Justice for both

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

van Duin, J.M.L.

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3. CASE LAW OF THE COURT OF JUSTICE ON ARTICLE 47 AND THE UCTD

Chapter outline
This chapter examines the functions of Article 47 of the Charter in the case law of the CJEU on the UCTD, using the labels and indicators identified in section 2.6. The same reference in the same case may have different functions. Therefore, the cases will not be grouped according to function, but according to the core component(s) of the fundamental right to effective judicial protection they pertain to. The focus will be on four core components in particular: the right of access to court (section 3.2), the right to an effective (judicial) remedy (section 3.3), the principle of equality of arms (section 3.4) and the right to be heard (section 3.5). Special attention will be paid to the (added) value of Article 47 vis-à-vis (full) effectiveness. Finally, a summary will be given of the various functions of Article 47 that can be detected in the analysed case law (section 3.6).

3.1 FOCUS ON FOUR CORE COMPONENTS OF ARTICLE 47

In this chapter, the CJEU's case law referring to Article 47 of the Charter in the context of the UCTD will be analysed. The cases where substantive consideration to Article 47 was given by the Advocate General and/or the CJEU[381] will be discussed by virtue of the core components they pertain to:

Core component	Cases	Subsection
ACCESS TO COURT	*Asturcom*	3.2.2
	Finanmadrid; *Margarit Panicello*	3.2.3
	Profi Credit Polska and *PKO Bank Polski*; *Aqua Med*	3.2.4
EFFECTIVE (JUDICIAL) REMEDY	*Aziz*; *Kušionová*	3.3.2
	Sziber; *Dunai*	3.3.3
EFFECTIVE JUDICIAL PROTECTION	*ERSTE Bank Hungary*; *Banco Santander*[382]	3.3.2

[381] See the cases listed in subsection 1.3.3, footnotes 89 and 91. The Opinion of AG Tanchev in Case C-51/17 *OTP Bank* will be mentioned in relation to Case C-118/17 *Dunai*. The Opinion of AG Hogan in Case C-34/18 *Lovasné Tóth* will be mentioned in relation to Case C-34/13 *Kušionová*.

[382] Case C-34/18 *Lovasné Tóth* (para 59) also refers to "effective judicial protection", but only as part of a reference to Case C-32/14 *ERSTE Bank Hungary*. Case C-495/19 *Kancelaria Medius* merely reconfirms the CJEU's case law on *ex officio* control in default

EQUALITY OF ARMS	*Sánchez Morcillo I & II*	3.4.2
	Pohotovosť	3.4.3
RIGHT TO BE HEARD	*Banif Plus Bank*; *Biuro podróży 'Partner'*	3.5.2

The right to adjudication within a reasonable time and the right to legal aid do not (yet) play a separate role of significance in unfair terms cases.[383] Cases that do not contain a reference to Article 47 will only be discussed where the CJEU itself draws a parallel (e.g. between *Kušionová* and *Aziz*) or where this is necessary to get a better understanding of the analysed case-law (e.g., *Finanmadrid* pertains to the same Spanish order for payment procedure as *Banesto*, and *Aqua Med* and *Baczó* both concern procedural rules on jurisdiction with a potential deterrent effect on consumers).

The four core components listed above are closely related. In so far as the scope for judicial intervention is excluded or severely limited, the right of access to court, the right to an effective judicial remedy and the rights of defence might all be at stake. The first group of cases (section 3.2) concern consumer arbitration and order for payment procedures that are either extrajudicial or expedited. A distinction can be made between a delegation of judicial functions to non-judicial bodies (e.g. an arbitral tribunal or a court registrar) and restrictive procedural conditions (e.g. time-limits). Both can be considered as restrictions of the right of access to court and an effective judicial remedy, especially when a remedy is understood as a (procedural) means of recourse. Whilst these cases almost exclusively concern consumer-defendants and thus could also be framed as pertaining to the rights of defence, they will be discussed under the heading of access to court. What they have in common is that they concern the risk that consumers are, in one way or another, prevented or deterred from exercising their rights in court. This is particularly problematic when they are the defendant, and the possibility

proceedings and repeats the reference to Article 47 of the Charter in Case C-176/17 *Profi Credit Polska* and Case C-266/18 *Aqua Med* (paras 17 and 32).

383 One of the questions in Case C-426/17 *Barba Giménez* pertained to legal aid, but the case did not concern unfair terms (or unfair commercial practices) and thus, did not fall within the scope of EU consumer law. In Case C-567/13 *Baczó and Vizsnyiczai v Raffeissen Bank* (3.2.4) and Case C-407/18 *Addiko Bank* (3.3.2), legal aid was a relevant factor in light of the costs of proceedings, but these cases do not contain an explicit reference to Article 47 of the Charter.

of judicial intervention – and unfair terms control – depends on them lodging an objection against the enforcement of a contract.

The second group of cases (section 3.3) concern the (im)possibility for the court to grant a (substantive) remedy against unfair terms once the case comes before a court. Here, the main problem is a limitation of the ambit of the dispute and/or the court's power to provide (interim) relief in pending proceedings. Given that such a limitation may prevent the court from offering an effective remedy under the UCTD, these cases will be discussed under the heading of an effective (judicial) remedy. Whilst Article 47 of the Charter is not explicitly mentioned in *ERSTE Bank Hungary* and *Banco Santander*, the CJEU refers in both decisions to "effective judicial protection" in the context of the UCTD. They are included in the analysis to distinguish *judicial* protection from other types of protection.

The cases in the third group (section 3.4) are related to the ones in the second group concerning (a lack of) judicial remedies in the context of mortgage enforcement. They will be discussed separately, because Article 47 is explicitly linked to the need to ensure procedural equality between consumers and traders.

Finally, the fourth group of cases (section 3.5) concern the right to be heard, which can be invoked by consumers as well as traders.

3.2 ACCESS TO COURT

3.2.1 Introduction: access as a necessary prerequisite for judicial protection

As observed in chapter 1, access to justice is a broader concept than access to court. Legal protection can, for instance, also be provided by non-judicial bodies like notaries or administrative authorities, or via mechanisms for alternative dispute resolution (**ADR**). Judicial remedies are not the only "adequate and effective means" to ensure the effective protection of consumers against unfair terms (Articles 6 and 7 UCTD). At the same time, the right of access to court is one of the core components of Article 47 of the Charter and a necessary prerequisite for judicial protection. In this section, I will take a closer look at the meaning of access to court in the context of the UCTD.

The case law in this section concerns consumer arbitration (*Asturcom*) and order for payment procedures that are either extrajudicial

(*Finanmadrid, Margarit Panicello*) or impose restrictive procedural conditions (*Profi Credit Polska, PKO Bank Polski, Aqua Med*). The fact that consumers must meet certain procedural requirements in order to assert their rights, does not automatically mean they do not enjoy effective judicial protection.[384] However, in so far as access to court is severely restricted or even entirely excluded, it may become a fundamental rights issue.

All above-mentioned cases are about procedures where the role of the court is limited, compared to the ordinary model of adversarial court proceedings with corresponding procedural safeguards. These procedures entail a reversal of the dispute or shift of procedural initiative:[385] the burden is placed on the defendant to initiate court proceedings and/or trigger a contentious debate between the parties, by asking for annulment of an arbitral award, by filing an objection against the claim, or by opposing enforcement of an arbitral award or order for payment. If the defendant does not take any action, no (full) judicial review or examination of the merits takes place – let alone unfair terms control. In this respect, the right of access to court and the rights of defence could be regarded as two sides of the same coin.

In the Spanish cases, adjudicative competences – i.e. decision-making powers – were outsourced to an arbitral tribunal (*Asturcom*) respectively a court registrar (*Finanmadrid* and *Margarit Panicello*). In the Polish cases, the court's role was limited to a formality check; it was up to the debtor to challenge the claim and/or (the terms of) the underlying contract. The outsourcing aspect in the Spanish cases differs from normal default proceedings, i.e. when a consumer-defendant does not appear in court. In that situation, the case is still adjudicated by a court. But even then it must be investigated – as the Polish cases show – whether the consumer's default of appearance is the result of a deterrent (or preclusive) effect of procedural rules as regards e.g. time-limits and costs.

Unlike the Advocate Generals, the CJEU did not (explicitly) address the constitutional dimension of the Spanish cases, i.e. the consumer-debtors' fundamental rights under Article 47 of the Charter. This dimension will be further elaborated in chapter 4. The Polish cases are a

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384 See e.g. Case C-483/16 *Sziber*, para 50 (discussed in subsection 3.3.3 below); Case C-176/17 *Profi Credit Polska*, Opinion of AG Kokott, points 71-73 (subsection 3.2.4).

385 Case C-49/14 *Finanmadrid*, Opinion of AG Szpunar, point 72; Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott, point 41.

step towards open constitutionalisation, because the CJEU acknowledged that restrictive procedural conditions can be problematic from a fundamental rights perspective as well.

3.2.2 Consumer arbitration: a residual role of courts?

Horizontal and vertical dimension of Article 47 in respect of arbitration clauses

Consumer arbitration as such is not the topic of this study. ADR can help to strengthen the effectiveness of consumer protection, where it offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders.[386] The cases of *Alassini* and *Menini* show that a restriction of the right of access to court may be justified in favour of ADR.[387] When consumers are the claimant and they can freely choose between bringing their claim in court or submitting it to an ADR body, there is *prima facie* no problem in respect of the right of access to court.

There is nevertheless tension between ADR and the effective (judicial) protection of consumers against unfair terms,[388] especially when the consumer is the defendant. This tension becomes even more visible in case of arbitration, which has a more adjudicative nature than mediation; it normally entails the exclusion of jurisdiction of (State) courts and results in a binding decision.[389] Private arbitral tribunals are not bound by the law in the same way as courts. It is unclear whether they can (be obliged to) exercise unfair terms control; they certainly cannot make a preliminary reference to the CJEU.[390]

Arbitration clauses in consumer contracts generally exclude the right of access to court. The UCTD does not prohibit arbitration clauses

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386 See e.g. Andrea Fejős and Chris Willett, 'Consumer Access to Justice: The Role of the ADR Directive and the Member States' (2016) 24 European Review of Private Law 33.

387 Discussed in subsection 2.2.1(i).

388 See e.g. Norbert Reich, 'More Clarity after "Claro"? Arbitration Clauses in Consumer Contracts as an ADR (Alternative Dispute Resolution) Mechanism for Effective and Speedy Conflict Resolution, or as "Deni de Justice"?' [2007] European Review of Contract Law 41; Marco Loos, 'Enforcing Consumer Rights through ADR at the Detriment of Consumer Law' [2016] European Review of Private Law 61, 74.

