are subject to the rule of

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108 The term 'trader' will hereinafter be used to refer to the professional counterparties of consumers in business-to-consumer contracts, i.e. sellers or suppliers (Article 2(c) UCTD) who use standard terms and conditions.

109 See e.g. Case C-137/08 *VB Pénzügyi Lízing v Ferenc Schneider*, para 47; C-169/14 *Sánchez Morcillo I*, paras 22-23; Joined Cases C-154/15, C-307/15 and C-308/15 *Gutiérrez Naranjo* paras 53 and 55; Case C-453/10 *Pereničová and Perenič v SOS financ*, para 28.

110 The CJEU has held that Article 6(1) must be regarded as a provision of equal standing to national rules of public policy: see e.g. Case C-243/08 *Pannon v Sustikné Győrfi*, para 32; C-40/08 *Asturcom*, paras 51-52; Case C-421/14 *Banco Primus v Gutiérrez García*, para 42. Moreover, the CJEU has interpreted Article 6(1) in such a way that there is little room left for the Member States and their national courts to determine the substantive legal consequences of a finding of unfairness: see e.g. Case C-618/10 *Banco Español de Crédito v Calderón Camino* (***Banesto***); Joined Cases C-482/13, C-484/13, C-485/13 and C-487/13 *Unicaja Banco v Rueda and Caixabank v Rueda Ledesma*; Joined Cases C-96/16 and C-94/17 *Banco Santander v Mahamadou Demba and Mercedes Godoy Bonet and Rafael Ramón Escobedo Cortés v Banco de Sabadell*. See also Ebers (n 36) 888–894; Thomas Wilhelmsson, 'Unfair Contract Terms' in Geraint Howells, Christian Twigg-Flesner and Thomas Wilhelmsson, *Rethinking EU consumer law* (Abingdon 2018) 154.

111 As Prechal and Widdershoven have observed, procedural autonomy encompasses remedial autonomy: Sacha Prechal and Rob Widdershoven, 'Redefining the Relationship between "Rewe-Effectiveness" and Effective Judicial Protection' (2011) 4 Review of European administrative law 31, 31. See on the concept of 'procedural autonomy' in the context of the UCTD further (e.g.) Trstenjak and Beysen (n 48) 99; Beka (n 31) 19ff.

law and thus, national remedies and procedures should suffice for the purposes of EU law.[112] Article 47 of the Charter mirrors the Member States' obligation to provide remedies (Article 19 of the Treaty on European Union; **TEU**) by granting individuals the fundamental right to effective judicial protection.[113] According to Micklitz and Reich, it is implicitly recognised in the "tandem" of Article 19 TEU and Article 47 that consumers need effective legal protection and, more particularly, *courts* to defend their rights under the UCTD.[114] To understand what this means for the adjudication of unfair terms cases, it is necessary to take a look at the CJEU's case law concerning national remedies and procedures under the UCTD pre- and post-Lisbon (2009).

2.1.2 In practice: judge-made proceduralisation

Contours of a common procedural law for consumers

Whereas the UCTD may initially have been a "toothless tiger",[115] this is no longer the case. It has become the subject of widespread litigation between consumers and consumer organisations on the one hand and traders on the other. It has also become the focal point of many requests for preliminary rulings, which has led to a "judicial dialogue"[116] between

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112 Wilman (n 30) 27. On the issue of 'mutual trust' in this respect, see Dominik Düsterhaus, 'Judicial Coherence in the Area of Freedom, Security and Justice – Squaring Mutual Trust with Effective Judicial Protection' (2015) 8 Review of European administrative law 151. On the 'rule of law' concept in the case law of the CJEU, see Koen Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 Common Market Law Review 1625; Thomas Von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 35 Fordham International Law Journal 1311.

113 See also Case C-682/15 *Berlioz Investment Fund v Directeur de l'administration des contributions directes*, para 44; Case C-619/18 *European Commission v Republic of Poland*, para 54. See also Laurent Pech and Debbie Sayers, 'Article 47 - Right to an Effective Remedy. D. Analysis. VII-VIII. Article 47(2)' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1213.

114 Micklitz and Reich (n 43) 803–804.

115 Micklitz and Reich (n 43) 775.

116 See e.g. Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 625; 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 2014) 255 <http://ssrn.com/abstract=2126551>; Cafaggi and Iamiceli (n 24) 579.

national (civil) courts and the CJEU on the Directive's interpretation and application at the national level. The CJEU has promoted the Directive's effective enforcement by dealing with matters of national (procedural) law that are, strictly speaking, not covered by the Directive. It has done so in response to preliminary references from national (civil) courts, who were confronted with (perceived) shortfalls in their own legal framework. For instance, the CJEU has assessed national regimes for mortgage enforcement, even though the UCTD does not regulate mechanisms for the enforcement of claims, let alone security rights.[117] As a result, the Member States' procedural autonomy has been qualified, or even "severely curtailed".[118]

The CJEU has developed various requirements for the enforcement and protection by national (civil) courts of the rights consumers derive from the UCTD. It has mainly done so on the basis of the general principles of equivalence and effectiveness, which entail – in short – that rights should not be treated less favourably under EU law than under national law, and that national law must not render the exercise of EU rights practically impossible or excessively difficult.[119] These principles define the outer-limits of the Member States' procedural autonomy.[120] In addition, the CJEU has held that national courts must ensure the practical

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117 Case C-415/1 *Aziz v Catalunyacaixa*, para 50; Case C-34/13 *Kušionová*, paras 36 and 49; Case C-280/13 *Barclays Bank v Sánchez García and Chacón Barrera*, para 37.

118 Micklitz and Reich (n 43) 784.

119 See, inter alia, Case C-33/76 *Rewe-Zentralfinanz en Rewe-Zentral v Landwirtschaftskammer für das Saarland*, para 5; and Case C-45/76 *Comet v Produktschap v Siergewassen*, paras 13-16; Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten*, para 17; Case C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State*, para 12; Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, para 43. The CJEU's assessment of equivalence is, in principle, unrelated to its assessment of effectiveness, and the case law on the principle of effectiveness has a bigger impact on national (procedural) law: see Janek Tomasz Nowak, 'De bevoegdheid van EU-lidstaten voor de aanname 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) 37.

120 Bobek has observed that the term 'autonomy' is misguiding, because it minimalises the impact of EU law on national procedural law: 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) 321–322. Van Gerven has proposed the use of the term 'procedural competence' instead, to make clear that procedural matters remain the prime responsibility of the Member States.

or useful effect – also referred to as *effet utile* or full effectiveness – of the UCTD, which demands positive action from them.[121] They must apply their internal procedural rules in such a way as to achieve the outcome that unfair terms are not binding on consumers.[122]

The role of the CJEU consists of an ad hoc examination of procedural rules that, according to the referring court, might impair the effective protection of consumers under the UCTD. There has been a shift from a substance-focused to a more procedure-oriented approach ("proceduralisation").[123] It has been a gradual and fragmented process, on the basis of a substantive competence (Article 114 TFEU and Articles 6 and 7 UCTD). As a consequence, there is now a considerable body of case law – a "judicial *acquis*"[124] – in connection with procedural issues, which has changed the role and responsibilities of national (civil) courts in consumer cases.[125] This judicial *acquis* constitutes an "invisible pillar"[126] of judge-made requirements that has been said to affect consumer litigation more significantly than harmonised procedural mechanisms like the European Small Claims Regulation.[127] In the words of Advocate General Szpunar:

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121 See e.g. Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen v Kuijpers*, para 41; Case C-377/14 *Radlinger and Radlingerová v Finway*, para 79.

122 Case C-397/1 *Jörös v Aegon Magyarország Hitel*, para 52.

123 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; Magdalena Tulibacka, 'Proceduralisation of EU Consumer Law and Its Impact on European Consumers' (2015) 8 Review of European administrative law 51, 53. Tulibacka specifically refers to 'judicial proceduralisation'. The term 'proceduralisation' has also been used to refer to the adoption of EU procedural rules in legislative instruments. The CJEU's progressive interpretation of the UCTD has led to a more indirect, judge-made 'Europeanisation' of national remedies and procedures: Beka (n 31) 10, 17. It could be said that the CJEU has initiated the 'proceduralisation' process: Dubos (n 103) 53–54.

124 Oliver Gerstenberg, 'Constitutional Reasoning in Private Law: The Role of the CJEU in Adjudicating Unfair Terms in Consumer Contracts' [2015] European Law Journal 599, 603.

125 Gerstenberg (n 124) 604; Cafaggi (n 24) 242–243.

126 Bart Krans, 'EU Law and National Civil Procedure Law: An Invisible Pillar' (2015) 23 European Review of Private Law 567.

127 Dubos (n 103) 51–52; Janek Tomasz Nowak, 'Considerations on the Impact of EU Law on National Civil Procedure: Recent Examples from Belgium' in V Lazić and S Stuij (eds), *International Dispute Resolution. Short Studies in Private International Law* (TMC Asser Press 2018) 2.

> "Consumer protection has become *one of the essential fields of EU law* which (…) affects the everyday lives of EU consumers. (…) [A]s a result of Directive 93/13, the degree of protection afforded to EU consumers is quite high (…), conferring on them rights which must be protected by the national courts."[128]

The CJEU's case law adds a layer of procedural rules of European origin to the adjudication of domestic cases, arguably to the extent that the contours of a common "European consumer procedural law" can be discerned.[129] Remedies and procedures are (re)interpreted and developed in light of the EU (consumer) rights they serve to protect; they turn into "hybrids" in so far as they take up both national and European elements.[130] Examples of such hybrids will be given in chapters 4 and 5.

A more (pro)active role of courts

Under the UCTD, consumers have the subjective right to bring a legal action requesting that a court examines whether a standard term of a contract to which they are a party is unfair.[131] They must be able to take such action against a contract itself or against its enforcement.[132] However, consumers are not always the *claimant* who initiates an action. On the contrary: they are likely to find themselves on the "receiving end" – i.e. *defendant* side – of the proceedings, which will affect their legal position whether they participate in the proceedings or not.[133] In that case, they must at least be able to contest the merits of a claim arising from a contract that contains terms likely to be unfair.[134]

Often, the challenge for consumers is not so much to win the case on the substance, as to get it before a competent court despite procedural

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128 Case C-70/17 *Abanca v Salamanca Santos*, Opinion of AG Szpunar of 13 September 2018, point 53.

129 Hans-W Micklitz, 'Mohamed Aziz - Sympathetic and Activist, but Did the Court Get It Wrong?' in A Sodersten and JHH Weiler, *When the ECJ Gets it Wrong* (European Constitutional Law Network 2013) 1 <http://www.ecln.net/florence-2013.html>.

130 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 308–309.

131 Joined cases C-381/14 en C-385/14 *Sales Sinués and Drame Ba v Caixabank and Catalunya Caixa (Catalunya Banc)*, paras 21 and 42.

132 See e.g. Case C-32/14 *ERSTE Bank Hungary v Sugár*, para 59; C-176/17 *Profi Credit Polska*, para 63; C-266/18 *Aqua Med*, para 53.

133 Case C-147/16 *Karel de Grote*, Opinion of AG Sharpston, point 32.

134 Case C-377/14 *Radlinger*, para 56.

gaps or obstacles.[135] What many of the preliminary references to the CJEU have in common, is that they concern the scope for judicial intervention, especially if consumers do not stand up for their rights of their own accord.[136] Various factors other than mere 'inertia' may cause consumers "to forego any legal remedy or defence",[137] e.g. a lack of information about their legal options or the costs involved with litigation.[138] In *Océano*, the very first preliminary ruling on the UCTD, the CJEU highlighted the "real risk" that consumers do not challenge unfair terms because they are unaware of their rights or encounter difficulties in enforcing them.[139] This was the rationale behind the introduction of a duty of *ex officio* control: national (civil) courts have to compensate for procedural omissions on the part of consumers by performing unfair terms control of their own motion.[140] In this respect, Micklitz and Reich have referred to a "compensatory function" of civil procedure;[141] and Beka to an "active court doctrine".[142] Thus, the new balance the UCTD introduced in business-to-consumer (B2C) relationships extends into the procedural realm. The substantive and procedural protection of consumers are

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135 Mónika Józon, 'Unfair Contract Terms Law in Europe in Times of Crisis: Substantive Justice Lost in the Paradise of Proceduralisation of Contract Fairness' [2017] Journal of European Consumer and Market Law 157, 162.