389 See e.g. Lorna McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26 European Journal of International Law 607.

390 See e.g. Case C-125/04 *Denuit v Transorient-Mosaïque Voyages et Culture*; Case C-185/19 *KE v LF*.

in consumer contracts as such, and the CJEU has not exercised the same scrutiny in respect of arbitration clauses as it did towards e.g. jurisdiction clauses.[391] This does not mean they cannot be considered as unfair. Terms excluding or hindering the consumer's right to take legal action or to exercise any other legal remedy are on the indicative and non-exhaustive list of unfair terms (Article 1(q) of the Annex to the UCTD). There could also be an issue of consent: are consumers aware of the arbitration clause when they enter into the contract, and if so, are they able to make a well-considered choice to waive their right of access to court?[392] In *Sebestyén*, a consumer had asked the referring court to declare an arbitration clause in a mortgage agreement void, because it unjustifiably limited her constitutional right to initiate legal proceedings; the arbitral tribunal had exclusive jurisdiction and there was no judicial remedy against its decisions. The CJEU held that the court must take Article 1(q) of the Annex into account, as well as the fact that the communication to the consumer of general information on the difference between arbitration and ordinary legal proceedings cannot alone rule out the unfairness of that clause.[393]

Arbitration clauses in consumer contracts touch on both the horizontal and the vertical dimension of Article 47. Horizontally,

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391 Discussed in subsection 2.3.2 above; see further subsection 3.2.4 below on Case C-266/18 *Aqua Med*. See also Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' (n 342) 640.

392 Case C-342/13 *Sebestyén v OTP Bank*, para 36. See also Horst Eidenmüller and Martin Fries, 'Against False Settlement: Designing Efficient Consumer Rights Enforcement Systems in Europe' in Hans-W Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart Publishing 2016) 100–101. A follow-up question is whether the right of access to court and to a fair trial (Article 6 ECHR) can be waived altogether, see: Marte Knigge and Pauline Ribbers, 'Waiver of the Right to Set-Aside Proceedings in Light of Article 6 ECHR: Party-Autonomy on Top?' 34 Journal of International Arbitration 775.

393 Case C-342/13 *Sebestyén*, para 36. Thus, information is crucial, see Case C-191/15 *Verein für Konsumenteninformation v Amazon EU*, para 69: a choice-of-law term that leads consumers into error by giving them the wrong impression about the law applicable to the contract is unfair; see also Aukje van Hoek, 'Eén voor allen en allen voor één: individuele versus collectieve handhaving van het consumentenrecht in het IPR' [2016] Ars Aequi 957; Marco Loos and Joasia Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 Journal of Consumer Policy 63, 85. This does not mean that the trader must inform the consumer of the general procedural provisions of domestic law, if the terms concerned do not alter or prejudice the consumer's legal position: Case C-34/18 *Lovasné Tóth*, paras 66 respecively 53 and 56.

Article 47 could be a parameter for the (substantive) unfairness assessment of potentially unfair terms under the UCTD; a few examples will be given in chapter 5.[394] Vertically, it could provide a basis for the judicial review of national (procedural) law that allows for such terms and/or prevents the court from performing unfair terms control (*ex officio*). Courts fulfil a residual role in this respect. They may be required to assess the unfairness or invalidity of an arbitration clause in three situations: (i) the defendant invokes an arbitration clause to argue that the court lacks jurisdiction to hear the claim, (ii) an action for annulment of an arbitral award is brought before the court, or (iii) the court is requested to grant leave for the enforcement of an arbitral award. The scope for judicial review of arbitral awards is usually limited.[395] However, extra scrutiny may be warranted in consumer cases, as becomes clear in *Asturcom*.

Asturcom: an empowering function of Article 47?

Asturcom concerned the enforcement of an arbitral award that was based on a presumably unfair arbitration clause in a contract between a consumer and a mobile telephone company. The award had obtained the force of *res judicata*, because the consumer had not brought an action for annulment within the prescribed period of two months. The referring Spanish court asked the CJEU whether it should still refuse to enforce the arbitral award of its own motion, in the absence of the consumer.[396]

The principle of *res judicata* – literally: a matter (already) judged – means that a matter that has already been decided by a competent court or tribunal and resulted in a final and binding decision, may not be subject to litigation again between the same parties. This principle serves to ensure the stability of the law and legal relations as well as the sound administration of justice.[397] It has two aspects: procedural *res judicata* means that a decision has become final and cannot be appealed and/or reviewed, substantive *res judicata* means that the decision is binding upon the parties, which precludes them from relitigating the matter in

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394 More specifically, subsection 5.2.1.

395 See e.g. Case C-126/97 *Eco Swiss China Time v Benetton International*, para 34; Case C-168/05 *Mostaza Claro*, para 34. See also Schebesta (n 143) 870.

396 Case C-40/08 *Asturcom*; see further subsection 4.2.2 on the national background and follow-up.

397 See e.g. Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott, points 30-31; Case C-224/01 *Köbler*, para 38.

new proceedings. Procedural *res judicata* usually entails substantive *res judicata*.[398] In principle, EU law does not require a national court to disregard national procedural rules conferring *res judicata* effect on a decision, even if doing so would enable it to remedy an infringement of EU law.[399] The question to what extent and under which circumstances this runs counter to the principle of effectiveness, was at issue in *Asturcom* as well as in other (non-UCTD) cases that will not be discussed here.[400]

In *Asturcom*, the CJEU found that the principle of effectiveness does not automatically entail that an arbitral award with *res judicata* effect must be set aside. When a national court is asked to enforce such an award, it must only assess *ex officio* whether the arbitration clause is unfair within the meaning of the UCTD if national rules of procedure require *ex officio* control under domestic rules of public policy – pursuant to the principle of equivalence – and where the legal and factual elements necessary for that task are available to the court.[401] Under Spanish procedural law, public policy was not listed as a ground for the court to refuse enforcement of the arbitral award, let alone *ex officio*. Thus, the principle of equivalence did not require *ex officio* control of unfair terms either. According to the CJEU, the need to comply with the principle of effectiveness cannot be stretched so far as to mean that the national court should make up fully for "total inertia" on the part of the consumer. In principle, it is for the parties to take the initiative for legal proceedings.[402] Furthermore, it is compatible with EU law to establish reasonable time-limits in the interest of legal certainty.[403] The CJEU held that a time-limit of two months to bring an action for annulment of an arbitral award did not make it virtually impossible or excessively difficult for consumers to

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398 See for an exception e.g. the type of decision at issue in Case C-503/15 *Margarit Panicello* (subsection 3.2.3).

399 Case C-126/97 *Eco Swiss*, paras 46-47; Case C-421/14 *Banco Primus,* para 47.

400 On this topic, see further e.g. Hartkamp, *European Law and National Private Law* (n 30) 106–109. In the context of the UCTD, see Case C-831/19 (pending).

401 Case C-40/08 *Asturcom*, paras 51-53 and 59. See also Case C-168/15 *Tomašová*, para 32 and Case C-470/12 *Pohotovost'*, point 42. Article 6 UCTD must be regarded as a provision of equal standing to domestic rules of public policy: see subsection 2.1.1.

402 See e.g. C-300/17 Hochtief v Budapest Főváros Önkormányzata, para 52.

403 Case C-40/08 *Asturcom*, para 41. See also Case C-8/14 *BBVA v Peñalva López*, para 28; Joined Cases C-154/14 and C-307/15 *Gutiérrez Naranjo*, para 69.

exercise their rights and thus, did not run counter to the principle of effectiveness.[404]

By contrast, it could also be argued that maintaining legal certainty must not lead to upholding unfair arbitration clauses,[405] regardless of whether the consumer brings an action for annulment or not. AG Trstenjak concluded that the national court must always have the power of *ex officio* control, given the aim of the UCTD to protect consumers and the obligation of the Member States to effectively guarantee the rights granted to individuals by EU law. She suggested that the principle of *res judicata* must be disregarded in favour of consumer protection.[406] According to her, the consumer could not be expected to take part in invalid arbitration proceedings based on an unfair arbitration clause, in order to have the clause annulled. In this respect, the referring court had highlighted distance – the arbitral tribunal was located 300km from the consumer's domicile[407] – and costs as potential deterrent factors. Trstenjak referred to Article 47, even though the Charter had not yet entered into force. The right to be heard must be safeguarded in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, including arbitration proceedings.[408] This meant that it could not be held against the consumer that she did not participate in the arbitration proceedings.[409] Trstenjak also expressed doubts as to the independence and neutrality of the arbitrators, where the arbitration clause in question was drafted by the arbitral tribunal itself. She found that the assessment of the clause must be the responsibility of a court, "which fully guarantees the judicial

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404 Case C-40/08 *Asturcom*, paras 46-47. In the case at hand, the consumer had been notified of both the arbitration proceedings and the arbitral award that was sought to be enforced. She had an opportunity to take legal action and thus, there was no need for *ex officio* control.

405 Christopher Hodges, 'Consumer Protection and Procedural Justice', Landmark Cases of EU Consumer Law - In Honour of Jules Stuyck (Intersentia 2013) 624.

406 Case C-40/08 *Asturcom*, Opinion of AG Trstenjak, points 58-59 respectively 74-75.

407 See also the Commission's written observations of 4 July 2008 (JURM(2008)88 RVP), para 40.

408 Opinion of AG Trstenjak, point 61. See also subsection 2.2.1(iv) on the rights of defence.

409 Opinion of AG Trstenjak, point 64.

impartiality required in a State governed by the rule of law".[410] Although the referring court and the Commission[411] shared these doubts, they were passed over by the CJEU.

It has been observed that the CJEU's hesitation to interfere in consumer arbitration, perhaps due to its politically sensitive nature, overshadows its pursuit of a high level of consumer protection.[412] This could be partially explained by the CJEU's institutional position and its role in the preliminary reference procedure; it is primarily asked to interpret the Directive and must be sensitive to the division of competences between the EU and the Member States. In *Achmea*, a non-consumer case concerning international arbitration under a bilateral investment treaty, the CJEU nevertheless stressed the importance of judicial review of arbitral awards from the perspective of the interpretation and application of EU law,[413] which cannot be ensured if the courts and tribunals of the Member States are side-lined. The CJEU recalled that the requirements of efficient arbitration proceedings may justify judicial review being limited in scope, provided that the fundamental provisions of EU law can be examined.[414] It could be argued that Article 47 of the Charter is a fundamental provision that warrants judicial review of arbitral awardsin other cases as well,[415] including unfair terms cases.

The Opinion of AG Trstenjak shows how *Asturcom* could have had a different outcome if it had been framed as an issue of effective judicial protection. The CJEU did not consider the fundamental rights dimension of the case. Rather, it focused on the existence of an opportunity to bring an action for annulment and the role of the national court under domestic law. Trstenjak went a step further and questioned whether consumers

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410 Opinion of AG Trstenjak, point 66. See also Norbert Reich, 'Party Autonomy and Consumer Arbitration in Conflict: A "Trojan Horse" in the Access to Justice in the E.U. ADR-Directive 2013/11?' (2015) 4 Penn. St. J.L. & Int'l Aff. 290, 320.

411 Commission's written observations, para 37.

412 Chantal Mak, 'Judgment of the Court (First Chamber) of 6 October 2009, Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira, Case C-40/08' [2010] European Review of Contract Law 437, 438, 443; Schebesta (n 143) 871.

413 Case C-284/16 *Slovak Republic v Achmea*, paras 42 and 50.

414 Case C-284/16 *Achmea*, para 54.

415 See also Bettina Heiderhoff, 'Die Selbstbeschränkung des Anwendungsbereichs der EU-Charte in Art. 51 und die Ausbildung eines anerkennungsrechtlichen europäischen ordre public', *EU-Grundrechte und Privatrecht / EU Fundamental Rights and Private Law* (Nomos 2016) 91.

can be expected to challenge an unfair arbitration clause at all, let alone an arbitral award based on that clause.[416] She referred to Article 47 as a standard for national (procedural) law, beyond the threshold of the principles of equivalence and effectiveness. Article 47 could create space for judicial intervention, in so far as national (procedural) law does not allow for it. As such, it could fulfil an empowering function where it authorises national (civil) courts to step in. For the referring court in *Asturcom* this might have made a difference, as will be shown in chapter 4.

3.2.3 Expedited order for payment procedures: a limited role of courts[417]

Delegation of judicial functions to non-judicial bodies

The CJEU has repeatedly emphasised the special responsibility of national courts to ensure the judicial protection of the rights EU law confers on individuals, with reference to Article 47 of the Charter. Access to court comes with procedural guarantees, such as judicial independence, and ensures the application of national and EU law.[418] This gives rise to the question of whether and to what extent judicial tasks and/or competences may be delegated to other, non-judicial bodies. Such a delegation of competences may take place for various reasons, e.g. to ease the burden on the courts. In *Alassini*, this was deemed a legitimate aim; as long as the parties could still exercise their right of access to the judicial system, they could be required to resort to ADR first.[419] However, in *Finanmadrid*, a Spanish order for payment procedure that was handled by the *Secretario Judicial* (court registrar or clerk[420]) instead of a judge was found to be liable to undermine the effectiveness of the UCTD.[421] The

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416 See also Schebesta (n 143) 862.

417 The analysis in this and the following subsection has also been included in Van Duin and Leone (n 44) 1238–1242.

418 See also Case C-284/16 *Achmea*, paras 35-36.

419 Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08 *Alassini*, discussed in subsection 2.2.1(i).

420 Since 2015 called *Letrado de la Administración de Justicia*: see further subsection 4.3.2 on the national background an follow-up of C-49/14 *Finanmadrid*. See also Fernando Gascón Inchausti, 'Between Reform and Dejudicialization: Current Trends in Spanish Civil Litigation' in A Uzelac and CH Van Rhee (eds), *Transformation of Civil Justice* (Springer International Publishing 2018) 135.

421 Case C-49/14 *Finanmadrid*, paras 46-47.

CJEU did not make an assessment under Article 47 of the Charter, despite an express reference to the right to effective judicial protection by the referring court. Still, the Opinion of AG Szpunar and the Commission's written observations shed more light on the potential (added) value of Article 47 in the context of the UCTD.

Finanmadrid is a sequel to *Banco Español de Crédito* (*Banesto*), a landmark case on the UCTD. In both cases, the debtor was a consumer who had entered into a credit agreement for the purchase of a motor vehicle. Both cases concerned the same Spanish order for payment procedure, aimed at granting creditors easy and rapid access to justice for uncontested pecuniary claims.[422] The creditor had to provide *prima facie* evidence of the claim, i.e. the existence of a debt by the submission of a contract or invoices. If the debtor did not lodge an objection, the procedure was non-contentious and it merely had to be ascertained whether the formal requirements were met. *Banesto* was about the lack of unfair terms control by the court before it issued an order for payment, *Finanmadrid* about the lack of unfair terms control by the court that was asked to enforce an order for payment issued by the court registrar.

In *Banesto*, the CJEU famously held that national courts are, in principle, not allowed to modify the contract by revising the content of unfair terms. But the case was also about a reversal of the dispute under restrictive procedural conditions. The CJEU found there was a significant risk that consumer-debtors would not lodge an objection for the following reasons:

- Due to the particularly short period provided for that purpose (20 days);
- Consumers might be dissuaded from defending themselves in view of the costs legal proceedings would entail in relation to the amount of the disputed debt;
- Consumers are unaware or do not appreciate the extent of their rights;
- Due to the incomplete nature of the information available to consumers, owing to the limited content of the request for the order for payment submitted by the creditor.[423]

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422 Case C-618/10 *Banesto*, para 51.

423 Case C-618/10 *Banesto*, para 54.

According to the CJEU, it was sufficient for creditors (traders) to initiate an order for payment to deprive consumer-debtors of the benefit of the protection intended by the UCTD.[424] They may count on the consumer's passivity and circumvent judicial control through – what Gerstenberg has called – "opportunistic exercises of party autonomy".[425] Therefore, the court performs *ex officio* control where it has the necessary legal and factual elements available to it.[426]

This time, AG Trstenjak doubted whether it was really necessary to change the order for payment procedure. In her view, the introduction of *ex officio* control – a "preventive judicial protection mechanism" – would eliminate an important efficiency benefit.[427] Trstenjak emphasised that procedures must be established that take the interests of both parties equally into account, including the creditor's right of access to justice. She considered that the case law of the CJEU up until then (2012) allowed for judicial protection to be dependent on consumers revealing their intention to make a legal challenge. It was sufficient that they could lodge an objection, which gave them the opportunity to decide whether they wished to avail themselves of the protection offered to them.[428]

The factors listed by the CJEU in *Banesto* nevertheless make clear that, even if such an opportunity exists, there are many reasons – *de facto* (e.g. unawareness) and *de jure* (e.g. time-limits) – why consumers would not make use of it.[429] In that event, it may be a mere formality, not a genuine opportunity for consumers to exercise their rights in court.[430] *Ex officio* control is one way to fix this; a broad understanding of access to

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424 Case C-618/10 *Banesto*, para 55. See also Case C-473/00 *Cofidis*, para 29: to prevent the court from performing unfair terms control, the trader merely had to wait for expiry of a time-limit before bringing an action for payment against the consumer.

425 Gerstenberg (n 124) 610. The trader would get away with a breach of EU consumer law by profiting from the consumer's lack of legal knowledge: Rott (n 101) 193. A focus on party autonomy, without taking the weaker position of consumers into account, may facilitate aggressive debt-collection and repossession practices: Daniela Caruso, 'Fairness at a Time of Perplexity' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 349.

426 Case C-618/10 *Banesto*, para 60.

427 Case C-618/10 *Banesto*, Opinion of AG Trstenjak, point 56.

428 Ibid, points 68-69, 73 and 75.

429 See also subsection 3.2.1 above.

430 Dougan (n 158) 412, 424; Beka (n 31) 172, 355.

court and justiciability of EU (consumer) rights is another, as will be further elaborated below.

Finanmadrid: a blind spot where Article 47 is concerned

Finanmadrid concerned the follow-up issue that *court* involvement was made dependent on the consumer-debtor lodging an objection, otherwise the order would be issued by a court registrar instead of a judge.[431] The referring court, which was subsequently requested to enforce the order, wanted to know whether the procedure was compatible with the fundamental right to effective judicial protection. It could have opted for only the principle of effectiveness, but additionally and explicitly referred to Article 47 as well.

In essence, there were four problems. Firstly, the court registrar could only check whether the formal admissibility requirements were met; there was no unfair terms control (*Banesto* had not yet been implemented).[432] The matter would only be referred to a judge when the documents indicated that the claimed amount was incorrect or when the debtor contested the claim. Secondly, the referring court assumed that the order had acquired the force of *res judicata* and was endowed with effects analogous to those of a judicial decision.[433] This meant that the debtor could not oppose enforcement of the order on the ground of unfair terms in the underlying contract, and that the court could not make an assessment of its own motion either.[434] The order was effectively immune from judicial review. Thirdly, the court registrar was not an independent judicial authority and did not enjoy the same constitutional status as courts.

A fourth, additional problem – drawn attention to by the Commission[435] – was that there appeared to be procedural defects in the order for payment procedure at issue, i.e. no valid service or notification to two of the defendants, which casted doubt on their possibility to exercise their rights of defence guaranteed by Article 47 of the Charter. The case concerned one main debtor and three guarantors; in respect of

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431 Case C-49/14 *Finanmadrid*, paras 37-39.

432 Case C-49/14 *Finanmadrid*, para 50.

433 Case C-49/14 *Finanmadrid*, paras 24 and 47.

434 Case C-49/14 *Finanmadrid*, para 24. See also the Commission's written observations of 19 May 2014 (sj.c(2014)1686122), para 33.

435 Case C-49/14 *Finanmadrid*, paras 71-73, with reference to Case C-472/11 *Banif Plus Bank*, paras 29-31.

two of those guarantors, it was unclear whether they had actually been informed of the pending order for payment procedure against them.

Whilst the CJEU dealt with the first and second problems, it did not address the third and fourth. It focused on unfair terms control at the enforcement stage and not on the outsourcing of judicial competences – or a potential violation of the rights of defence – in the preceding stage. The CJEU held that, when the authority hearing the request for an order for payment (i.e. the court registrar) did not have the power to assess unfair terms, the court ruling on enforcement of the order must have that power.[436] Thus, the CJEU seemed to agree with AG Szpunar's view that the onus is on the enforcement court as a last resort to ensure that unfair terms control takes place.[437] This was reiterated in *EOS KSI Slovensko*: the conferral of jurisdiction in order for payment procedures to officials who do not have the status of a magistrate and cannot perform unfair terms control is permissible, so long as judicial control is ensured at the enforcement stage (*ex officio*) or when an objection is lodged.[438]

The mere fact that an order has *res judicata* effect because the consumer has not challenged the claim (in time) cannot justify the complete absence of judicial review.[439] In the words of AG Szpunar, a balance must be struck "between the notion that a court should compensate for a procedural omission on the part of a consumer who is unaware of his rights and the notion that it should not make up fully for the consumer's total inertia".[440] In so far as the principle of *res judicata* makes it impossible or excessively difficult to ensure the protection conferred on consumers by the UCTD, it runs counter to the principle of effectiveness.[441] Time-limits must be sufficient in practical terms to enable the applicant to prepare and bring an action.[442] If the time-limit is too short, there is a significant risk that the consumer will not lodge an

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436 Case C-49/14 *Finanmadrid* paras 46 and 55.