136 See also Micklitz and Reich (n 43) 781; Ebers (n 36) 920.

137 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial v Murciano Quintero*, para 22; Case C-137/08 *Pénzügyi Lízing*, para 54. As Anthi Beka has observed, the term 'inertia' implies an indifference that does not correspond with the notion of overindebted and vulnerable consumers; "inertia" should not be equated with a renouncement of rights: Beka (n 31) 298–299.

138 See e.g. Loos, 'Access to Justice in Consumer Law' (n 53).

139 Joined Cases C-240/98 to C-244/98 *Océano*, para 26; Case C-473/00 *Cofidis v Fredout*, para 33; Case C-168/05 *Mostaza Claro v Centro Móvil Milenium*, para 28.

140 See also Case C-40/08 *Asturcom*, para 47 and, more recently, Case C-147/16 *Karel de Grote*, para 31; Case C-51/17 *OTP Bank and OTP Faktoring Követeléskezelő v Ilyés and Kiss*, para 88. In Case C-377/14 *Radlinger*, the duty of *ex officio* control is phrased broadly: courts must examine of their own motion "infringements of EU consumer protection legislation" (para 62). Their role is not limited to a mere power to rule on the compliance with the requirements flowing from that legislation; it also consists of the obligation to examine the issue and to establish the consequences (paras 70 and 73).

141 Micklitz and Reich (n 43) 803–804. See also Josep Maria Bech Serrat, 'Cláusulas suelo y autonomía procesal en la Unión Europea: ¿por qué no hacer una excepción a la cosa juzgada?' [2018] InDret 55 <https://www.raco.cat/index.php/InDret/article/view/332601>.

142 Beka (n 31) 129.

intertwined, to the extent that the latter is a necessary precondition for the former.

The CJEU's case law has created tension between the role civil courts fulfil within their own legal system and what the CJEU expects from them. A more (pro)active role may be at odds with, in particular, the principle of party autonomy, i.e. the parties define which issues are to be decided by the court on what (factual and legal) basis.[143] In the words of AG Trstenjak, "the principle that the subject-matter of the case is delimited by the parties" – the so-called 'dispositive principle' – has been departed from "in order to ensure the effectiveness of consumer protection desired by the EU legislature".[144] The specific characteristics of court proceedings are subordinate to the protection intended by the UCTD. This reflects a top-down, instrumental approach: national civil courts and civil procedure are merely a means to an end.[145] I will return to this later, when I discuss a potential paradigm shift under Article 47 of the Charter.[146]

2.1.3 Proceduralised constitutionalisation

The start of the judge-made proceduralisation process under the UCTD predates the Charter.[147] A constructive reading of the Directive has allowed the CJEU to "infuse a common standard of effective judicial protection into the national procedural orders".[148] Whereas it could be said that the Charter has arrived "late at the party"[149] in the debate on weaker party protection and access to justice, Article 47 of the Charter is far from obsolete, as shown by multiple references in the CJEU's more

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143 See e.g. Rott (n 101) 89–90; Hanna Schebesta, 'Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom' [2010] European Review of Private Law 847, 849.

144 Case C-618/10 *Banesto*, Opinion of AG Trstenjak, point 33. See also Beka (n 31) 79. Beka observes that this principle is the reflection of a legal culture which respects party autonomy, participation and individuality as well as judicial impartiality.

145 See also Storskrubb (n 53) 39; Tulibacka (n 35) 1533–1534; Półtorak (n 19) 11; Wilman (n 30) 470.

146 See, in particular, section 2.5.

147 The Charter was proclaimed on 18 December 2000 (six months after the landmark judgment in Joined Cases C-240/98 to C-244/98 *Océano*) and entered into force on 1 December 2009 (seven months after Case C-243/08 *Pannon*).

148 Safjan and Düsterhaus (n 14) 13–14.

149 Weatherill, Vogenauer and Weingerl (n 15) 257.

recent case law.[150] In 2013, the CJEU explicitly recognised for the first time that Article 47 is binding on national (civil) courts when they adjudicate disputes under the UCTD in the case of *Banif Plus Bank*. The CJEU held that:

> "in implementing European Union law, the national court must also respect the requirements of effective judicial protection of the rights that individuals derive from European Union law, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. Among those requirements is the principle of *audi alteram partem*, as part of the rights of defence and which is binding on that court, in particular when it decides a dispute on a ground that it has identified of its own motion".[151]

It appears that effectiveness is no longer the sole parameter for the assessment of national procedural law in light of EU (consumer) law. The rights of defence are elevated to the level of EU fundamental rights. The fact that the CJEU refers to Article 47 more regularly suggests an increased attention to procedural safeguards. In so far as (a lack of) effective judicial protection is framed as a fundamental rights issue, a move towards "proceduralised constitutionalisation" could be detected:[152] proceduralisation with a constitutional dimension.

As regards the UCTD, key issues identified in the case law and academic debate are the duty of *ex officio* control; substantive issues, such as the legal consequences of a finding of unfairness; and the interaction between judicial and other ways of enforcement. Article 47 places the emphasis on the former, i.e. an effective remedy and a fair hearing before a *court*. Whilst *ex officio* control could be seen as a manifestation of effective judicial protection,[153] the assessment of a norm infringement – the substantive unfairness test – must be distinguished from the procedural preconditions that make such an assessment possible, and subsequent (substantive) remedies. As will become apparent in this study, Article 47 predominantly plays a role in respect of *judicial remedies* – in the sense of a (procedural) means of recourse – and *procedural safeguards*. It is not so much about determining what private parties are

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150 A reference to Article 47 of the Charter was made in almost 30% of cases on the UCTD before the CJEU. See subsection 1.3.3 for an overview.

151 Case C-472/11 *Banif Plus Bank*, para 29.

152 Domurath (n 54) 172.

153 See e.g. Pech and Sayers (n 113) 1222.

substantively entitled to, as it is about facilitating them to exercise their (EU) rights in court.

The (inter)relation between Article 47 and the notion of (full) effectiveness is a key issue in the case law and literature. One explanation for this can be found in the historical origins of Article 47, which spring from two different sources.[154] There is the line of case law developed by the CJEU to test the compliance of national remedies and procedures with EU law, in particular the principles of equivalence and effectiveness. In addition, Article 47 reaffirms the principle that Member States must guarantee "real and effective judicial protection".[155] The principle of effective judicial protection in EU law stems from "the constitutional traditions common to the Member States" and the right to a fair trial and an effective remedy enshrined in Articles 6 and 13 ECHR.[156] This principle has been codified as an EU fundamental right: Article 47 is its written, statutory expression.[157]

This twofold origin results in an inherent dichotomy, which becomes particularly visible in civil proceedings and will be further explored in this study. Whereas the (full) effectiveness of the UCTD demands that the court performs unfair terms control *ex officio*, it follows from *Banif Plus Bank* that the requirements of a fair hearing must be

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154 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.

155 Case C-14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen*, para 23. For an extensive study on the pre-Lisbon principle of effective judicial protection in EU law, see Engström, 'The Europeanisation of Remedies and Procedures through Judge-Made Law – Can a Trojan Horse Achieve Effectiveness?' (n 33).

156 See e.g. Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, para 18; Case C-432/05 *Unibet*, para 37; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, para 335; Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Rosalba Alassini v Telecom Italia*, para 61; Case C-199/11 *Europese Gemeenschap v Otis*, paras 46-47; Case C-93/12 T *Agrokonsulting-04-Velko Stoyanov v Izpalnitelen direktor na Darzhaven fond 'Zemedelie' — Razplashtatelna agents*, para 59.

157 Johanna Engström, 'The Principle of Effective Judicial Protection after the Lisbon Treaty. Reflection in the Light of Case C-279/09 DEB Deutsche Energiehandels- Und Beratungsgesellschaft MbH' (2011) 4 Review of European administrative law 53, 53; 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.

observed before a decision is given. Article 47 contains *autonomous procedural safeguards* that could be interpreted in ways that go beyond the goals of specific instruments of EU law – like the UCTD – or the laws of the Member States. Against this background, this study aims to investigate whether and to what extent Article 47 may operate as a separate (negative) yardstick or a (positive) standard for the adjudication of EU (consumer) rights. In the second part of this chapter, I will take a closer look at its normative content, scope and effect, as follows from the CJEU's case law.

2.2 NORMATIVE CONTENT OF ARTICLE 47: A MULTI-FACETED PROVISION

2.2.1 Core components of the fundamental right to effective judicial protection

Article 47 of the Charter is multi-faceted: it comprises both the right to an effective remedy before a tribunal (first paragraph) and fair trial or due process requirements (second and third paragraph). Pursuant to Article 52(1) of the Charter, the essence of Charter rights, including Article 47, must always be respected; Dougan has referred to "an irreducible core of protection".[158] Restrictions of those rights must be justified and should not undermine their essential content.[159] Which components constitute the core of Article 47 and to what extent they can be restricted, is subject to judicial interpretation.[160] Most requirements following from Article 47 have been interpreted and construed judicially.[161] To the extent that there is consensus, the following list gives an indication of Article 47's core components:[162]

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158 Michael Dougan, 'The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts' in Paul Craig and Gráinne De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 431.

159 Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Bauer*, para 59. See further subsection 2.4.1.

160 Takis Tridimas and Giulia Gentile, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 German Law Journal 794, 812.

161 Vernadaki (n 70) 61; Malu Beijer, *The Limits of Fundamental Rights Protection by the EU. The Scope for the Development of Positive Obligations* (Intersentia 2017) 309.

162 See e.g. Case C-199/11 *Otis*, para 48. For an extensive overview, see e.g. Pech and Sayers (n 113); Vernadaki (n 70). See also European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European law relating to access to justice* (2016), which can be consulted on fra.europa.eu; Fabrizio Cafaggai and Federica

(i) The right of access to an independent and impartial tribunal
(ii) The right to an effective (judicial) remedy
(iii) The principle of equality of arms
(iv) The rights of defence, in particular the right to be heard
(v) The right to legal aid
(vi) The right to adjudication within a reasonable time

A short introduction is provided below of what these core components entail, in so far as they are relevant for this study. They will be further elaborated in the subsequent chapters. Not all of them play an equally important role in the analysed case law. The right to legal aid and the right to adjudication within a reasonable time are not explicitly addressed as such. Therefore, they will be discussed only briefly here, and not separately in chapter 3.

(i) Access to an independent and impartial tribunal

The first core component of Article 47 of the Charter is the right of access to court.[163] Article 47 refers to "an independent and impartial tribunal established by law". The CJEU's case law on Article 267 TFEU clarifies when a body is considered a court or tribunal within the meaning of EU law. This depends on certain conditions, inter alia whether it is established by law, it is permanent, its jurisdiction is compulsory, its procedure is *inter partes* (i.e. contentious), it applies rules of law, it is independent and it gives judgment in proceedings leading to a decision of a judicial nature.[164] A court or tribunal must exercise its functions autonomously and impartially, with no interest in the outcome of the proceedings apart from the strict application of the rule of law.[165] To be able to determine a dispute concerning rights and obligations arising

Casarosa (eds), *ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter. Module 3 – Right to an Effective Remedy* (EUI 2017), available at cjc.eui.eu/projects/actiones.

163 See e.g. Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, para 62; C-199/11 *Otis*, paras 48-49; Case C-470/12 *Pohotovost'*, para 53; Case C-112/13 *A. v B.*, para 51; Case C-437/13 *Unitrading v Staatssecretaris van Financiën*, para 20; Case C-34/13 *Kušionová*, para 59.

164 See e.g. Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, para 38; Case C-503/15 *Margarit Panicello*, paras 27-28. See also Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, 25/11/2016, OJ 2016, C 439/01 No. 9.