437 Case C-49/14 *Finanmadrid*, Opinion of AG Szpunar, points 62 and 72.

438 Case C-448/17 *EOS KSI Slovensko v Danko and Danková*, para 50.

439 Case C-49/14 *Finanmadrid* para 48.

440 Case C-49/14 *Finanmadrid*, Opinion of AG Szpunar, point 43, with reference to Case C-40/08 *Asturcom Telecomunicaciones*, para 47.

441 Case C-49/14 *Finanmadrid*, para 54. See also Case C-122/14 *Aktiv Kapital Portfolio v Egea Torregrosa*, paras 31 and 36.

442 Case C-8/14 *BBVA*, para 29, with reference to Case C-69/10 *Samba Diouf*, para 66. In this respect, the service of a specific procedural notice is significant: Case C-8/14 *BBVA*, Opinion of AG Szpunar, point 56.

objection.[443] The referring court had also mentioned the additional obstacle of mandatory legal representation, but the CJEU did not take this into consideration.

The question regarding Article 47 remained unanswered in *Finanmadrid*, although it was considered to be a separate issue – also by the referring court.[444] This is peculiar in view of the CJEU's own statement in *Åkerberg Fransson* that, when requested to give a preliminary ruling, it must provide all the interpretative guidance the national court needs in order to determine whether legislation falling within the scope of EU law is compatible with EU fundamental rights.[445] Unlike the CJEU, the Commission did discuss the third and fourth problem mentioned above. According to the Commission, the court registrar could not be considered as an "independent and impartial tribunal, established by law". Therefore, orders issued by the court registrar must be subject to judicial review.[446] This is a different rationale for judicial intervention: it is not (only) about ensuring that unfair terms control takes place, but (also) that the case comes before a court. It is questionable whether the delegation of judicial competences is justified in light of the aim it pursues, i.e. streamlining the procedure. Moreover, the Commission noted that the procedure at issue could be contrary to Article 47 in respect of the two defendants who had not been duly notified.[447]

In so far as the referring court and the Commission used Article 47 in its strengthening or signalling function, the CJEU did not pick up on it. Consequently, the decision in *Finanmadrid* has a blind spot where Article 47 is concerned. As AG Szpunar observed, even if Article 47 provides only a *minimum* level of protection, there might be a violation in cases where the (consumer-)defendant did not have access to an effective remedy due to, e.g., a restrictive calculation of the time period for lodging an objection, the prohibitive costs of the procedure or the absence of recourse against an order adopted without the defendant's knowledge. In this respect, Szpunar drew a parallel with the Brussels I

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443 Case C-448/17 *EOS KSI Slovensko*, paras 52-53.

444 Case C-49/14 *Finanmadrid*, paras 46 and 56-57 respectively.

445 Case C-617/10 *Åkerberg Fransson*, para 19.

446 Case C-49/14 *Finanmadrid*, Commission's written observations, para 67. The CJEU adopted similar reasoning in a (non-consumer) case under the Brussels I Regulation regarding a writ of execution issued by a notary: Joined Cases C-267/19 and C-323/19 *Parking v Sawal and Interplastics v Letifico*, paras 52-53.

447 Case C-49/14 *Finanmadrid*, Commission's written observations, para 75.

Regulation.[448] This Regulation also recognises explicitly that consumers deserve special protection; for that reason, it contains additional procedural guarantees in cross-border disputes.[449] According to Szpunar, however, the order for reference did not contain enough information to answer the question whether the defendant had access to an effective remedy.[450]

Margarit Panicello: another instance of a signalling function of Article 47

The solution offered by the CJEU in *Finanmadrid* – *ex officio* control at the enforcement stage – does not address a lack of judicial involvement or a potential violation of procedural rights in the proceedings leading up to the order for payment. In *Margarit Panicello*, another Spanish case concerning a similar type of procedure (*jura de cuentas*: 'unpaid fee recovery procedure'[451]), AG Kokott explained why judicial review at the enforcement stage might be too late. The pressure that the very existence of an enforceable instrument exerts on consumers to discharge their (alleged) payment obligations must not be underestimated. If the consumer 'voluntarily' complies with a decision, albeit based on unfair terms, it does not even need to be enforced. This was one of the reasons for AG Kokott to conclude that the procedural rules at issue were contrary to the UCTD as well as Article 47 of the Charter.[452]

The *jura de cuentas* is a special administrative procedure before the court registrar. The procedure is designed for lawyers to recover unpaid fees from their clients; while it is voluntary for the lawyer, it is mandatory for the client. It should be noted that the UCTD applies to contracts for legal services between lawyers and natural persons acting for purposes

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448 Case C-49/14 *Finanmadrid*, Opinion of AG Szpunar, point 95, where a parallel is drawn with Regulation 44/2001. See also e.g. Case C-519/13 *Alpha Bank Cyprus*, paras 30-31: the objectives of improving the efficiency and speed of judicial procedures and ensuring the proper administration of justice cannot be attained by undermining the rights of defence.

449 Case C-347/18 *Salvoni v Fiermonte*, para 21. On the special protective rules for consumers under the Brussels I Regulation, see e.g. Aukje van Hoek, 'CJEU – Pammer and Alpenhof – Grand Chamber 7 December 2010, Joined Cases 585/08 and 144/09' [2012] European Review of Contract Law 93.

450 Case C-49/14 *Finanmadrid*, Opinion of AG Szpunar, point 96.

451 Case C-503/15 *Margarit Panicello*, Opinion AG Kokott, point 1. See further subsection 4.3.3 on the national background and follow-up

452 Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott, points 136-137.

outside their trade, business or profession.[453] The request for a preliminary ruling was made by a Spanish court registrar, who questioned his own exclusive competence in the procedure. Paradoxically, this is also why the CJEU found the case to be inadmissible; the court registrar was not an independent "court or tribunal" in the sense of Article 267 TFEU. In AG Kokott's view, by contrast, it did not matter that a decision adopted by a court registrar in another procedure was not classified as "a judicial act *within the meaning of Spanish constitutional procedural law*".[454] The court registrar acts with sufficient independence. Moreover, an order of the court registrar is of a judicial nature: it establishes an enforceable claim to payment.[455] In any case, it is questionable whether consumers are able to tell the difference with a real judicial decision.

According to AG Kokott, several elements of the procedure were problematic from the perspective of the UCTD, read in conjunction with Article 47. The court registrar could not perform unfair terms control, but, more importantly, Kokott also found that the notion of deferring such control to the enforcement stage must be rejected on grounds of both procedural economy and the effective implementation of the UCTD. Even if unfair terms control could take place at the enforcement stage, the initial claim would still have been awarded and there would be the threat of enforcement of the decision. This would promote the settlement of claims founded on unfair terms.[456] Therefore, it could be argued that judicial intervention should already be possible at an earlier stage.

As AG Kokott indicated, the design of the procedure may give rise to concerns under Article 47, in light of the risk that consumers will not challenge the claim, the decision or its enforcement. This might encourage traders to take their chances with claims that are based on

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453 Case C-537/13 *Šiba v Devėnas*. See also Marien Aguilera Morales, '¿Quo vadis "jura de cuentas"? ¿quo vadis Europa? El estatus y función de los Secretarios Judiciales a examen por el TJUE' (2017) 41 Revista General de Derecho Procesal 6–7.

454 Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott, point 63. Kokott refers to a national debate about the question of whether it was compatible with the rule of law to transfer quasi-judicial powers to bodies responsible for the administration of justice: point 86.

455 Opinion of AG Kokott, points 81, 91 and 95.

456 Opinion of AG Kokott, points 133-136.

unfair terms or otherwise unfounded.[457] From the perspective of the UCTD, *ex officio* control at the enforcement stage might be acceptable as a last resort, but Kokott relied on Article 47 to go one step further: effective judicial protection would entail that judicial control should take place *before* a decision is issued.[458] She seemed to consider *judicial* protection in the preceding procedure as an additional, positive requirement.[459]Article 47 fulfills a signalling function here as well: it was meant to incite a more fundamental reconsideration of the procedure at issue.

The CJEU nevertheless concluded that the procedure lacked a clear judicial nature and that the case was therefore inadmissible. A similar question in a different case was also declared inadmissible, because the case was pending before the court registrar and not before the referring court.[460] Article 47's signalling function was not picked up by the Spanish legislature either, as will be discussed in chapter 4.[461]

3.2.4 Other restrictive procedural conditions

Profi Credit Polska: a strengthening function of Article 47

Whereas *Finanmadrid* was a missed opportunity for the CJEU to clarify the meaning of effective judicial protection in the context of the UCTD, the CJEU did explicitly refer to Article 47 of the Charter in two more recent cases – *Profi Credit Polska* and *PKO Bank Polski* – that concerned an order for payment procedure in Polish law. In both cases, a financial institution had brought a claim against a consumer-debtor on the basis of a promissory note or a bank ledger that provided security for a credit agreement. Unlike in *Banesto* and *Finanmadrid*, the agreement itself was not in the case file; the procedure was *ex parte* and rested on the presumption that the promissory note fully proved the factual basis for the claim. The court only had to establish that it was formally valid. It

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457 In this respect, Beka has rightly noted there is a fundamental distinction between a debt that is owed but the consumer is unable to pay, and a debt that results from an unfair term and/or consumer protection legislation not having been observed: Beka (n 31) 252.

458 See also Case C-426/17 *Barba Giménez*, para 28.

459 Case C-503/15 *Margarit Panicello*, Opinion of AG Kokott, point 117.

460 Case C-426/17 *Barba Giménez*, para 45-46.

461 See subsection 4.2.3.

was up to the debtor to contest not only the obligation arising from the promissory note, but also the underlying contractual relationship.

According to AG Kokott, it was not problematic per se that consumers are required to lodge an objection; they could reasonably be expected to take this step to assert their rights.[462] The assumption that the creditor must have access to an expedited procedure was not called into question either; this would be an excessive intrusion of the Member States' procedural autonomy.[463] Moreover, the creditor has an interest in seeking enforcement quickly. What was problematic, however, was a constellation of restrictive procedural conditions: a time-limit of only two weeks for consumers to substantiate their complaints, a limitation of the scope of the court's assessment of those complaints and relatively high court fees. These are all capable of making it excessively difficult for consumers to exercise their rights.[464]

The CJEU held that Article 7(1) UCTD – the need to provide "adequate and effective means" – entails an obligation to lay down detailed procedural rules that ensure observance of the rights individuals derive from the Directive, which implies a requirement that there is an effective remedy, a requirement "also enshrined" in Article 47 of the Charter.[465] The right to an effective remedy is infringed if national procedure law gives rise to a significant risk that consumers will not lodge the objection required.[466] The decision confirms and consolidates *Banesto* and *Finanmadrid*. The CJEU reiterated that the exercise of consumers' (substantive) rights must not be subject to unreasonable procedural conditions, in particular time-limits or costs.[467] A time-limit of two weeks, combined with strict admissibility requirements – during which time consumers not only had to raise their complaints, but also to adduce facts and evidence – and a court fee that was three times higher

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462 Case C-176/17 *Profi Credit Polska*, Opinion of AG Kokott, points 71-73. See also Case C-32/14 *ERSTE Bank Hungary*, para 63.

463 Opinion of AG Kokott, point 76.

464 Opinion of AG Kokott, points 77-81. See also the Commission's written observations of 27 July 2017 (sj.j(2017)4286930), para 75.

465 Case C-176/17 *Profi Credit Polska*, para 59; Case C-632/17 *PKO Bank Polski*, para 45. See also Case C-483/16 *Sziber*, para 49.

466 Case C-176/17 *Profi Credit Polska*, paras 61 and 69, with reference to Case C-49/14 *Finanmadrid*, para 52 and Case C-122/14 *Aktiv Kapital Portfolio*, para 37.

467 Case C-176/17 *Profi Credit Polska*, paras 63-64. The UCTD itself does not cover the allocation of the costs of legal proceedings as provided for by national legislation: Case C-433/11 *SKP*, para 34.

for the consumer than for the other party was found to be unreasonable.[468] The procedural rules at issue allowed for an order for payment to be granted in the absence of a genuine opportunity for the consumer-debtor to file an opposition or a possibility for the court to perform *ex officio* control.[469]

The CJEU seemed to consider Article 47 as largely synonymous with the principle of effectiveness.[470] It also cited the procedural rule of reason as the relevant test, not Article 52(1) of the Charter. Still, this reference to Article 47 is more than symbolic, even if it does not necessarily lead to a different outcome and could thus be seen as merely supporting the UCTD's (full) effectiveness. It was the CJEU, not the referring court, that brought up Article 47, which appears to fulfil not only a legitimising function but also a strengthening function in respect of procedural rights as enabling rights. *Ex officio* control is meant to compensate for procedural omissions that cannot be imputed to consumers, due to e.g. restrictive procedural conditions.[471] It is only part of the solution;[472] it does not remove procedural obstacles, such as excessive court fees. Article 47 calls for a different balance between the creditor's right of access to justice and the consumer-debtor's right to effective judicial protection. Restrictive procedural conditions may be harder to justify when EU consumer rights are at stake. Expedited procedures should not turn into an avenue for depriving consumers of their (substantive and procedural) rights. The Polish cases clearly show that the judicial protection of consumers against unfair terms presupposes that the right of access to court can be exercised effectively, which is explicitly recognised as a fundamental rights issue.

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468 Case C-176/17 *Profi Credit Polska*, paras 65-68.

469 The court may require the trader to produce underlying documents – in particular, the credit agreement – in order to verify that the rights consumers derive from the UCTD and the Consumer Credit Directive are observed: Joined Cases C-419/18 and C-483/18 *Profi Credit Polska v Włostowska*, para 77; Case C-632/17 *PKO Bank Polski*, paras 51-52; Case C-495/19 *Kancelaria Medius*, para 45. See also Joined Cases C-453/18 and C-494/18 *Bondora v VC and XY*, para 54 (on the European order for payment procedure).

470 Case C-176/17 *Profi Credit Polska*, para 57; Case C-632/17 *PKO Bank Polski*, para 43.

471 See e.g. Case C-147/16 *Karel de Grote*, para 31.

472 Case C-8/14 *BBVA*, Opinion of AG Szpunar, point 70. *Ex officio* control is an imperfect response to a combination of restrictive procedural rules and a reliance on party initiative: Van Duin and Leone (n 44) 1240.

Aqua Med: an eliminatory function of Article 47?

Aqua Med, another Polish case, seems to confirm that the core components of Article 47 of the Charter deserve protection in and of themselves, also in the context of the UCTD. The CJEU reiterated that national procedures under the UCTD must be in conformity with the principle of equivalence and the right to an effective remedy as required by Article 47. The CJEU distinguished a restriction of the right of consumers to an effective remedy from the exercise of the rights conferred on them by the UCTD.[473] Procedural difficulties may deter or prevent consumers from exercising their *substantive* rights, but excessive restrictions of their *procedural* rights are also (in and of themselves) prohibited.

The case was about a jurisdiction clause, which referred to national provisions that govern the arrangements for determining jurisdiction in domestic disputes. The clause allowed the claimant to choose between the court which has jurisdiction in either the place where the (consumer-)defendant is domiciled or where the contract was to be performed. Contractual terms that reflect mandatory statutory or regulatory provisions are excluded from the scope of the UCTD (Article 1(2)). The rationale behind this is that the national legislature is already supposed to have struck a balance between all the rights and obligations of the parties to the contract.[474] However, the CJEU found that the clause at issue could not be understood as merely reflecting a specific provision; rather, it referred to a set of procedural rules.[475] Questions relating to the impact of national legislation on the "protection guarantees" resulting from the UCTD do fall within its scope.[476] In the end, the CJEU assessed the national procedural rules at issue, not the clause itself. Like jurisdiction clauses, procedural rules on jurisdiction may make it more difficult for consumers to take legal action. The CJEU found that rules on jurisdiction – and by extension a jurisdiction clause referring to those rules – may give rise to an "excessive restriction"[477] of the consumer's right to an effective remedy under Article 47 of the Charter.

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473 Case C-266/18 *Aqua Med*, paras 50-51.

474 Case C-266/18 *Aqua Med*, para 33. See also Joined Cases C-96/16 and C-94/17 *Banco de Sabadell*, para 43.

475 Case C-266/18 *Aqua Med*, paras 35-37.

476 Case C-118/17 *Dunai*, para 38. See further subsection 3.3.3.

477 Case C-266/18 *Aqua Med*, para 52.

Again, it was the CJEU itself, not the referring court, that brought up Article 47. It held that the rules at issue did not exclude the possibility of consumers participating in proceedings brought against them and asserting the rights they derive from the UCTD. However, overly high (travel) costs could deter them from entering an appearance and properly defending their rights, if the court is very far away from their place of residence.[478] In this respect, the Commission has drawn a comparison with Article 18 of the Brussels I Regulation, which stipulates that proceedings against a consumer may only be brought in the courts of the Member State where the consumer is domiciled.[479] Even though *Aqua Med* concerned a domestic dispute, the distance between the court and the consumer's place of residence was approximately 200km, almost the same distance as between Amsterdam and Brussels.

In so far as Article 47 precludes excessive restrictions, it may fulfil an eliminatory function. It is nevertheless unclear whether the excessive restriction test is an implicit reference to the proportionality test of Article 52(1) of the Charter. A comparison between *Aqua Med* and another case on jurisdiction, *Baczó*, shows that it matters whether procedural rules are (solely) assessed in light of the need to ensure protection of *substantive* consumer rights, or whether those rules are (also) considered as restrictions of *procedural* rights that form the core components of Article 47.

In *Baczó*, which is referred to in *Aqua Med*, the designation of specialised courts for actions seeking to have unfair contract terms set aside was considered to be a legitimate aim, even though this might burden consumers with higher costs.[480] The CJEU held that the aim of ensuring "uniform practice and a more effective protection of consumer rights" by specialised courts could prevail over procedural difficulties such as costs, distance and the mandatory assistance of a lawyer, which did not necessarily make the exercise of *substantive* rights excessively difficult. According to the CJEU, measures aiming to compensate for the consumer's financial difficulties, such as legal aid, may help to offset the

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478 Case C-266/18 *Aqua Med*, paras 53-54. See also Joined Cases C-240/98 to C-244/98 *Océano*, paras 22-23; Case C-243/08 *Pannon*, para 41; Case C-137/08 *Pénzügyi Lízing*, para 54.

479 Case C-266/18 *Aqua Med*, Commission's written observations of 27 July 2018 (sj.a(2018)4465858 SK), paras 19 and 48.

480 Case C-567/13 *Baczó* , paras 46-47.

(extra) costs of the proceedings. Moreover, consumers, in their capacity as applicants, did not need to be present at all stages.[481]

In *Aqua Med*, with reference to Article 47, the CJEU came to a slightly different conclusion than in *Baczó*. The CJEU held that the consumer's right to an effective remedy should not be excessively restricted by procedural conditions such as costs or time-limits.[482] This suggests that procedural difficulties are harder to justify under Article 47. It nevertheless remains to be seen whether the excessive restriction test actually differs from the tests applied in other cases.

3.3 EFFECTIVE (JUDICIAL) REMEDY

3.3.1 Introduction: a broad understanding of justiciability

The cases discussed in the previous section already illustrate the importance of the availability and accessibility of a (judicial) remedy for the exercise of consumer rights under the UCTD. In *Profi Credit Polska*, the right to an effective remedy under Article 47 of the Charter was phrased as a parallel requirement to Article 7 UCTD; in *Aqua Med*, it was formulated as an additional requirement. As will become apparent in the present section, not all restrictive procedural conditions are an infringement of Article 47. A differentiation could be made between, on the one hand, rules that obstruct (access to) an effective judicial remedy and thus, impinge on the core elements of Article 47, and on the other hand rules that merely complicate (subsequent) legal proceedings.[483] AG Wahl has made a similar distinction in his Opinion on a Slovakian case concerning extrajudicial enforcement, comparable to *Kušionová*. According to Wahl, consumers do not need to be subject to a particularly favourable treatment. Some rules may make it difficult for consumers to protect their rights effectively, which – Wahl seems to imply – might not necessarily be a problem, but in other cases it may become outright

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481 Case C-567/13 *Baczó*, para 55 with reference to Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León v Anuntis Segundamano España*, para 42 and paras 57-59.