165 See e.g. Case C-503/15 *Margarit Panicello*, paras 37-38.

under EU law, a court or tribunal must have the power to consider all the questions of fact and law that are relevant to the case before it.[166]

The right of access to court is not absolute. An example of a restriction of the right of access to court that could be justified is the introduction of additional (procedural) steps before an action is brought. The case of *Alassini*, for instance, concerned an out-of-court settlement procedure under Italian law, which formed a mandatory step for individuals to bring a claim against, in this case, a telecom provider. The CJEU balanced this restriction of the right of access to court against objectives of general interest, i.e. to facilitate the quicker and less expensive settlement of disputes and to alleviate the burden on the court system.[167] The legislation at issue pursued a legitimate aim and was not disproportionate. The CJEU also referred to the principle of effectiveness: it was not practically impossible or excessively difficult for individuals to exercise their rights derived from, in this case, the Universal Service Directive.[168] This may be different if the national court were to find that the settlement procedure could be accessed only by electronic means or that no interim measures were available in urgent situations.[169] The CJEU adopted a similar reasoning in *Menini*, which concerned mandatory mediation procedure under Italian law. The Consumer ADR Directive[170] does not preclude mediation as a mandatory preliminary step, as long as it does not prevent the parties from exercising their right of access to the judicial system. The CJEU based its conclusion on the principle of effective judicial protection – with reference to *Alassini*[171] – and the ADR Directive itself, which explicitly refers to Article 47 of the Charter.[172]

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166 Case C-199/11 *Otis*, para 49; Case C-403/16 *El Hassani v Minister Spraw Zagranicznych*, para 39.

167 Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, paras 63-64.

168 Directive 2002/22/EC on Universal Service and users' rights relating to electronic communications networks and services (OJ L 108, 24 April 2002, p. 51).

169 Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, paras 53-60.

170 Directive 2013/11/EU on alternative dispute resolution for consumer disputes (OJ L 165, 18 June 2013, p. 63).

171 Case C-75/16 *Menini and Rampanelli v Banco Popolare Società Cooperative*, paras 55 and 61.

172 Recital 45: "The right to an effective remedy and the right to a fair trial are fundamental rights laid down in Article 47 of the Charter of Fundamental Rights of the European Union. Therefore, ADR procedures should not be designed to replace court procedures and should not deprive consumers or traders of their rights to seek redress before the courts. This Directive should not prevent parties from exercising

Other examples of restrictions of the right of access to court are time-limits and the costs of judicial proceedings.[173] Costs must not represent an insurmountable obstacle to access to the courts:[174] "prohibitively expensive justice means no justice."[175] The question to what extent restrictions to the right of access to court and other core components of Article 47 can be justified will be further considered below.[176]

(ii) An effective (judicial) remedy

The right to an effective (judicial) remedy is generally associated with the opportunity of obtaining actual redress for an infringement of one's (EU) rights, which presupposes access to justice.[177] What constitutes an *effective* remedy depends on the circumstances of the case, as long as the remedy is effective in practice as well as in law.[178] In the words of AG Kokott:

> "[Article 47 of the Charter] is invoked mainly on account of its procedural requirements, but they are merely a means to an end, namely to guarantee an *effective* remedy. However, a remedy is effective only if the finding of infringements of the law has appropriate consequences."[179]

Article 47 requires the availability of a *means of recourse* to realise the appropriate consequences of a rights violation. What those consequences are, does not follow from Article 47 itself. An effective (judicial) remedy

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their right of access to the judicial system. In cases where a dispute could not be resolved through a given ADR procedure whose outcome is not binding, the parties should subsequently not be prevented from initiating judicial proceedings in relation to that dispute". On ADR and procedural safeguards, see further Anne Kamphorst, 'The Right to a Fair Trial in Online Consumer Dispute Resolution' [2019] Journal of European Consumer and Market Law 175.

173 See e.g. Case C-73/16 *Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy*, para 76. The fact that the claimant has not been deterred, in practice, from asserting the claim is not in itself sufficient to establish that the proceedings are not prohibitively expensive: Case C-260/11 *The Queen, on the application of David Edwards v Environment Agency*, para 43.

174 Case C-279/*09 DEB*, para 61.

175 Case C-470/16 *North East Pylon Pressure Campaign Limited Maura Sheehy v An Bord Pleanála Minister for Communications, Climate Action and Environment*, Opinion of AG Bobek, point 34.

176 See subsection 2.4.1.

177 *Handbook on European law relating to access to justice* (2016), 92.

178 *Handbook on European law relating to access to justice* (2016), 95.

179 Case C-411/17 *Inter-Environnement Wallonie ASBL v Conseil des ministres*, Opinion of AG Kokott, point 199.

might be understood as the possibility of appeal before a court against an administrative decision or the annulment of a legislative act. This type of judicial review does not normally occur in private law adjudication.[180] Nevertheless, access to a (competent) court to seek redress for an infringement of one's EU rights is also an important prerequisite here.

Another prerequisite is the finality of judicial decisions. The effectiveness of a (judicial) remedy would be illusory if a judicial decision that is final and binding remains inoperative. There must be a means of securing observance of the judgment.[181] In the words of AG Bobek:

> "[Article 47] cannot be reduced to the 'input' stage leading to a court's decision, namely the mere possibility to 'access the court building', institute proceedings, and be allowed to plead one's case. It naturally also includes certain requirements as to the 'output' of the entire endeavour, that is, the stage of execution of the final decision".[182]

The execution of a judgment is therefore an integral part of the right to a fair trial.[183]

(iii) Equality of arms

Article 47 comprises the principle of equality of arms, which is "a corollary of the very concept of a fair hearing".[184] It constitutes a specific expression of the general principle of equality before the law – or: non-discrimination – laid down in Article 20 of the Charter.[185] Each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent.[186] The aim is to ensure a (procedural) balance between the parties, inter alia by guaranteeing that any document submitted to

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180 Storskrubb (n 53) 296–298.

181 Case C-752/18 *Deutsche Umwelthilfe v Freistaat Bayern*, para 35. See also Wagner (n 69) 34.

182 Case C-556/17 *Torubarov v Bevándorlási és Menekültügyi Hivatal*, Opinion of AG Bobek, point 59.

183 Case C-205/15 *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (***Toma***), para 43.

184 Case C-205/15 *Toma*, para 47.

185 Case C-205/15 *Toma*, para 36.

186 See also Case C-169/14 *Sánchez Morcillo I*, para 49; Case C-682/15 *Berlioz*, para 96.

the court may be examined and challenged by any party to the proceedings.[187]

The case of *Toma* shows how the right of access to court, the right to legal aid and the principle of equality of arms are closely related. The case was about an exemption from court fees for legal persons governed by public law which did not apply to legal persons governed by private law. This could be framed as an issue of access to court or legal aid, but also of equality before the law.[188] The CJEU considered the case under Article 47, but ultimately found no violation: the applicants were not placed in a clearly less advantageous position compared with their opponents and the fairness of the procedure was therefore not called into question.[189]

(iv) Rights of defence

The rights of defence occupy a prominent position in the organisation and conduct of a fair hearing.[190] The right to be heard – also referred to as the principle of *audi alteram partem*[191] – and the so-called adversarial principle form part of the (procedural) rights of defence, which are inherent to Article 47.[192] In *Banif Plus Bank*, the CJEU reiterated that:

> "[I]n order to satisfy the requirements associated with the right to a fair hearing, it is important for the parties to be apprised of, and to be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings".[193]

The right to be heard applies in all (judicial) proceedings[194] and entails that everyone should have the possibility to set out their views, before a decision is taken that could adversely affect their interests.[195] The time

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187 Case C-199/11 *Otis*, paras 71-72.

188 Case C-205/15 *Toma*, paras 45-46 and paras 35-36 respectively.

189 Case C-205/15 *Toma*, para 54.

190 See e.g. Case C-325/11 *Alder and Alder v Orlowska and Orlowski*, para 35.

191 Literal translation: hear the other side.

192 Case C-300/11 *Z.Z. v Secretary of State for the Home Department*, paras 55 and 57.

193 Case C-472-11 *Banif Plus Bank*, para 30, with reference to Case C-89/08 *European Commission v Ireland*, paras 55-56.

194 Case C-277/11 *M.M. v Ministry for Justice, Equality and Law Reform*, para 82.

195 Case C-418/11 *Texdata Software*, para 83; C-119/15 *Biuro*, Opinion of AG Saugmandsgaard Øe, point 61, referring to settled case law of the CJEU.

period within which the right to be heard must be exercised should be sufficient to allow the parties to effectively make known their views.[196]

Other components

The requirement of adjudication within a reasonable time aims to protect the parties against excessive procedural delays, but there are no set time frames to determine what is reasonable.[197] This depends on the circumstances of the case, such as its complexity and the conduct of the parties.[198]

Furthermore, Article 47 specifically provides that everyone shall have the possibility of being advised, defended and represented, and that 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. In the case of *DEB*, the CJEU held that the national court assessing the conditions for granting legal aid – in the form of assistance by a lawyer or an exemption from costs – must take several factors into account, including the importance of what is at stake for the applicant, the applicant's capacity to represent themselves effectively, and the amount of the costs of the proceedings.[199] The bottomline is that it is important for litigants not to be denied the opportunity to present their case effectively before the court.[200]

2.2.2 More than a minimum level of protection

Article 47 of the Charter is not the only instrument that guarantees the right to an effective remedy and a fair hearing within the EU; this right is also protected by national constitutions and, in particular, Articles 6 and 13 ECHR. However, the right to effective judicial protection, recognised as part of EU law by virtue of Article 47 of the Charter, has acquired a separate identity and content that is partly shaped, but not

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196 See e.g. Case C-69/10 *Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, paras 66-67: the period prescribed must be sufficient in practical terms to enable the applicant to prepare and bring an effective action.

197 *Handbook on European law relating to access to justice* (2016), 135-136.

198 Case C-58/12 *Groupe Gascogne v European Commission, para 85; Case C-385/07 Der Grüne Punkt – Duales System Deutschland v Commission of the European Communities*, para 186.

199 Case C-279/09 *DEB*, para 61.

200 Case C-279/09 *DEB*, para 45.

defined by Articles 6 and 13 ECHR.[201] The CJEU has held that Article 47 must be "interpreted in its context, in light of other provisions of EU law, the law of the Member States and the case law of the European Court of Human Rights".[202] To clarify the normative content of Article 47 and in particular its embedding in EU law it is helpful to contrast it with the ECHR.

All current EU Member States are parties to the ECHR, but its effect in national (procedural) law – in particular, its role in judicial reasoning by national (civil) courts as reflected in their decisions – may vary. In Spain, Article 24 of the Spanish Constitution serves as the primary basis to assess alleged infringements in consumer cases where the right to effective judicial protection is at stake.[203] This provision recognises the individual right to effective judicial protection, which is then interpreted in light of the ECHR. The dual regime of fundamental rights protection – at the national level and at EU level – has led to a preliminary reference in *Melloni*. The CJEU held that the Member States could apply a higher fundamental rights standard than the Charter, in so far as the primacy, unity and effectiveness of EU law are not compromised.[204] The protection of fundamental rights within the EU must be ensured within the framework of the structure and objectives of the EU.[205] National authorities and courts are allowed more room for manoeuvre where an EU legal act – e.g. a minimum harmonisation directive like the UCTD – calls for national implementing measures, as long as those can be realised with respect for both the effectiveness of EU law and the fundamental rights protected by the Charter, as interpreted by the CJEU.[206] In chapter 4, examples will be given of cases where the CJEU provided a

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201 Case C-69/10 *Samba Diouf*, Opinion of AG Cruz Villalón, point 39. See also Safjan and Düsterhaus (n 14) 38.

202 C-279/09 *DEB*, para 37. Pursuant to Article 6(3) TEU, the fundamental rights as guaranteed by the ECHR constitute general principles of EU law.

203 See further subsections 4.1.2 and 4.1.3.

204 Case C-399/11 *Melloni v Ministerio Fiscal*, para 60, with reference to Article 53 Charter. See also Case C-206/13 *Siracusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, paras 31-32; Case C-112/13 *A. v B.*, para 44.

205 Case C-399/11 *Melloni v Ministerio Fiscal*, Opinion of AG Bot, point 107.

206 Ibid, points 124 and 127; Case C-476/17 *v Hütter and Schneider-Esleben*, paras 79-80. See also Hilde K Ellingsen, 'Effective Judicial Protection of Individual Data Protection Rights: Puškár' (2018) 55 Common Market Law Review 1879, 1089, 1091.

higher level of protection in the context of the UCTD than the Spanish Constitutional Court.[207]

In the Netherlands, Article 6 ECHR appears to be the primary reference. Dutch civil courts generally assume that Article 47 of the Charter and Article 6 ECHR are interchangeable.[208] Even though there is overlap between the two provisions, the Dutch courts' assumption is not entirely correct, for various reasons.

Firstly, Article 47 of the Charter has direct effect, irrespective of the status accorded to it in national (constitutional) law.[209]

Secondly, unlike Article 6 ECHR, the right to a fair hearing of Article 47 of the Charter is not confined to disputes concerning civil rights and obligations or criminal charges, but extends to all areas of EU law.[210] At the same time, Article 6 ECHR is cross-sectoral: it applies to everyone within the jurisdiction of the State parties (Article 1 ECHR), and to all civil proceedings regardless of the subject-matter. The Charter only binds the Member States when they are implementing EU law (Article 51(1) of the Charter). Thus, the application of Article 47 is confined to the scope of EU law. This could be seen as a limitation. However, it could also be seen as an extension: EU law may provide a higher level of protection (Article 52(3) of the Charter). Article 47 of the Charter may impose more demanding requirements than Articles 6 and 13 ECHR. Examples will be given in subsequent chapters where Article 47 seems to go beyond a minimum level of protection in the context of the UCTD.

Thirdly, Article 47 also protects the right to an effective remedy before a tribunal. Unlike Article 13 ECHR, Article 47 of the Charter may be relied upon in respect of any EU rights, not only the rights set forth in the Charter.[211] Whilst the ECHR does not explicitly provide for any specific consumer rights,[212] EU law does. This emphasises the special importance of Article 47 of the Charter in the context of EU consumer

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207 See subsections 4.3.2 and 4.4.2.

208 See subsection 5.1.2.

209 See further subsection 2.3.2 below.

210 Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02, 29-30.

211 Prechal (n 157) 148.

212 Benöhr (n 19) 49; Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' (n 75) 33. On weaker party protection and the ECtHR, see Jan Zglinski, 'Doing Too Little or Too Much? Private Law Before the European Court of Human Rights' (2018) 37 Yearbook of European Law 1, 25–27.

law. Article 47 is not connected to weaker party protection as such, but in unfair terms cases it is read in conjunction with the Directive.

And lastly, the ECtHR and the CJEU have different institutional positions, although there is no formal hierarchy between their decisions.[213] The ECtHR may find a violation of the ECHR in a concrete case and provide a "safety net" – in the form of compensation – to an individual applicant when domestic remedies have been exhausted.[214] But its case law is case-specific, and not the only source of interpretation for the CJEU. The CJEU may assess the validity of EU law and interpret it, in response to a request of a national (civil) court for a preliminary ruling about a question of EU law (Article 267 TFEU). Exhaustion of local remedies is not required. Many cases do not, or only partially concern fundamental rights issues.

In short, it could be said that the Charter is now the primary point of reference as regards fundamental rights in EU (consumer) law. In cases that involved the right to effective judicial protection, the CJEU has repeatedly stated that it was necessary to refer only to Article 47 of the Charter.[215] This does not mean that other instruments have become irrelevant. On the contrary: the ECHR still offers a minimum level of protection, which cannot be restricted or adversely affected by the Charter (Article 53 of the Charter). Moreover, the interpretation of the ECHR remains instructive for the CJEU.

2.3 SCOPE AND DIRECT EFFECT OF ARTICLE 47 IN THE CONTEXT OF THE UCTD

2.3.1 Scope of application

Scope ratione materiae: applicability of Article 47 in unfair terms cases

The applicability of Article 47 of the Charter to the adjudication of unfair terms cases was not immediately evident. National rules of civil procedure have often not been specifically designed for consumer

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213 See e.g. Aida Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (Oxford University Press 2009) 31–32.

214 Martin Kuijer, 'Fundamental Rights Protection in the Legal Order of the European Union', *Research handbook on EU Institutional Law* (Elgar Publishing 2016) 244.

215 Case C-682/15 *Berlioz*, para 54; Case C-199/11 *Otis*, para 47; Case C-386/10 *Chalkor AE Epexergasias Metallon v European Commission*, para 51.

litigation. The EU does not have a general competence in the field of civil procedure. Moreover, the Member States have retained the competence to lay down detailed (procedural) rules for the enforcement and protection of the subjective rights the UCTD confers on consumers. Therefore, the question was whether national procedural law could be seen as an implementation of EU (consumer) law for the purposes of engaging Article 47.

The Charter does not fully harmonise fundamental rights protection in the EU; it is not an all-embracing fundamental rights regime.[216] Charter provisions cannot, in and of themselves, trigger their own application or form the basis of any new power of the (CJ)EU.[217] The CJEU's fundamental rights jurisdiction is limited to interpreting provisions of (primary and secondary) EU law in light of the Charter.[218] Article 47 expressly refers to the protection of rights (and freedoms) guaranteed by EU law. This indicates that it has an accessory character: its application requires a connecting link with another instrument of EU law.[219]

At the same time, the CJEU interprets Article 51(1) of the Charter broadly: situations cannot exist that are covered by EU law without the fundamental rights guaranteed by the Charter being applicable.[220] In other words: the applicability of EU law triggers the applicability of Article 47, regardless of the existence or absence of harmonised remedies and procedures.[221] Article 47 encompasses several procedural rights and

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216 Weatherill, Vogenauer and Weingerl (n 15) 267; Olha Cherednychenko, 'The EU Charter of Fundamental Rights and Consumer Credit: Towards Responsible Lending?' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 143. On the limits of the EU fundamental rights regime, see Beijer (n 161).

217 Prechal (n 157) 146.

218 See e.g. Case C-403/16 *El Hassani*, para 33. 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, 132, 136.

219 Pech and Sayers (n 113) 1215.

220 Case C-617/10 *Åklagaren v Åkerberg Fransson*, paras 18-21; Case C-206/13 *Siracusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, paras 24-25; Case C-205/15 *Toma*, para 23. See also Beijer (n 218) 137.

221 See e.g. Case C-243/15 *Lesoochranárske zoskupenie tegen Obvodný úrad Trenčín* (*Brown Bears II*), para 65. Safjan and Düsterhaus (n 14) 25; Nowak (n 127) 8; Koen Lenaerts, 'The Court of Justice of the European Union and the Protection of Fundamental Rights' [2011] Polish Yearbook of International Law 79, 87.

safeguards that must be observed in all cases covered by EU law, including cases concerning unfair terms in consumer contracts.

> The *Sánchez Morcillo* case related to mortgage enforcement proceedings where unfair terms were initially not even at issue. Advocate General Wahl had therefore concluded that the case did not concern the implementation of EU law.[222] This may be true to the extent that the applicable procedural rules pertained to enforcement against all mortgage-debtors, not only consumers. However, the CJEU held that enforcement proceedings may fall within the scope of the UCTD, where they are based on a mortgage loan agreement concluded with consumers. In that event, those proceedings are subject to the requirements arising out of the CJEU's case law on the effective protection of consumers under the UCTD; this implies a requirement of judicial protection, guaranteed by Article 47 of the Charter, that is binding on national courts.[223]

It can nevertheless be debated whether Article 47 may impose farther-reaching requirements than the instrument of EU law that triggers its application.[224] The UCTD is a minimum harmonisation directive. The Charter is arguably not applicable in so far as the Member States may provide a higher level of (substantive) protection,[225] or where EU law leaves contractual autonomy untouched, for instance in respect of B2B contracts;[226] or in other cases – such as property and non-contractual liability – not covered by the Directive.[227]

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222 Case C-169/14 *Sánchez Morcillo I*, Opinion of AG Wahl, points 73-74.

223 Case C-169/14 *Sánchez Morcillo I*, paras 25 and 35.

224 See e.g. Case C-193/17 *Cresco Investigation v Achatzi*, where the CJEU went beyond the requirements of the applicable directive to impose an obligation on national courts to guarantee individuals the legal protection afforded to employees under Article 21 of the Charter (paras 78 and 80).

225 Marija Bartl and Candida Leone, 'Minimum Harmonisation after Alemo-Herron: The Janus Face of EU Fundamental Rights Review' (2015) 11 European Constitutional Law Review 140. See differently: Leczykiewicz, '"Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?' (n 17) 484.

226 Reich, *General Principles of EU Civil Law* (n 71) 122.

227 Case C-349/18 *Nationale Maatschappij der Belgische Spoorwegen v Kanyeba*, paras 72-73; Case C-598/15 *Banco Santander v Sánchez López*, further discussed in subsection 3.3.2 below.

However, directives must be implemented and interpreted in conformity with Article 47.[228] National procedural rules can have an impact on the "protection guarantees" resulting from the UCTD, read in light of Article 47.[229] It could therefore be submitted that the Member States and their national (civil) courts are bound by Article 47 even where they have procedural autonomy and are free to choose "adequate and effective means" to combat unfair terms.[230] As Bobek has put it in his much-cited article 'Why There Is No Principle of "Procedural Autonomy" of the Member States': once a right originates in EU law, its effective enforcement potentially covers all aspects of national procedural law.[231] It could be said that the same applies to Article 47, which has potentially wide ramifications. This will be further explored in chapter 3.

In *Associação Sindical dos Juízes Portugueses*, the CJEU seemed to go even further. It reiterated that effective judicial protection is essential for the rule of law.[232] Therefore, Member States must ensure that all national courts and tribunals within their judicial system which deal with cases in the fields covered by EU law meet the requirements of effective judicial protection, including judicial independence.[233] The CJEU did not only refer to the application or interpretation of EU law, but also to the task of adjudication and the autonomous exercise of judicial functions, to which the guarantee of independence is inherent.[234] This would imply that all national courts in all Member States must meet the requirements of Article 47 of the Charter at an institutional level – not only in cases falling within the scope of EU law, but always.

AG Bobek has distinguished this "transversal" case from remedy- or procedure-specific issues, which do not structurally concern the entire judicial function.[235] One could further distinguish the applicability of

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228 Case C-73/16 *Puškár*, para 59; Case C-214/16 *King v The Sash Window Workshop Ltd and Richard Dollar*, para 41.

229 Case C-118/17 *Dunai*, paras 38 and 60.

230 Iglesias Sánchez (n 18) 1594.

231 Bobek (n 120) 320.

232 Case C-64/16 *Associação Sindical dos Juízes Portugueses*, paras 30 and 36. See also Case C-362/14 *Schrems v Data Protection Commissioner*, para 95 and Case C-279/09 *DEB*, para 58.

233 Case C-64/16 *Associação Sindical dos Juízes Portugueses*, paras 37 and 41.

234 Case C-64/16 *Associação Sindical dos Juízes Portugueses*, paras 40 and 42-44.

235 Case C-556/17 *Torubarov*, Opinion of AG Bobek, points 54-55.

Article 47 at a systemic level, which requires the Member States to maintain a system of effective remedies and adequate procedures, and in a concrete case, which requires the observation of procedural safeguards in cases covered by EU law. The CJEU's case law on the UCTD mainly pertains to remedy- or procedure-specific issues on a systemic level: it concerns the question as to the compatibility of national procedural law with Article 47 in the context of the Directive.

Scope ratione personae: protection of both consumers and traders

Consumers are entitled to effective judicial protection in respect of the rights the UCTD confers on them. The UCTD is not aimed at the protection of traders, but that does not mean they do not enjoy judicial protection in unfair terms cases at all. It should be considered whether traders can also rely on Article 47, or whether it can only be invoked by individuals who derive specific subjective rights from EU (consumer) law.

AG Bobek has pointed out that Article 47 alone does not create standing (i.e. active legitimacy to bring a claim); it is not "universally applicable".[236] However, the applicability of the Charter already implies a connection with EU law, also when EU law is enforced *against* individuals. In the words of AG Wathelet:

> "To require that that 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."[237]

In the same vein, the CJEU reiterated that the Charter is applicable in all situations governed by EU law.[238] Article 47 does not only pertain to protective norms.[239] Its protection extends to parties adversely affected by measures that are based on national provisions implementing a directive, even if they cannot derive any rights from it.[240] Here, Article 47

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236 Case C-403/16 *El Hassani*, Opinion AG Bobek, point 74-82.

237 Case C-682/15 *Berlioz*, Opinion of AG Wathelet, point 63.

238 Case C-682/15 *Berlioz*, paras 48-49. See also Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, Opinion of AG Sharpston, point 88.

239 See also Półtorak (n 19) 241–242.

240 Case C-682/15 *Berlioz* para 59.

operates as a shield, not a sword. Similarly, the protection of Article 47 in unfair terms cases is not limited to consumers; traders can also rely on it. Even if there is no other basis in EU law that provides for a scheme of effective judicial protection for traders, they still have a right to be heard.[241] The key question is whether a case falls within the scope of the UCTD.