482 See specifically Case C-266/18 *Aqua Med*, paras 51 and 53.

483 Nowak (n 119) 34–35; Krommendijk, 'Is There Light on the Horizon?' (n 288) 1413.

impossible for them to do so.[484] As an example of why this is problematic, Wahl referred to the well-known *Aziz* case.[485] In that case, the CJEU held that Spanish procedural law was incompatible with the UCTD, because the referring court could not adopt interim measures to suspend the enforcement and guarantee the full effectiveness of its final decision. In other cases, however, the distinction between difficult and impossible might not always be as clear, as the difference between the view of the Commission and the CJEU's judgment in *Kušionová* shows.[486]

In *Kušionová*, the CJEU openly referred to the Charter, which – like *Aziz* – pertained to mortgage enforcement against the consumer's family home. The CJEU insisted on the possibility of interim relief to ensure the right to an effective judicial remedy under the UCTD, by reference to Articles 7 and 47 Charter.[487] This begs the question of whether Article 47 may give any further (constructive) guidance as to what an effective remedy requires, in the context of the UCTD. As we have seen in chapter 2, a positive or generative function of Article 47 of the Charter is controversial. There is a delicate balance between the Scylla of reducing the Member States' procedural autonomy and the Charybdis of denying consumers a high level of (judicial) protection.[488] It will be shown in this section that the requirement of an effective *judicial* remedy under the UCTD has been given further substance in the CJEU's case law. The analysed case law reaffirms that access to court is not a mere formality: there must be a genuine opportunity for consumers to take legal action. Moreover, once a case comes before a court, that court must also be able to grant an actual remedy for an infringement of the rights it is meant to protect. This is in line with a broad understanding of justiciability and also echoes the call made by Van Gerven for a standard of sufficient or adequate judicial protection.[489]

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484 Case C-482/12 *Macinský*, Opinion of AG Wahl, point 73 and 77, referring to the principle of effectiveness. The case was withdrawn before the CJEU could give a decision.

485 Case C-415/11 *Aziz*; further discussed in subsections 3.4.2 and 4.4.2.

486 See subsection 3.3.2 below.

487 Case C-34/13 *Kušionová*, paras 47 and 66.

488 Gerstenberg (n 124) 601.

489 Van Gerven (n 5) 504–504. See also Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 395; Reich, 'The Principle of Effectiveness and EU Private Law' (n 1) 308–309.

What constitutes an effective *substantive* remedy ultimately depends on the factual and legal context. In *Kušionová*, it was the possibility of preventing the definitive and irreversible loss of the consumer's family home.[490] In *Sziber*, it was the availability of an "effective procedural path" to obtain restitution of amounts unduly paid.[491] This follows from Article 47 of the Charter, read in conjunction with Articles 6 and 7 UCTD. Unlike Article 7 UCTD, which requires "adequate and effective means", Article 47 requires a *judicial* remedy, as *ERSTE Bank Hungary* confirms.[492]

3.3.2 The role of the court in mortgage enforcement proceedings

Aziz: hidden constitutionalisation

The case of *Aziz* revealed a missing link between substantive and procedural consumer protection in Spanish law. It revolved around a mortgage loan agreement, which constituted an extrajudicial title that gave the creditor direct access to mortgage enforcement proceedings. The possibility for consumers to allege that the agreement contained unfair terms was deferred to separate declaratory proceedings before a different court. Here, the problem was not so much a lack of court involvement (*ex officio* control) per se, as a shortfall in judicial remedies. The referring court could declare the terms of the mortgage loan agreement unfair, but it could not suspend – let alone reverse – mortgage enforcement proceedings based on those terms. Thus, it asked for a reconsideration of the applicable procedural framework against the background of a common understanding of the (fundamental) right to an effective remedy.[493]

The dispute at issue in *Aziz* was directly concerned with the powers of the referring court to determine whether contractual terms are unfair.[494] The CJEU emphasised that a judicial remedy must not only be available to consumers; its *effectiveness* must also be guaranteed.[495] In Spanish mortgage enforcement proceedings, the ambit of the dispute was restricted. Consumer-debtors could only file an opposition on a

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490 Case C-34/13 *Kušionová*; see subsection 3.3.2 below.

491 Case C-483/16 *Sziber*; see subsection 3.3.3 below.

492 See subsection 3.3.2 below.

493 Gerstenberg (n 124) 616–617, 620–621. See further subsection 4.3.2 on the national background and follow-up of *Aziz*.

494 Case C-280/13 *Barclays Bank*, para 38.

495 Case C-415/11 *Aziz* paras 59-60.

limited number of (procedural) grounds, which did not include unfair terms. The CJEU observed that the creditor could deprive consumers of the protection intended by the UCTD, simply by initiating the enforcement proceedings.[496] The possibility for consumers to obtain subsequent compensation was insufficient, especially where the mortgaged property is their family home.[497] Compensation was not an effective remedy: it could not prevent the loss of the home. In this respect, the CJEU referred to *Unibet*, where the need for interim relief was recognised as necessary to give full effect to EU rights.[498]

The CJEU highlighted the link between substantive and procedural protection in an additional way. Certain terms may make it more difficult for consumers, given the procedural means at their disposal, to take legal action and exercise their rights of defence.[499] The court's unfairness assessment should therefore include a consideration of the (procedural) means available to consumers to ensure that unfair terms are not binding on them.[500] For instance, a so-called early maturity or acceleration clause in the mortgage loan agreement allowed the creditor to call in the totality of the loan on expiry of a stipulated time-limit. The referring court found this time-limit to be disproportionately short in light of the long-term (lifetime) contract.[501]

Unlike the Commission,[502] the CJEU did not explicitly mention the Charter, but *Aziz* could be seen as an instance of "hidden constitutionalisation":[503] it indirectly set a higher standard of fundamental rights protection than the national (constitutional)

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496 Case C-415/11 *Aziz*, para 62, with reference to Case C-618/10 *Banesto*, para 55. See also Joined Cases C-537/12 and C-116/13 *Banco Popular Español v Rivas Quichimbo and Banco de Valencia v Valldeperas Tortosa*, para 60; Case C-169/14 *Sánchez Morcillo I* para 28; Case C-32/14 *ERSTE Bank Hungary*, para 45.

497 Case C-415/11 *Aziz*, paras 60-61.

498 Case C-423/05 *Unibet*, paras 37 and 77. See also subsection 2.4.1.

499 Case C-415/11 *Aziz*, para 75. See also Joined Cases C-537/12 and C-116/13 *Banco Popular Español*, paras 70-71.

500 Case C-415/11 *Aziz*, para 68.

501 Case C-415/11 *Aziz*, paras 21 and 31.

502 Case C-415/11 *Aziz*, Commission's written observations of 5 December 2011 (SJ.J (2011) 1426399), para 44.

503 Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' (n 342) 649; Micklitz and Reich (n 43) 800; Iglesias Sánchez (n 18) 970; Della Negra (n 123) 1024.

standard.[504] It provoked the creation of a new judicial remedy at the national level; a "hybridisation" in the procedural sphere. In a way, the right to an effective remedy could be said to fulfil a transformative function, where it lead to the introduction of unfair terms as an opposition ground in mortgage enforcement proceedings.[505] In chapter 4 I will explain why in my view, it cannot be maintained that it was the CJEU that "invented" a new remedy,[506] i.e. interim relief, if only because the Spanish legislature opted for a different solution: unfair terms control – if necessary *ex officio* – in mortgage enforcement proceedings.

Kušionová: open constitutionalisation

In *Kušionová*, the CJEU confirmed that the right to an effective judicial remedy as safeguarded by Article 47 of the Charter is a mandatory requirement applicable to the implementation of the UCTD.[507] The CJEU reformulated the question of the referring court, which only mentioned Article 38 of the Charter but pertained to the judicial remedies available to consumers. An important difference with *Aziz* is that in *Kušionová* there was no court involvement at all, unless the consumer-debtor challenged the enforcement.[508] A reference to Article 47 was used to stress the need for an effective judicial remedy against the *extrajudicial* enforcement of a loan secured by a charge.[509] Article 47 thus fulfils a strengthening function in support of the Directive's (full) effectiveness, and possibly even a generative function where it underlines the need for *judicial* remedies.

The CJEU held that while the choice of remedies remains within the discretion of the Member States, they must ensure that those remedies are effective, proportionate and dissuasive.[510] The national court must be able to adopt protective (interim) measures to prevent the enforcement from going ahead.[511] This applies all the more strongly where the property at issue is the family home of the consumer whose rights have

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504 See further subsection 4.3.2. See also Iglesias Sánchez (n 18) 963, 970.

505 See further subsection 4.3.3.

506 As submitted by Micklitz, 'Unfair Contract Terms – Public Interest Litigation before European Courts' (n 342) 641.

507 Case C-34/13 *Kušionová*, para 47.

508 Della Negra (n 123) 1023.

509 Case C-34/13 *Kušionová*, para 45.

510 Case C-34/13 *Kušionová*, para 59.

511 Case C-34/13 *Kušionová*, paras 58 and 60.

been infringed. The loss of a home (Article 7 of the Charter) after unlawful enforcement – resulting in eviction – would seriously undermine consumer rights and places the consumer's family in a particularly vulnerable position.[512] In this respect, it has been observed that fundamental rights have the potential to expose underlying socio-economic concerns.[513] These concerns transcend the issue of unfair terms control: the vulnerability of consumers vis-à-vis financial institutions is magnified where (i) the case concerns the family home – which distinguishes mortgage enforcement from regular order for payment procedures[514] – *and* (ii) there is a lack of effective (judicial) remedies and/or procedural safeguards, which puts consumer-debtors in an even more subordinated position vis-à-vis creditors.[515]

The CJEU did not answer the sensitive question, asked by the referring court,[516] whether extrajudicial enforcement – without any court involvement – is a way for the trader to effectively circumvent unfair terms control. It merely concluded that a contractual term, e.g. one that enables the creditor to use extrajudicial means of enforcement, falls outside the scope of the UCTD if it reflects the content of a mandatory statutory or regulatory provision (Article 1(2) UCTD).[517] Here, the term referred to the existence of an extrajudicial enforcement procedure under national law; in its absence, the creditor would still have been entitled to employ the procedure. According to AG Hogan in his Opinion on *Lovasné Tóth*, such terms do not exclude the right to an effective remedy under Article 47 of the Charter.[518] A term that does not affect the consumer's legal position, even if it gives the (false) impression that the consumer's legal remedies are limited, is not a possibly unfair term in the sense of the Annex sub (q).[519]

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512 Case C-34/13 *Kušionová*, paras 63 and 66. See also Case C-415/11 *Aziz* para 61.