It has been argued that Article 47 should already be applicable as soon as one of the parties relies on (substantive) EU law, i.e. before the scope of the case has been established by a court. The very fact that there is a dispute over alleged EU rights should suffice for the purposes of Article 47.[242] The above-cited case of *Banif Plus Bank* seems to confirm this; the right to be heard must be observed before the court takes a final decision regarding a potentially unfair term.[243]

A follow-up question would be whether Article 47 also guarantees the right to an effective (judicial) remedy against a violation of procedural safeguards in and of themselves, not just a violation of other EU rights. The CJEU has held that a procedural irregularity that infringes a fundamental right guaranteed by Article 47 gives rise to an entitlement of the party concerned to remedy – again, as long as the case falls within the scope of EU law.[244] In *Kadi*, for instance, the CJEU found an independent violation of the applicants' rights of defence, especially their right to be heard.[245] It emphasised "the need to accord the individual a sufficient measure of procedural justice," in the course of judicial review

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241 Case C-119/15 *Biuro*, para 26.

242 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) 1213; Prechal (n 157) 148. Hofmann refers to the requirement of an arguable complaint in respect of Article 13 ECHR: a court must be able to assess whether an infringement has occurred and if so, provide redress, but Article 47 of the Charter does not guarantee a favourable outcome.

243 See subsection 2.1.3.

244 Case C-58/12 *Groupe Gascogne*, para 72, with reference to ECtHR 26 October 2000, Appl. No. 30210/96 *Kudla v Poland*. For instance, an action for damages can be brought (before the General Court itself) for a failure of the General Court of the European Union to adjudicate within a reasonable time: *Groupe Gascogne*, paras 81-83; Case C-385/07 *Der Grüne Punkt*, para 195. The reopening of the case or the setting aside of the judgment is not required on this ground alone, because it does not necessarily change the outcome of the initial dispute: *Groupe Gascogne*, paras 74 and 78.

245 Joined Cases C-402/05 P and C-415/05 P *Kadi*, paras 352-353.

of restrictive measures taken against persons and entities associated with Al-Qaeda and the Taliban.[246]

In *Tomášová*, the CJEU acknowledged the possibility of State liability for damages in case of a national court's failure to exercise *ex officio* control under the UCTD.[247] It can be submitted that a manifest infringement of Article 47, despite the existence of well-established CJEU case law, constitutes a sufficiently serious breach of EU law as well.[248] However, it is questionable whether this constitutes a truly effective remedy, not only because State liability is seen as a last resort, but also because it is not the same as the correct application of the law in a concrete case;[249] it does not provide redress in (the proceedings concerning) the contractual relationship between the consumer and the trader.

2.3.2 Direct effect

Vertical and horizontal dimension of Article 47

The EU legal order relies strongly on the cooperation of the Member States and their national courts. They "contribute to the attainment of the objective (…) of ensuring effective judicial protection of an individual's rights" under EU law.[250] The effects of EU law in the legal systems of the Member States have been the subject of an extensive debate on "the complex cooperative relationship"[251] between the CJEU and national courts. The focus is on the solutions the CJEU has developed for conflicts (norm collisions) between EU law and national law. The supremacy (or primacy) and the direct effect of EU law play an important role in this respect. The CJEU has confirmed in *Egenberger* that Article 47 of the Charter has direct effect in the sense that it can be directly invoked by

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246 *Kadi*, para 344.

247 Case C-168/15 *Tomášová*, para 36.

248 Where a supreme court is responsible for such a breach, this could constitute a ground for State liability: Case C-224/01 *Gerhard Köbler v Republik Österreich*.

249 Jerfi Uzman, *Constitutionele remedies bij schending van grondrechten: over effectieve rechtsbescherming, rechterlijk abstineren en de dialoog tussen rechter en wetgever* (Kluwer 2013) 333, 361.

250 See e.g. Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación*; Case C-432/05 *Unibet*, para 44; Case C-50/00 *Unión de Pequeños Agricultores v Council of the European Union*, para 42.

251 Case C-137/08 *Pénzügyi Lízing*, Opinion AG Trstenjak, point 59.

individuals, provided the case falls within the scope of EU law.[252] The fundamental right to effective judicial protection as laid down in Article 47 is sufficient in and of itself and does not need to be made more specific by provisions of EU law or national law to confer on individuals a right on which they may rely as such. National courts must ensure the judicial protection for individuals flowing from Article 47 within their jurisdiction, and to guarantee its full effectiveness by disapplying contrary provisions of national law if necessary.[253] Thus, Article 47 may provide a ground for courts to set national law aside if an interpretation that is compatible with EU law is not possible.[254]

The above-mentioned direct effect of EU law could be seen as a different concept than direct horizontal effect in private law, understood as meaning that subjective rights (and obligations) are created, modified or extinguished between private parties.[255] Article 47 can be invoked against the Member States and their national (civil) courts, but it does not have direct horizontal (or interpersonal) effect in the sense that it imposes obligations on private parties vis-à-vis other private parties. In private law adjudication, it takes effect indirectly via the interpretation and (dis)application of national private law and civil procedure by the courts.[256] It is the *courts* that must provide effective judicial protection, not the private parties themselves.

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252 Case C-414/16 *Egenberger*, para 78. See also Case C-176/*12 Association de médiation sociale v Union locale des syndicats*, para 47. This is not the same concept as a subjective right: Uzman (n 249) 306.

253 Case C-414/16 *Egenberger* para 79.

254 Joined Cases C-569/16 and C-570/16 *Bauer*, para 65.

255 Arthur Hartkamp, 'The Effect of the EC Treaty in Private Law: On Direct and Indirect Horizontal Effects of Primary Community Law' [2010] European Review of Private Law 527, 529, 536; David Ramos Muñoz, 'Fundamental Rights and Private Law - A Blueprint for Analysis with Spanish Eyes', *EU-Grundrechte und Privatrecht / EU Fundamental Rights and Private Law* (Nomos 2016) 229. 'Direct horizontal effect' may also be understood as meaning that courts can give effect to EU (fundamental) rights in private disputes and, if need be, set aside national law. On the 'horizontality' of EU fundamental rights in the latter sense, and Article 47 of the Charter in particular, see Frantziou (n 29) 106–107.

256 Leczykiewicz, '"Effective Judicial Protection" of Human Rights after Lisbon: Should National Courts Be Empowered to Review EU Secondary Law?' (n 17) 491; Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 European Law Review 479, 491; Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (n 116) 242; Cherednychenko (n 216) 145.

It is hard to imagine how private parties could be directly required to comply with Article 47. For instance, Article 47 does not entail that parties cannot use a jurisdiction clause in their standard terms and conditions. In the context of the UCTD, they must refrain from using unfair terms. Article 47 could potentially be a parameter for the assessment of substantive unfairness in light of the Directive: a jurisdiction clause may make it difficult for consumers to take legal action or exercise their rights of defence.[257] Thus, indirectly, Article 47 could have a *horizontal* dimension. Judicial control of unfair terms must nevertheless be distinguished from judicial or legislative review on the basis of Article 47, which inserts a *vertical* dimension in the adjudication of horizontal disputes.[258]

The provisions of the UCTD do not have direct (horizontal) effect in either sense. Even if they confer subjective rights on individuals, they require implementation in national (private) law and cannot be directly relied on against other individuals.[259] Member States must take all appropriate measures to ensure fulfilment of their obligations arising out of EU law (Article 4 TEU), in addition to such measures that are necessary to implement legally binding EU acts (Article 291(1) TFEU). But they have considerable leeway as to the implementation and application of directives, especially in case of minimum harmonisation. Directives are binding as to the result to be achieved, but the choice of form and methods is left to the Member States (Article 288(3) TFEU). National courts, in their turn, have a duty to interpret national law in conformity with a directive, in order to ensure that the directive is fully effective and to achieve an outcome consistent with the objectives it pursues.[260] However, they are not obliged to apply national law *contra legem*[261] or to set national provisions aside solely on the basis of a directive.[262]

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257 See e.g. Joined Cases C-240/98 to C-244/98 *Océano*, para 24. See further subsection 3.2.4 on Case C-266/18 *Aqua Med*.

258 Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (n 116) 242; Cherednychenko (n 216) 145.

259 Joined Cases C-569/16 and C-570/16 *Bauer*, para 76. See also Ebers (n 36) 89; Aronstein (n 30) 21ff.

260 See e.g. *Radlinger*, para 79; Case C-407/18 *Kuhar v Addiko Bank*, paras 65-66.

261 Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, para 42; Case C-26/13 *Kásler and Káslerné Rábai v OTP Jelzálogbank*, para 65. See also Case C-414/16 *Egenberger*, para 71.

262 Ebers (n 36) 267.

Obligation to apply Article 47 ex officio?

The direct effect of Article 47 empowers national courts to provide effective judicial protection and to set national law aside if necessary. This gives rise to the question whether they are obliged to apply Article 47 *ex officio*, i.e. if it has not been (explicitly) invoked by the parties. Article 47 requires the existence of a judicial remedy and several other procedural safeguards. The right to be heard, for instance, must be respected by courts, in particular when they decide a dispute on a ground identified of their own motion.[263] In this sense, it could be said that the court must apply – or rather: observe – Article 47 *ex officio*. A failure to do so in a concrete case may constitute a procedural breach and an infringement of Article 47.

A violation of Article 47 can also be found on a systemic level, for instance where the applicable procedural rules do not sufficiently guarantee an opportunity to exercise the rights of defence. The question arises whether the court is obliged to check *ex officio* whether national (procedural) law is compatible with the requirements of Article 47 and if not, set it aside. *Egenberger* implies that such an obligation only exists "where the national court is called on [by one of the parties] to ensure that Article 47 of the Charter is observed".[264] That a court is not obliged to raise a potential violation of Article 47 *ex officio* – notwithstanding the obligation of courts at last instance to make a preliminary reference to the CJEU under Article 267 TFEU – does not mean that it cannot do so. The above-mentioned *Sánchez Morcillo* case provides an example of a national (civil) court reframing a preliminary reference in terms of the fundamental right to effective judicial protection.[265] It was the referring court that brought up Article 47 of the Charter,[266] not the parties

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263 Case C-89/08 *European Commission v Ireland*, para 54; see also Case C-472/11 *Banif Plus Bank*, para 29 (cited above in subsection 2.1.3).

264 Case C-414/16 *Egenberger*, para 81.

265 Case C-169/14 *Sánchez Morcillo I*; introduced in subsections 1.2.2 and 2.3.1 and further discussed in subsections 3.4.2 and 4.4.2.

266 Mr. Alejandro Rubio González, (former) State Attorney representing the Government of Spain at the CJEU, speech delivered in Brussels on 17 December 2014, available at http://www.academia.edu/9846524/The_application_of_the_Charter_of_Fundamental_Rights_of_the_European_Union_by_legal_practitioners. See also subsections 3.4.2 and 4.4.2.

themselves. And the CJEU has "recast" a request for a preliminary ruling on a few occasions by reference to Article 47.[267]

The *ex officio* application of Article 47 must be distinguished from the *ex officio* application of EU consumer protection legislation. Article 47 does not entail a requirement for courts to conduct *ex officio* review in order to safeguard the rights parties derive from EU law. The duty of the court to apply EU consumer law of its own motion seems to depend on the EU instrument at issue.[268] The CJEU neither refers to the principle of effective judicial protection nor to Article 47 in this respect. It simply emphasises that *ex officio* control is the only way to attain effective consumer protection under the UCTD. The difference between effective judicial protection and *ex officio* control will be further examined in chapter 3.

2.4 ARTICLE 47 AS A NEGATIVE YARDSTICK OR POSITIVE STANDARD?

2.4.1 Restrictions to Article 47: an eliminatory function

The fundamental right to effective judicial protection is not absolute, but it may not be denied altogether either.[269] In so far as Article 47 of the Charter precludes unjustified restrictions of its core components, it may operate as a (negative) yardstick for national procedural law. Where it is used to eliminate procedural rules – or, in its horizontal dimension, contract terms – that impinge on the fundamental right to effective judicial protection, it could fulfil an **eliminatory function**.[270] Such an eliminatory function could be seen as largely parallel to the principle of effectiveness, but also separate to the extent that Article 47 entails a different test.[271]

Pursuant to Article 52(1) of the Charter, restrictions must be provided for by law and respect the essence of the rights recognised by

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267 See e.g. Case C-279/09 *DEB*, para 33.

268 Van Duin and Leone (n 44) 1244.

269 Prechal and Widdershoven (n 111) 36; Ellingsen (n 206) 1983.

270 The label "eliminatory function" was introduced by Reich; see subsection 2.5.2 below. Other possible labels that express the same function are "derogating" or "corrective" function: Carla Sieburgh, 'Principles in Private Law: From Luxury to Necessity - Multi-Layered Legal Systems and the Generative Force of Principles' (2012) 22 European Review of Private Law 295, 301.

271 See further subsection 2.5.1.

the Charter. In addition, they must be necessary and proportionate, and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights (and freedoms) of others. Article 52(1) resembles a classic fundamental rights assessment in the vertical relationship between citizens and the State, i.e. fundamental rights as defences for individuals against unjustified interferences by the government. However, Article 47 of the Charter has acquired a separate identity, because of its connection to EU law.[272] As Safjan and Düsterhaus have observed, ensuring the effectiveness of EU law and effective judicial protection at the same time requires "a novel and original balancing approach".[273]

In respect of secondary EU legislation, the CJEU has held that national courts must take into account the balance struck by the EU legislature between the various interests involved, in order to determine the implications of Article 47 in the circumstances of the case.[274]

A further complicating factor is that in civil proceedings, a balance must be struck between the competing (fundamental) rights of both private parties involved.[275] As Prechal has observed, this differs from balancing the protection of an individual right and an objective of general interest.[276] The protection of one party's rights may entail a restriction of the other party's rights. For horizontal relationships, Collins has therefore proposed a double proportionality test: not only must it be examined whether an interference with a protected right is justified in the general interest, but the interference with competing rights must also be minimised.[277] This seems to be in line with what the CJEU has held: where several fundamental rights are at issue, the proportionality assessment must be carried out in accordance with the need to reconcile

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272 See also subsection 2.2.2.

273 Safjan and Düsterhaus (n 14) 37.

274 Case C-414/16 *Egenbeger*, para 81.

275 Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España*, para 68.

276 Prechal (n 157) 153. See also Karl Riesenhuber, 'Interpretation of EU Secondary Law' in Karl Riesenhuber (ed), *European Legal Methodology* (Intersentia 2017) 252–253.

277 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) 155; Collins, 'On the (In)Compatibility of Human Rights Discourse and Private Law' (n 75) 49.

the requirements of the protection of those various rights, striking a fair balance between them.[278]

Under Article 47 of the Charter, the claimant's right to an effective (judicial) remedy and the defendant's rights of defence both deserve protection.[279] The question arises as to how these rights should be balanced against each other. In *Hypoteční banka*, a case concerning the Brussels I Regulation,[280] the CJEU considered:

> "49. [T]he requirement that the rights of the defence be observed, as laid down also in Article 47 of the Charter of Fundamental Rights of the European Union, must be implemented in conjunction with respect for the right of the applicant to bring proceedings before a court in order to determine the merits of its claim.
> (…)
> 51. In that regard, it must be borne in mind that the Court has already held that the objective of avoiding situations of denial of justice, which the applicant would face should it not be possible to determine the defendant's domicile, constitutes such an objective of public interest (…), it being a matter for the referring court to determine whether that objective is in fact pursued by the national provision at issue."

A balance was struck between the procedural rights of the parties: a restriction of the defendant's rights of defence was justified in light of the applicant's right to bring proceedings, which would be meaningless in the absence of a competent court.[281] Substantive consumer protection under the UCTD did not play a role; the requirements of the rights of defence were interpreted within the scheme and for the purposes of the Brussels I Regulation.[282] The CJEU's interpretation of Article 47 in the

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278 Case C-752/18 *Deutsche Umwelthilfe* C-752/18, para 50.

279 Case C-199/11 *Otis*, para 48; Case C-327/10 *Hypoteční banka v Lindner*, para 46.

280 Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (**Brussels I Regulation**). As per 10 January 2015, Regulation 44/2001 has been replaced by Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (also referred to as "Brussels I*bis* Regulation").

281 Case C-327/10 *Hypoteční banka*, para 53. The CJEU did not answer the question regarding a jurisdiction clause that was arguably unfair within the meaning of the UCTD.

282 Case C-327/10 *Hypoteční banka*, para 48. See also Case C-112/13 *A. v B.*, paras 51, 56, 58.

context of this Regulation cannot simply be transposed to other areas of law.[283]

The balance may play out differently in the context of the UCTD, where the protection of consumers as weaker parties is prioritised in order to restore the transactional balance. The aim of restoring this balance extends into the procedural sphere. Judicial protection under the UCTD is inevitably more one-sided, because it is focused on consumer rights. There does not seem to be much space for a true balancing process of all (substantive and procedural) rights and interests involved.[284] AG Wahl has nevertheless submitted that "certain legitimate interests have a better claim to outweigh the protection of consumers than others", such as the principle of *res judicata*.[285] In addition, traders invoke fair trial rights to argue that 'preferential treatment' of consumers is at odds with their right to be heard, equality of arms or judicial impartiality.[286] This other side of Article 47 – where it is used as an argument *against* (increased) judicial protection of consumers – will be further explored below and in subsequent chapters.

2.4.2 Towards a generative function?

One of the main topics of debate is whether Article 47 sets a positive standard for the adjudication of EU rights, i.e. whether it can fulfil a **generative function**.[287] On the one hand, it is clear that the Member States have positive obligations to guarantee effective judicial protection.[288]

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283 On Article 47 of the Charter in the context of the recognition and enforcement of foreign judgments, see further Hazelhorst (n 28) 292.

284 Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' (n 277) 160–161; Nowak (n 119) 36.

285 Case C-482/12 *Macinský and Macinská v Getfin and* Financreal, Opinion of AG Wahl, point 76.

286 See e.g. ECtHR 20 December 2018, Appl. No. 22853/15 *Merkantil*, discussed in subsection 3.3.3, and cases on the right to be heard, discussed in sections 3.5, 4.5 and 5.5. See also Beka (n 31) 141.

287 Label introduced by Gerstenberg, 617. In this function, Article 47 is not only used to interpret or explain existing rules, but also as a source for generating new ones: see also Sieburgh, 'Principles in Private Law: From Luxury to Necessity - Multi-Layered Legal Systems and the Generative Force of Principles' (n 270) 301.

288 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, 1413; Beijer (n 161) 270. Article 47 of the Charter is not the only source for procedural positive

They must establish a system that provides remedies capable of addressing (alleged) infringements of EU rights, alongside procedures allowing actual access to a court and granting fair prospects for a case to be adjudicated.[289] Procedural rights and safeguards must be guaranteed and observed by all authorities of the Member States, including judicial bodies. In this respect, Cafaggi has distinguished a systemic, institutional function of Article 47, which requires coordination between modes of enforcement and content of remedies.[290] Mak has recalled the "*Schutzgebotsfunktion*" or protective function of fundamental rights, in so far as they entail an 'obligation to protect' that requires positive action from public authorities, including courts.[291]

On the other hand, it is contested to what extent the Member States and their national courts are required to take any further (positive) action on the basis of Article 47 alone.[292] The right of access to court, for instance, does not necessarily imply that access to court must be actively facilitated.[293] Moreover, Article 47 does not prescribe any specific measures and leaves choices to be made with regard to the measures that can be taken.[294]

There is a fear that if Article 47 derives legal authority from being a written source of law, the CJEU might become more interventionist.[295]

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obligations in EU law, as Beijer notes: Beijer (n 161) 306. See e.g. Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame* , para 20 (pre-Lisbon Treaty): national courts must have the power do "everything necessary" to ensure that national law prevents EU law from having "full force and effect".

289 Pech and Sayers (n 113) 1216; Beijer (n 218) 138.

290 Cafaggi (n 24) 257.

291 Mak, 'Rights and Remedies. Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (n 116) 242–243. Mak refers to the work of Canaris on fundamental rights in (German) private law. See also the "protective" function of Charter provisions discerned by Olha Cherednychenko and Norbert Reich, 'The Constitutionalization of European Private Law: Gateways, Constraints, and Challenges' [2015] European Review of Private Law 797, 818.

292 Beijer (n 161) 204–205.

293 Case C-403/16 *El Hassani*, Opinion AG Bobek, point 110.

294 Beijer (n 218) 145; Wilman (n 72) 892.

295 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, 58–59. See also Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' (n 277) 157; Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 363; Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 323.

The Charter was adopted to enhance the visibility of fundamental rights protection in the EU, not to expand the EU's powers or to extend the scope of application of EU law. It expressly stipulates that it does not extend or modify the competences of the EU (Article 51(2) of the Charter) and that rights recognised by the Charter must be exercised under the conditions and within the limits defined by the Treaties (Article 52(2) of the Charter). The Treaties – and by extension, the Charter – are not intended to create new remedies, unless the structure of the national legal system is such that there is no remedy making it possible, even indirectly, to ensure respect for the rights individuals derive from EU law.[296] The CJEU has used this as a justification to "invent" new remedies, such as interim relief. Furthermore, in *DEB*, it relied on Article 47 to introduce an EU-wide standard for the assessment of national conditions for granting legal aid. This may add fuel to the fear that Article 47 will be used a "Trojan horse", with the language of rights as a legitimising pretext for enhancing the general effectiveness of EU law.[297]

It nevertheless seems unlikely that Article 47 is capable on its own of overriding all limitations to (CJ)EU interference in the enforcement of EU rights at the national level.[298] Rather, as Van Cleynenbreugel has suggested, Article 47 offers a constitutional basis for "guided deference": the CJEU may develop a blueprint for national procedural law that allows for diversified rules, as long as they conform to judge-made standards that shape and refine the right to an effective remedy and a fair hearing. Such a standard still leaves a margin of appreciation to national procedural systems to render it operational.[299] In this respect, national rules of civil procedure could be seen as an expression of the fundamental right to effective judicial protection. Article 47 is relevant

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296 See also e.g. Case C-583/11 *Inuit Tapiriit Kanatami v European Parliament and Council of the European Union*, paras 103-104; Case C-432/05 *Unibet*, para 40. See also Prechal and Widdershoven (n 111) 41–42; Pech and Sayers (n 113) 1215–1216.

297 Engström, 'The Europeanisation of Remedies and Procedures through Judge-Made Law – Can a Trojan Horse Achieve Effectiveness?' (n 33) 3.

298 Leczykiewicz, '"Where Angels Fear to Tread": The EU Law of Remedies and Codification of European Private Law' (n 295) 58.

299 Pieter Van Cleynenbreugel, 'Judge-Made Standards of National Procedure in the Post-Lisbon Constitutional Framework' (2012) 37 European Law Review 90, 97, 99. See also Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 324. On guidance and deference, see further Takis Tridimas, 'Bifurcated Justice: The Dual Character of Judicial Protection in EU Law' in Allan Rosas, Egil Levits and Yves Bot (eds), *The Court of Justice and the construction of Europe* (Springer 2013) 369.

for the interpretation and (dis)application of those rules, but does not provide remedies as such. Even when the CJEU imposes a certain interpretation or insists upon the availability of a remedy, it is ultimately for the referring court to resolve the matter. The same is true when a provision is set aside on the basis of Article 47 of the Charter. The conclusions to be drawn in the case at hand are still governed by national law.[300] It very much depends on the national legal system how far courts are able and willing to go; this will be further examined in chapters 4 and 5.

2.5 ARTICLE 47 VIS-À-VIS EFFECTIVENESS

2.5.1 A different rationale

A rights-based, court-centered approach

The relationship between Article 47 of the Charter and the notion of (full) effectiveness in EU law is a recurring issue in both the CJEU's case law and legal scholarship. Many attempts have been made to clarify the differences between three manifestations of effectiveness in the CJEU's case law: the principle of effectiveness, *effet utile* and effective judicial protection.[301] In practice, however, the difference is not as clear-cut. There is consensus that the CJEU is inconsistent: it does not offer any clear guidance on the question of what test should be applied in which case.[302] There seems to be no obvious hierarchy between the two tests either.[303] It cannot be said that one should precede the other, and not even that one entails a higher threshold than the other.[304] The CJEU has held that the principle of effectiveness implies effective judicial protection,[305] which suggests they embody the same legal principle.[306] Both account for the

300 See also Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 595–596.

301 See e.g. Koen Lenaerts and others, *EU Procedural Law* (Oxford University Press 2014) 110; Ebers (n 36) 249–250.

302 See e,g. Wilman (n 30) 32; Nowak (n 119) 30–31; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1408.

303 Wilman (n 30) 472.

304 Östlund (n 33) 211.