513 See e.g. Aurelia Colombi Ciacchi, 'European Fundamental Rights, Private Law, and Judicial Governance' in Hans-W Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 126.

514 Case C-176/17 *Profi Credit Polska*, Opinion of AG Kokott, point 62

515 Maribel González Pascual, 'Social Rights Protection and Financial Crisis in Europe. The Right to Housing, a Cautionary Tale' (2016) 9 Inter-American and European Human Rights Journal 260, 269–272.

516 Case C-34/13 *Kušionová*, para 30.

517 Case C-34/13 *Kušionová*, para 80.

518 Case C-34/18 *Lovasné Tóth*, Opinion of AG Hogan, points 73 and 78.

519 Case C-34/18 *Lovasné Tóth*, paras 53-54

The CJEU ultimately found that in Slovakia, *ex ante* and *ex post* remedies were available to the consumer to challenge the enforcement, albeit under time-limits (within 30 days and 3 months respectively).[520] It was possible for the national court to adopt interim measures and to declare the enforcement void, which retrospectively places consumers in a situation almost identical to their original situation.[521] The CJEU might have come to a different conclusion if the prospect of a deposit by way of guarantee or the costs of legal representation without the possibility to seek legal aid would deter consumers from seeking a suspension of the enforcement. Protection *a posteriori* would most likely also have been insufficient if the home would be definitely lost.[522]

The Commission argued that the only way to achieve actual consumer protection was judicial control *ex ante*, i.e. before the enforcement took place.[523] It also argued that 30 days was too short and the 3-month time period after the enforcement did not count.[524] Furthermore, it could be observed that, given what was at stake in *Kušionová*: the loss of a family home, the 30-day time-limit is not significantly longer than the 20-day time-limit in *Banesto*.[525]

Despite its reference to the Charter and to the case law of the ECtHR,[526] the CJEU did not engage in a proportionality assessment under Article 52(1) of the Charter. In that case, it should have assessed whether a restriction of the consumer's right to an effective remedy (Article 47 of the Charter) or interference with Article 7 of the Charter could be justified in light of e.g. the need to ensure the efficiency of enforcement proceedings or the creditor's interest in swift enforcement of the debt.[527]

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520 Case C-34/13 *Kušionová*, para 55.

521 Case C-34/13 *Kušionová*, para 67.

522 See Case C-407/18 *Addiko Bank*, paras 60 and 62.

523 Case C-34/13 *Kušionová,* Commission's written observations of 14 May 2013 (sj h(2013)1140700), para 16. The Commission had doubted whether unfair terms did indeed constitute a ground to declare the sale void: see its written observations, paras 17 and 20.

524 Case C-34/13 *Kušionová,* Commission observations, para 48. According to AG Wahl, the total of four months was not comparable to the 20-day time-limit in *Banesto*: Case C-482/12 *Macinský*, Opinion of AG Wahl, point 91.

525 Della Negra (n 123) 1024. The significance of what is at stake for the parties is a relevant factor for time-limits: Case C-8/14 *BBVA*, Opinion of AG Szpunar, point 41.

526 Case C-34/13 *Kušionová*, para 64.

527 Della Negra (n 123) 1024, 1030. The ECHR considers procedural guarantees (Article 6 ECHR) as crucial for the proportionality assessment of a breach of the right to

Instead, the CJEU considered whether a suspension or termination of the enforcement proceedings was proportionate to the aim of consumer protection against unfair terms.[528] Thus, *Kušionová* might be an instance of open constitutionalisation, but the CJEU did not strike a real balance between all competing rights and interests involved.[529]

Judicial protection as a mandatory (minimum) requirement

Two CJEU decisions will be considered that refer to "effective judicial protection", but do not expressly mention Article 47 of the Charter. They pertain to extrajudicial enforcement, like *Kušionová*, and show that (access to) a judicial remedy constitutes a mandatory (minimum) requirement.

In *ERSTE Bank Hungary*, the CJEU confirmed that extrajudicial enforcement is allowed, as long as effective judicial protection is guaranteed.[530] In so far as a role is assigned to public notaries, this falls within the Member States' procedural autonomy; the CJEU's case law on the exercise of the judicial function – *ex officio* control of unfair terms – cannot be transposed to notaries.[531] According to AG Cruz Villalón, notaries have a particular responsibility to inform and advise consumers about potentially unfair terms and subsequent procedural options.[532] Without the intervention of the notary, consumers may not have all the relevant information enabling them to take legal action and/or defend themselves. As an impartial advisor, the notary can assist the parties in the exercise of their rights and the fulfilment of their obligations in order to prevent litigation. As such, notaries may play a preventive role with respect to unfair terms and must also ensure equal treatment by their

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respect for the home (Article 8 ECHR). See further González Pascual (n 515) 263; Padraic Kenna and Héctor Simón Moreno, 'Towards a Common Standard of Protection of the Right to Housing in Europe through the Charter of Fundamental Rights' (2019) 25 European Law Journal 608.

528 Luca Ettore Perriello, 'Right to Housing and Unfair Contract Terms' [2018] Journal of European Consumer and Market Law 96, 99.

529 See also Cherednychenko (n 216) 162; Perriello (n 528) 102.

530 Case C-32/14 *ERSTE Bank Hungary*, paras 36 and 65. See also Case C-34/18 *Lovasné Toth*, para 59.

531 Case C-32/14 *ERSTE Bank Hungary*, paras 47-49. The Commission had argued that the notary should take the responsibility of unfair terms control, because the notarial deed constitutes an enforceable title with effects analogous to a judicial decision: written observations, paras 43 and 46.

532 Case C-32/14 *ERSTE Bank Hungary*, Opinion of AG Cruz Villalón, points 80 and 81.

advice. Thus, they may contribute to compliance with Articles 6 and 7 UCTD and the effectiveness of the Directive.[533]

Nevertheless, the CJEU held that effective *judicial* protection must be guaranteed by making it possible for consumers to bring legal proceedings against the disputed contract, including in the enforcement phase, and under reasonable procedural conditions.[534] The CJEU explicitly referred to, inter alia, *Kušionová* and *Aziz*. Notarial and judicial protection supplement each other, but the latter is not optional. In *Addiko Bank*, the CJEU repeated that a preventive check by the notary in respect of unfair terms is not sufficient; consumers must be enabled to bring legal proceedings, including in the enforcement phase.[535]

In *Banco Santander*, the referring Spanish court considered whether in practice, the notary may not be the "sole effective remedy" for protecting consumer rights in respect of extrajudicial enforcement procedures, especially in the situation at issue in that case.[536] In Spain, the sale of the mortgaged property may take place in front of a notary instead of a judge, if the parties have agreed to an extrajudicial auction.[537] In the case of *Banco Santander*, the mortgage loan agreement also contained a clause by which the consumer authorised the bank to execute the sale of the mortgaged property on her behalf. Thus, the bank could represent the consumer before the notary without her attendance or participation. After the bank acquired the property for less than 60% of the value, it brought a claim seeking an order for eviction. By then, it was too late for *ex officio* control of the unfairness of the terms of the underlying mortgage agreement: the transfer of ownership had already taken place. Thus, the mortgage agreement no longer existed. The court could not review the unfairness of its terms; it was merely required to enforce and protect the bank's property right.

The CJEU found that the case was inadmissible.[538] The scope of application of the UCTD and the CJEU's competence are limited to

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533 Case C-32/14 *ERSTE Bank Hungary*, paras 54-58.

534 Case C-32/14 *ERSTE Bank Hungary*, para 59. See also Case C-598/15 *Banco Santander*, para 38; Case C-377/14 *Radlinger*, para 46.

535 Case C-407/18 *Addiko Bank*, paras 56-57.

536 Case C-598/15 *Banco Santander*, para 27.

537 Koldo Casla, 'The Rights We Live in: Protecting the Right to Housing in Spain through Fair Trial, Private and Family Life and Non-Retrogressive Measures' (2016) 20 The International Journal of Human Rights 285, 287.

538 Case C-598/15 *Banco Santander*, para 31.

proceedings concerning *contractual* relationships, not property rights. Against a third party, the consumer-debtor cannot invoke a defence based on a contract between her and the bank. AG Wahl referred in his Opinion to the principle of legal certainty and the security of acquired property rights.[539] However, the CJEU's reasoning has been criticised for being too formal and distracting from the conflicting norms and interests at stake.[540] It has also been observed that it is often (a proxy of) the bank itself, not a third party acting in good faith, that acquires the property.[541] The real problem in *Banco Santander* was that the clause at issue limited the consumer's practical ability to take legal action and thus, her right to effective judicial protection. Whilst she had had a legal opportunity to challenge the enforcement,[542] she might have refrained from using it because she was not aware of her rights or what would follow if she did not exercise them in time. In so far as notaries can play a preventive role, that was not the case here, because the consumer's presence before the notary was not required.

Banco Santander exemplifies how the Directive's limited scope can be a constraint for the application of Article 47 as well. The requirement of effective judicial protection only applies in cases where there is a nexus with EU law, as illustrated by other cases where the UCTD – and therefore also Article 47 of the Charter – was found to be inapplicable.[543]

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539 Case C-598/15 *Banco Santander*, Opinion of AG Wahl, point 77.

540 Wolfgang Faber and Claes Martinson, 'Can Ownership Limit the Effectiveness of EU Consumer Contract Law Directives? A Suggestion to Employ a "Functional Approach"' [2019] Austrian Law Journal 85, 88.

541 Ángel Francisco Carrasco Perera and Karolina Lyczkowska, 'STJUE de 17 de Julio de 2014, Asunto C-169/14, Banco Bilbao Vizcaya Argentaria: un nuevo (y esta vez defectuoso) pronunciamiento del TJEU sobre el procedimiento hipotecario español' [2014] Revista CESCO de Derecho de Consumo 1, 11; Helena Díez García, 'Igualdad de Armas y Tutela Judicial Efectiva En El Art. 695.4 LEC Tras El Real Decreto-Ley 11/2014, de 5 de Septiembre: Crónica de Una Reforma Legislativa Anunciada (de Los AATC 70/2014, 71/2014, 111/2014, 112/2014 y 113/2014 a La STJUE de 17 de Julio de 2014)' [2014] Derecho Privado y Constitución 247.