305 Case C-169/14 *Sánchez Morcillo I*, para 61; Case C-61/14 *Orizzonte Salute – Studio Infermieristico Associato v Azienda Pubblica di Servizi alla persona San Valentino – Città di Levico Terme*, para 48.

306 See also C-73/16 *Puškár*, Opinion of AG Kokott, point 51.

effective protection of EU rights. On other occasions, however, the CJEU has differentiated between the two,[307] or even rephrased a preliminary reference pertaining to the principle of effectiveness in terms of effective judicial protection.[308]

Certain differences become apparent at the outset, in light of the scope of application and normative content of Article 47.

The principle of effectiveness is, first and foremost, an institutional principle with a structuring function: it marks the borders between EU law and national legal systems, without reflecting (substantive) ideas of justice.[309] As AG Jääskinen has put it, the principle of effectiveness, "came into being as a function of the limitations placed by EU law on the procedural autonomy of the Member States".[310] Effectiveness is inextricably linked to the decentralised enforcement of EU law; it only applies in the absence of specific EU rules on remedies and procedures.[311]

Moreover, according to Prechal, the scope and content of Article 47 are more sharply defined than (unwritten) principles.[312] Compliance with the fundamental right itself is what matters first and foremost.[313] Article 47 contains autonomous procedural safeguards, as *Banif Plus Bank* exemplifies.[314] It reflects a rights-based conception of the rule of law: EU citizens have individually enforceable rights that must be upheld by courts.[315] This intensifies the duty of national (civil) courts to interpret

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307 See e,g. Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*; Case C-93/12 *Agrokonsulting*, paras 59-60. See also Krommendijk, 'Is There Light on the Horizon?' (n 288) 1409–1410.

308 See also subsection 2.3.2 above.

309 Eric Tjong Tjin Tai, 'Effectiviteitsbeginsel en nationaal privaatrecht' [2011] Weekblad voor privaatrecht, notariaat en registratie 790.

310 Case C-61/14 *Orizzonte Salute*, Opinion of AG Jääskinen, point 33.

311 Nowak (n 127) 8. See also Safjan and Düsterhaus (n 14) 32; Ebers (n 36) 258–259, 325; Östlund (n 33) 106.

312 Prechal (n 157) 156.

313 Prechal and Widdershoven (n 111) 43; Tridimas and Gentile (n 160) 806.

314 Case C-472/11 *Banif Plus Bank*; see subsection 2.1.3 above.

315 Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 358, 363; Vernadaki (n 70) 20. See also Case C-556/17 *Torubarov*, Opinion of AG Bobek, point 56: "[I]t might be useful to recall that all those institutional and constitutional guarantees are not an end in themselves. Nor are they put in place for the benefit of judges. They are the means to another end: to ensure effective judicial protection of EU-law rights for individuals at national level, and thus, again, the essence of the rule of law."

rules of national (procedural) law in accordance with EU law and if necessary, set those rules aside.[316]

The justification of restrictions also differs.[317] The test under Article 52(1) of the Charter has been discussed above.[318] Unlike Article 47, the principle of effectiveness does not guarantee any procedural rights in and of itself. It removes obstacles *to* protection, but does not create remedies *for* protection.[319] The test is rule-based, i.e. whether a certain rule is justified in the legal system as a whole: the so-called procedural rule of reason.[320] The rule at issue must be analysed by reference to its role in the procedure, its progress and its special features before the various national instances. The basic principles of the domestic judicial system, such as the protection of the rights of defence, the principle of legal certainty and the proper conduct of procedure, must be taken into consideration where appropriate.[321] There is no normative yardstick beyond or below the (non-)existence of remedies and procedures.[322] To the extent that the concept of *effet utile* has been used by the CJEU to require positive action, effectiveness as such is still an empty, amorphous concept.[323] It has no internal limits, which makes it volatile and potentially intrusive.[324] It can be used to legitimise any result, as long as it serves the purposes of the EU legal order.[325]

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316 Collins, 'The Constitutionalization of European Private Law as a Path to Social Justice?' (n 277) 156–157.

317 Sacha Prechal, 'The European Acquis of Civil Procedure: Constitutional Aspects' (2014) 19 Uniform Law Review 179, 194–195.

318 See subsection 2.4.1.

319 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 303. See also Östlund, 105.

320 Schebesta (n 143) 859; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1407.

321 See e.g. Case C-40/08 *Asturcom*, para 39; Case C-470/12 *Pohotovost'*, para 51; Case C-169/14 *Sánchez Morcillo I*, para 34; Case C-32/14 *ERSTE Bank Hungary*, para 51; Case C-49/14 *Finanmadrid*, para 44.

322 Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 397–398.

323 Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 588; Bobek (n 120) 316.

324 Della Negra (n 123) 1020; Dougan (n 158) 424.

325 Bobek (n 120) 316; Półtorak (n 19) 48.

Contrasting dynamics

The need to ensure the (full) effectiveness of EU law and effective judicial protection are not necessarily driven by the same rationale.[326] The former is specifically geared towards e.g. the protection of consumers against unfair terms,[327] whereas effective judicial protection could be seen as both a process and a goal.[328] Procedural rights are 'enabling' rights; they enable "individuals to protect themselves against infringements of their rights" and "to remedy civil wrongs".[329] In this sense, procedural rights could be seen as derivative subjective rights.[330] Procedural rights could also be seen as independent, self-contained rights, implementing the idea of procedural justice and maintaining the rule of law.[331] This leads to contrasting dynamics.[332] Article 47 may even be invoked *against the EU*: judicial remedies must be guaranteed in order to contest (enforcement) measures based on EU law,[333] which inevitably distinguishes Article 47 from the (full) effectiveness of EU law. In consumer litigation, a challenge of EU acts is usually not the reason for legal action; Article 47 can be applied within the framework of the UCTD. Still, Article 47 and effectiveness are not always completely aligned in this context either, as will be further elaborated in chapter 3.

As I have observed earlier, the CJEU has mainly taken an instrumental approach so far towards the proceduralisation of consumer

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326 I have already tentatively explored the difference in 'Metamorphosis? The Role of Article 47 of the EU Charter of Fundamental Rights in Cases Concerning National Remedies and Procedures under Directive 93/13/EEC' [2017] Journal of European Consumer and Market Law 190. See also Prechal and Widdershoven (n 111) 50; Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 592–593; Prechal (n 317) 196; Della Negra (n 123) 1026; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1405; Katri Havu, 'EU Law in Member State Courts: Adequate Judicial Protection and Effective Application: Ambiguities and Nonsequiturs in Guidance by the Court of Justice?' (2016) 8 Contemporary Readings in Law and Social Justice 158; Ellingsen (n 206) 1890.

327 Ebers (n 36) 100, 106; Riesenhuber (n 276) 250; Trstenjak and Beysen (n 48) 124; Della Negra (n 123) 1021.

328 Dougan (n 158) 431; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1406.

329 Handbook on European law relating to access to justice (2016), 16.

330 Półtorak (n 19) 12–13.

331 Vernadaki (n 101) 310; Östlund (n 33) 250, 290.

332 Safjan and Düsterhaus (n 14) 37–38.

333 Safjan and Düsterhaus (n 14) 15. See for instance Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*; see subsection 2.3.1.

protection under the UCTD.[334] This approach is functional and sectoral,[335] aimed at the enforcement of (substantive) EU consumer protection legislation, rather than the development of overarching EU procedural standards.[336] This instrumentality has been criticized for its narrow focus.[337] Civil justice is traditionally regarded as a bastion of state sovereignty.[338] Civil procedure, in particular, has its own internal logic and policy goals, which have not been clearly and uniformly established across Europe.[339] It is often trans-substantive:[340] there may be different procedures for the same substantive issues (e.g., a contractual claim can be brought in an expedited order for payment procedure or in ordinary proceedings on the merits). Similarly, the same procedure (e.g. summary proceedings to obtain interim relief) may be followed for different substantive issues. The CJEU's approach is the opposite of trans-substantive. The duty of *ex officio* control following from the UCTD applies in all types of proceedings, as long as the case concerns (potentially) unfair terms falling within the scope of the Directive.[341] It can be regarded as a procedural tool to realise the Directive's objectives.[342] Such a 'one size fits all' template does not seamlessly fit into

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334 See subsection 2.1.2.

335 Nowak (n 127) 30; Adelina Adinolfi, 'The "Procedural Autonomy" of Member States and the Constraints Stemming from the ECJ's Case-Law: Is Judicial Activism Still Necessary?' in Hans-Wolfgang Micklitz and Bruno De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 303.

336 Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 594. See also Case C-618/10 *Banesto*, Opinion of AG Trstenjak, point 58.

337 See e.g. Hugh Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-National Law', *Revolution and Evolution in Private Law* (Hart Publishing 2018) 320–322; Dubos (n 103) 25.

338 Vernadaki (n 101) 299.

339 Nowak (n 127) 33–34.

340 Schebesta (n 104) 852–853; Nowak (n 127).

341 Case C-137/08 *Pénzügyi Lízing*, para 56 (*inter partes* proceedings); Case C-147/16 *Karel de Grote* (default proceedings, equivalence); Case C-618/10 *Banesto* para 57 (order for payment, effectiveness); Case C-415/11 *Aziz* (mortgage enforcement proceedings); Case C-377/14 *Radlinger* para 59 (insolvency proceedings); Case C-488/11 *Asbeek Brusse and de Man Garabito v Jahani* (appeal); Case C-168/05 *Mostaza Claro* (annulment of arbitral award).

342 See e.g. Wrbka (n 50) 267; Nowak (n 127) 31. Micklitz has called *ex officio* control a "procedural remedy": Hans-W Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' in E Terryn, G Straetmans and V Colaert (eds), *Landmark Cases of EU Consumer Law: In Honour of Jules Stuyck* (Intersentia 2013) 640.

a trans-substantive procedural framework that has not been specifically designed for consumer litigation.

The question arises to what extent EU rights should shape national remedies and procedures,[343] especially in the area of civil justice. Moreover, it could be contended that reaching a fair and just decision requires a more tailored approach of the national (civil) court, with due regard to the circumstances of the case.[344] In private law adjudication, unfair terms are often only one aspect of a case; there are usually other rights and interests involved as well, such as security rights and/or efforts to render the administration of justice more efficient.[345] It has also rightly been observed that private parties are deprived of their personality as legal subjects when they are merely defined as functional entities,[346] e.g. consumers. Their rights, too, are turned into instruments when they are merged with policy objectives.[347]

Article 47 of the Charter can be conceived as not being merely ancillary to the goals of specific instruments of EU law. It appears to be less instrumental, and to leave more space to take other (procedural) factors into account than (only) the objectives of e.g. the UCTD.[348] It is about the fundamental right to effective judicial protection of EU citizens at large, not just in their capacity as consumers or market actors.[349] In the words of Reich: Article 47 "shares the concept of protecting individual

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343 Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 385.

344 Tulibacka (n 35) 1539. See further subsection 5.4.2.

345 See e.g. Case C-618/10 *Banesto*, Opinion of AG Trstenjak. See also Jarich Werbrouck, 'Another Brick in the Wall: The Court's Judgment in KdG/Susan Kuijpers, 17 May 2018 [C-147/16]' [2019] European Review of Private Law 135, 154.

346 Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-National Law' (n 337) 318; Hans-W Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The images of the consumer in EU law: legislation, free movement and competition law* (Hart Publishing 2016) 25–26; Marija Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political' (2015) 21 European Law Journal 572, 581.

347 Hans-W Micklitz, 'The Constitutional Transformation of Private Law Pillars through the CJEU' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017) 69–70. See also Östlund, 215; Wilman (n 30) 470.

348 Östlund, 239, 255.

349 Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' (n 346) 41.

rights as subjective rights in a liberal spirit."[350] As such, it could better fit into, and possibly enrich, the private law discourse.[351]

2.5.2 Other functions ascribed to Article 47

A merely legitimising function, or a strengthening/empowering function?
How close to or far away from effectiveness one positions Article 47 influences the perception of its (potential) functions. As I have observed earlier, (a reference to) Article 47 could be seen as merely reinforcing effectiveness, with no other function than legitimising (further) CJEU interference.[352] Reich has discerned three functions of (full) effectiveness in European private law. The first one is an eliminatory function.[353] The second one is an interpretative or hermeneutical function, which serves to give an expansive, remedy-oriented interpretation of national law.[354] The third one is a remedial function, which leads to an "upgrade" of remedies under national law.[355] The first and third functions reminisce the eliminatory and generative functions ascribed to Article 47. Reich himself has connected Article 47 to the positive side of effectiveness by reference to the link between substantive and procedural protection of EU rights.[356] A functional interpretation of Article 47 could contribute to a constructive approach towards remedies and procedures.[357]

This gives rise to the question of what the added value, if any, of Article 47 could be, beyond a **legitimising function**. Other authors have observed that Article 47 does not only pertain to the effective enforcement of EU (consumer) rights, but also to the concept of EU citizenship and expectations of a fair and efficient justice system.[358] It

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350 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 322.
351 Cherednychenko (n 216) 157.
352 See subsection 2.4.1.
353 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 302. See also subsection 2.4.1.
354 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 305–307.
355 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 308. See also subsection 2.1.2.
356 Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 322–323.
357 Cherednychenko and Reich (n 291) 819.
358 Tulibacka (n 35) 1535; Storskrubb (n 53) 83.

reflects the importance attached by the EU legal order to court-based justice for EU citizens.[359]

Instead of comparing the (added) value of Article 47 vis-à-vis effectiveness, the argument could also be turned around: Article 47 should be the 'umbrella provision' or 'anchor point' for the adjudication of cases falling within the scope of EU law.[360] This would leave only a residual role for effectiveness – for instance, in respect of the duty of *ex officio* control of unfair terms that does not follow (directly) from Article 47.[361]

Article 47 operates as a strengthened benchmark of effective access to justice within the EU.[362] From the perspective of EU citizens (consumers), Article 47 could thus fulfil a **strengthening function** that may go beyond effectiveness, in so far as the fundamental rights dimension of (a restriction of) its core components is expressly recognised. From the perspective of courts, Article 47 could also fulfil an **empowering function**,[363] where it accentuates the primary role of courts as protectors of individual rights, rather than policy enforcers.[364] It is up to them to provide individual rights protection. Article 47 authorises them to step in and to correct the legislature's errors or omissions, if necessary by reference to its eliminatory or generative function. Both the strengthening and the empowering function of Article 47 reflect the rights-based, court-centered approach discussed above. These functions could be seen as an elaboration of an interpretative or hermeneutical function: they specify what effective judicial protection entails.

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359 Tulibacka (n 35) 1530; Micklitz, 'The Consumer: Marketised, Fragmentised, Constitutionalised' (n 346) 41.

360 Case C-562/12 *Liivimaa Lihaveis v Eesti-Läti programmi*, Opinion of AG Jääskinen, point 57, reiterated in his Opinion in Case C-61/14 *Orizzonte Salute*, para 24; Case C-93/12 *Agrokonsulting*, Opinion of AG Bot, points 29-30. See also e.g. Ward (n 154) 1273; Prechal (n 157) 156; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1416–1417.

361 See e.g. Nowak (n 119) 36. See also subsection 2.3.2 above.

362 Sanna (n 28) 173.

363 Label derived from Gerstenberg, 621.

364 Ebers (n 36) 123–124. See also Engström, 'The Europeanization of Remedies and Procedures – the Principle of Effective Judicial Protection in the Swedish Judicial Habitat' (n 68) 592; Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 389. A rights-based approach does not necessarily involve a complete exclusion or rejection of policy-based reasoning; Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing 2012) 7.

A signalling or transformative function; open constitutionalisation

A conceptualisation of Article 47 as a provision with intrinsic value moves away from effectiveness, in the direction of a self-standing yardstick or standard. In this respect, Tridimas and Gentile have argued that a fundamental right has its own identity (essence), as opposed to effectiveness, which seeks to augment a right's functionality.[365] They observe a strong **signalling** effect of constitutional language that pays tribute to the rule of law. A reference to Article 47 is more than symbolic: it indicates the seriousness of the issue. A similar "leverage" or "signal" function is also ascribed to fundamental rights in private law, which may indicate that an essential societal issue is at stake and incite a desired legal development.[366] According to Mak, fundamental rights may mediate between the legal sphere and the political sphere, where they raise policy questions or make the deliberation of policy choices more explicit. As such, the interplay between fundamental rights and private law may help to "open up" fixed or established rules that do not provide satisfactory solutions.[367] Wielsch has pointed out such a function of fundamental rights in European private law as well, where they are used by courts as a check on law-making powers and processes.[368] Article 47 may operate as a correction mechanism when national procedural law is deemed to offer insufficient protection.[369] Moreover, as Sieburgh has observed, judicial reasoning in a discursive manner is important where national law meets EU law, especially in case of (perceived) tension. Conflicts and discrepancies should be openly discussed to motivate why and on what basis a certain path is chosen.[370] Article 47 has discursive value in this respect.

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365 Tridimas and Gentile (n 160) 804–805, 815.

366 JM Smits, 'Constitutionalisering van het vermogensrecht', *Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking* (Kluwer 2003) 51, 65.

367 Chantal Mak, *Fundamental Rights in European Contract Law* (Kluwer Law International 2008) 282. Mak refers to the work of Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press 1997) 319–320.

368 See e.g. Dan Wielsch, 'The Function of Fundamental Rights in EU Private Law' (2014) 10 European Review of Contract Law 365, 368, 382.

369 See also Półtorak (n 19) 50.

370 Carla Sieburgh, 'Legitimiteit van de confrontatie van Europees recht en burgerlijk recht van nationale origine', *Controverses rondom legaliteit en legitimatie* (Kluwer 2011) 240.

The signal could be a trigger for change and instigate a "trialogue"– as Cafaggi has aptly called it[371] – about an upgrade of the procedural framework between the referring court, the CJEU and the national legislature. In this respect, a reference to Article 47 could fulfil a **transformative function**, as Gerstenberg has suggested.[372] In a way, the signalling function of Article 47 also has a systemic, institutional dimension. It is closely connected to the generative function of Article 47, except that it is used to indicate a problem and encourage a debate on potential solutions; finding a (systemic) solution is only the next step, not necessarily prescribed by Article 47 alone and often left to the national legislature. Thus, Article 47 is not directly the source of positive requirements. Like Reich, Gerstenberg connects Article 47 to the positive side of effectiveness, but he also refers to "an imperative commitment to an EU-wide, shared understanding of a fundamental right".[373] This resonates with the "guided deference" envisaged by Van Cleynenbreugel[374] as well as Micklitz' view that Article 47 could be one of the building blocks for an "autonomous constitutionally 'safe' European private legal order".[375]

Whether Article 47 will live up to its potential to be such a building block, remains to be seen. Frantziou observes a "mismatch" between the (horizontal) application of EU fundamental rights across a common constitutional order and a functional approach to ensure the effectiveness, uniformity and primacy of EU law.[376] To the extent that the term 'constitutional' refers to the (CJ)EU's own outlook on fundamental rights protection, (open) constitutional reasoning has been largely absent from the CJEU's case law.[377] Therefore, calls have been made for a more transparent or well-developed approach towards the application of EU

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371 Fabrizio Cafaggi, 'On the Transformations of European Consumer Enforcement Law: Judicial and Administrative Trialogues, Instruments and Effects', *Judicial Cooperation in European Private Law* (Edward Elgar Publishing 2017) 228, 237.

372 Gerstenberg (n 124) 603, 613. See also the "transformative" function attributed to EU (consumer) law by Spanish courts, discussed in subsection 4.1.3.

373 Gerstenberg (n 124) 617.

374 See subsection 2.4.2.

375 Micklitz, 'Mohamed Aziz - Sympathetic and Activist, but Did the Court Get It Wrong?' (n 129) 14–15.

376 Eleni Frantziou, 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality' (2015) 21 European Law Journal 657, 665–666.

377 Frantziou (n 376) 672.

fundamental rights, including Article 47 of the Charter.[378] Open constitutionalisation[379] – i.e. the explicit recognition of fundamental rights issues – could clarify both the purpose of judicial protection and the balancing of rights and interests at stake, also if no violation is found. It is the different rationale of Article 47 that could make it truly stand out in judicial reasoning: a rights-based, court-centered approach; a rule of law connotation; and due process as an end in itself, with an emphasis on justice for both sides.

2.6 INTERIM CONCLUSION: OVERVIEW OF (POTENTIAL) FUNCTIONS OF ARTICLE 47 IN LEGAL DOCTRINE

This chapter has recounted the normative content of Article 47, in particular its core components – access to court, an effective (judicial) remedy, equality of arms and the right to be heard – that inform the structure of the subsequent chapters. All authors who have written about proceduralisation under the UCTD or Article 47 of the Charter as a new instrument in EU law have proposed different views on Article 47's (potential) functions, and in particular its (added) value vis-à-vis effectiveness. How these functions are labelled exactly is less relevant for the purposes of this study than what they express about the use of (a reference to) Article 47 in response to different issues.

To operationalise the various functions ascribed to Article 47 in legal doctrine, I have distilled them into five main categories that reflect the debate outlined in this chapter. I have also made an overview of the indicators that can be expected in view of these functions. The overview starts with the function that is closest to the notion of (full) effectiveness; the other functions slowly move beyond it and may even go against it.

	Function (label)	**Indicators**
1.	LEGITIMISING FUNCTION (subsection 2.5.1)	- Reference to Article 47 merely serves as legitimation for CJEU interference - Parallel or supplementary to effectiveness; other functions cannot (clearly) be discerned

[378] See e.g. Cherednychenko (n 216) 162; Reich, *General Principles of EU Civil Law* (n 71) 94.

[379] Micklitz and Reich (n 43) 801; Della Negra (n 123) 1024; Micklitz, 'The Constitutional Transformation of Private Law Pillars through the CJEU' (n 347) 74.

2.	STRENGTHENING FUNCTION (subsection 2.5.1)	- Reinforcing effectiveness, but may go beyond - Express recognition of (restriction of) core components of Article 47 as fundamental rights issue - Rights-based, i.e. focus on procedural rights - Emphasis on consumer's perspective: availability of recourse
	EMPOWERING FUNCTION (subsection 2.5.1)	- Overlap with strengthening function, but: - Court-centered, i.e. focus on responsibility of courts - Emphasis on court's perspective: power or duty to intervene
3.	SIGNALLING FUNCTION (subsection 2.5.2)	- Court could have opted for effectiveness but refers (instead or in addition) to Article 47 to signal an issue in the design of procedure - More than ornamental: potential fundamental rights violation indicates seriousness - Aim is to make deliberation explicit and/or to trigger debate (trialogue) about the need for change
	TRANSFORMATIVE FUNCTION (subsection 2.5.2)	- Overlap with signalling function, but: - Reference to Article 47 (is a factor that) triggers debate about an upgrade of national procedural law
4.	ELIMINATORY FUNCTION (subsection 2.4.1)	- Separate test from effectiveness, although outcome may be the same - Not necessarily a higher threshold, but different rationale - Vertical: basis to set restrictive procedural rules aside (judicial review) - Horizontal: parameter for substantive assessment of unfair terms (judicial control)
5.	GENERATIVE FUNCTION (subsection 2.4.1)	- Article 47 as (separate) source of positive requirements - Compliance with autonomous procedural safeguards may go *against* effectiveness (see also subsection 2.5.2)

These functions are not mutually exclusive; they may be mutually reinforcing. The same reference to Article 47 (in the same case) may have different functions. These functions may have different purposes or effects on different levels. For instance, Article 47 in its legitimising function mainly pertains to the structural dimension identified in chapter 1,[380] i.e. the division of competences between the (CJ)EU and the Member States. Its eliminatory function relates to the procedural dimension; it allows national (civil) courts to offer immediate protection to the parties at the level of a concrete case. But this function also has an institutional dimension, where Article 47 operates as a correction mechanism on a systemic level; it is thus closely related to its signalling function.

The labels and indicators set out above provide a basis for the case law analysis in the subsequent chapters. I have found examples of all five categories, with some important nuances. Chapter 6 contains an overview with two additional functions I have identified in chapters 4 and 5: a reconciliatory function and a rhetorical function.

[380] See subsection 1.3.1.