542 Case C-598/15 *Banco Santander*, para 49.

543 See e.g. Case C-380/15 *Garzón Ramos,* para 27; Case C-7/16 *Banco Popular Español*, para 27.

3.3.3 Additional procedural requirements

Sziber: no further guidance on what constitutes an effective procedural path

The cases discussed so far show that consumers must have access to an effective *judicial* remedy. Article 47 itself does not prescribe the remedy's (substantive) content, but it reinforces the link between rights and remedies, between substantive and procedural protection. In the context of the UCTD, it must be ensured that unfair terms are not binding on consumers. In *Sziber*, the CJEU clarified that the goal is to "restore the legal and factual situation that the consumer would have been in had those unfair terms not existed", which includes "restitution of advantages wrongly obtained" by the trader.[544]

The case was about a loan agreement denominated in a foreign currency with no clear stipulation of the exchange rate. In response to CJEU case law,[545] ad hoc legislation was adopted in Hungary to deal with the large number of cases regarding foreign currency loans. This legislation remedied specific unfair terms, by replacing them with retroactive effect and converting the outstanding amount into a loan denominated in the national currency.[546] If consumers wished to request the invalidity of the entire loan agreement, they were obliged to specify the legal consequences and submit a settlement of accounts showing the amounts unduly charged. The referring court wanted to know whether it was contrary to Article 47 to impose such additional procedural requirements on consumers.[547] The Commission also doubted whether it could be expected from consumers that they ask the court to apply the legal consequences of invalidity of the agreement and to present complex mathematical calculations.[548]

The CJEU held that these requirements did not appear to be so complex or onerous that they disproportionately affected the consumer's right to effective judicial protection. The additional effort required from consumers was intended to "unblock the judicial system" as "a response

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544 Case C-483/16 *Sziber*, para 53.

545 In particular Case C-26/13 *Kásler*.

546 Case C-118/17 *Dunai*, para 36.

547 Case C-483/16 *Sziber*, para 27.

548 Case C-483/16 *Sziber*, Commission's written observations of 9 February 2017 (sj.h(2017)742229), paras 35-37.

to an exceptional situation" in Hungary, which pursued "a general interest in the proper administration of justice". Such an objective may prevail over private interests, provided that it does not go beyond what is necessary.[549] Interestingly, the ECtHR came to a similar conclusion in a case brought by five companies – i.e., traders – that were part of the OTP Banking Group, arguing that the new legislation violated their right to a fair trial (Article 6 ECHR). The ECtHR found that the accelerated, simplified processing of cases pursued the legitimate aims of consumer protection and the efficient administration of justice. According to the ECtHR, the applicant companies had not been prevented from challenging the presumption of unfairness of the terms at issue. The fact that their arguments had been rejected did not violate the guarantees of a fair trial, such as equality of arms. They must also have been aware for a long time of the potentially unfair nature of the terms in question; the UCTD became applicable in Hungary in 2004.[550]

In *Sziber*, the CJEU found that where there is an "effective procedural path" open to the consumer to request reimbursement and seek reparation, the effectiveness of the protection intended by the UCTD does not preclude the procedural rules at issue.[551] A relevant factor may have been that the consumer was the applicant here, who could reasonably be requested to provide the court with further details and quantification of the claim. It was ultimately for the national court to ascertain whether the procedural rules at issue were contrary to the right to effective judicial protection.[552]

Congruous to *Profi Credit Polska*, the CJEU appeared to consider effective judicial protection as provided for in Article 47 as largely synonymous with the principle of effectiveness.[553] The reference to Article 47 mainly fulfils a strengthening function, not an eliminatory or generative one. Whilst the case could be seen as an example of guided deference, the CJEU does not give any further guidance of what constitutes an "effective procedural path". However, the test applied in *Sziber* does resemble that of Article 52(1) of the Charter. Additional procedural requirements may be justified, as long as they are

549 Case C-483/16 *Sziber*, paras 51-52.
550 ECtHR 20 December 2018, Appl. No. 22853/15 *Merkantil*, paras 72 and 78-80.
551 Case C-483/16 *Sziber*, para 54.
552 Case C-483/16 *Sziber*, paras 53-5. See also Case C-118/17 *Dunai*, paras 44-45.
553 Case C-483/16 *Sziber* para 35.

proportionate and consumers are still offered an effective procedural path to obtain a substantive remedy. This provides more support for a broad understanding of justiciability in the context of the UCTD.

Dunai: an empowering function of Article 47

In *Dunai*, which revolved around the same Hungarian ad hoc legislation as in *Sziber*, the CJEU held that, whilst terms reflecting mandatory statutory provisions do not fall within the scope of the UCTD (Article 1(2) UCTD), questions relating to the impact of national legislation on the "protection guarantees" resulting from Article 6(1) UCTD do.[554] In short, those guarantees entail that Article 6(1) precludes (substantive and procedural) provisions that prevent consumers from not being bound by the unfair term concerned.[555] National legislation can be used to put an end to the use of unfair terms, as was done in Hungary, but it must respect the requirements of the UCTD. If it would be excluded from the Directive's scope, the legislative response of a Member State to CJEU case law would be immune from judicial review, as AG Tanchev also observed in *OTP Bank*.[556] This would erode the rights the UCTD confers on consumers and cause tension with the right to effective judicial protection. Tanchev's reference to Article 47 of the Charter could be seen as an example of its legitimising function. It provides an (extra) argument for CJEU interference with national legislation, but does not play any separate role.

Furthermore, *Dunai* concerned the question whether lower courts can be formally bound, in the exercise of their judicial functions, by general and abstract decisions adopted by a supreme court to ensure consistency in the interpretation of the law.[557] The referring court wanted to know whether the UCTD precludes this, in light of Article 47. It had doubts about the appointment of judges as members of the Hungarian supreme court's standardisation panel, which was not transparent (i.e. not public). The CJEU held earlier that the supreme courts of the Member States may elaborate certain criteria for the examination of unfair terms,

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554 Case C-118/17 *Dunai*, para 38. See also Case C-51/17 *OTP Bank*, para 54 and Case C-266/18 *Aqua Med*, para 34: Article 1(2) UCTD is to be strictly construed.

555 Case C-118/17 *Dunai*, para 53.

556 Case C-51/17 *OTP Bank*, Opinion of AG Tanchev, points 63-64.

557 Case C-118/17 *Dunai*, paras 57 and 63.

in compliance with the Directive.[558] In *Dunai*, it added that lower courts must not be prevented from ensuring the Directive's full effect by making a preliminary reference or by setting aside conflicting legislative provisions or judicial practices.[559] The CJEU referred to previous case law, where it had held that national courts must refuse to apply any conflicting provision of national legislation when they are called upon to apply provisions of EU law.[560] This is not (directly) the case when they apply *national* provisions implementing a directive. Unlike the UCTD, however Article 47 has direct effect: it is a "concrete provision of EU law", as opposed to general principles.[561] Thus, it has an empowering function for national (civil) courts, not only vis-à-vis the legislature but also vis-à-vis higher courts in their own jurisdiction. *Dunai* empowers them to apply Article 47 in its eliminatory function, in so far as they disregard or set aside (a certain interpretation of) national law.

The wording of the CJEU implies that ensuring the Directive's full effect and offering consumers an effective remedy are distinctive, but overlapping aims.[562] National legislative provisions or judicial practices should not undermine the full effect of the UCTD, in particular Article 6(1) and the consumer's right to restitution. In this respect, it is for the CJEU alone to decide upon any limitations on the effects of an interpretation of a rule of EU law.[563] In so far as national courts are prevented from offering an effective remedy under national law, Article 47 of the Charter may be at stake – which requires courts to set aside conflicting provisions or practices, if necessary. Article 47 provides them with a procedural tool to achieve substantive consumer protection.

In *Dunai*, the CJEU found there was nothing in the case file to suggest that the referring court would not be able to offer an effective remedy for the purpose of protecting the rights consumers can derive from the Directive.[564] Still, the decision makes clear that national (civil)

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558 Joined Cases C-96/16 and C-94/17 *Banco de Sabadell*, para 68.

559 Case C-118/17 *Dunai*, para 61.

560 Case C-689/13 Puligienica Facility Esco (PFE) v Airgest, para 40.

561 Case C-118/17 *Dunai*, para 58. See subsection 2.3.2.

562 Case C-118/17 *Dunai*, para 64: "do not prevent the competent court from ensuring the full effect… *and* from offering consumers and effective remedy…" [italics added; AD]. See also the duality of purpose discussed in subsection 2.3.1.

563 Joined Cases C-154/14 and C-307/15 *Gutierrez Naranjo*, para 70; see further subsection 4.5.2.

564 Case C-118/17 *Dunai*, para 62.

courts are ultimately responsible for providing an effective remedy in a concrete case. Moreover, legislative or judicial guidance does not discharge them from their tasks as decentralised EU-judges. In this respect, Józon has referred to a "new allocation of roles between the courts and the legislature": civil courts find themselves in a more regulatory function, especially where legislative action appears to be inadequate.[565] Article 47 reinforces the mandate of national courts to uphold the subjective rights EU law confers on citizens, here in their role as consumers.[566]

3.4 EQUALITY OF ARMS

3.4.1 Introduction: weaker position exacerbated by procedural inequalities

Restrictive procedural conditions – such as time-limits or a limitation of opposition grounds – may prevent consumers from obtaining, or courts from providing, an effective (judicial) remedy under the UCTD, read in conjunction with Article 47 of the Charter. Whilst such conditions may be justifiable in themselves, they may be problematic where consumers are the weaker party – not only from a substantive, but also from a procedural point of view. Procedural inequalities exacerbate the consumer's inferior position vis-à-vis the trader. A *de facto* inequality might exist in terms of knowledge or financial means; a *de jure* inequality might consist of a difference in legal remedies that are available to the parties.[567] The case of *Sánchez Morcillo*, for instance, concerned an asymmetric restriction of the right to appeal in mortgage enforcement proceedings.[568] It was the first case in which the CJEU found a (*prima facie*) violation of Article 47 in the context of the UCTD. It did not matter whether the consumers involved were represented or assisted by a

565 Józon (n 135) 160.

566 Collins, 'The Revolutionary Trajectory of EU Contract Law towards Post-National Law' (n 337) 327. See also Micklitz, 'The ECJ between the Individual Citizen and the Member States: A Plea for a Judge-Made European Law on Remedies' (n 34) 363; Beka (n 31) 276.

567 See also subsection 3.2.3.

568 Case C-169/14 *Sánchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case); see also subsections 1.1.2 and 2.3.2.

lawyer. Legal representation could arguably countervail a lack of legal knowledge,[569] but not fix a lack of legal remedies – in this case: appeal.

Article 47 in itself does not guarantee the right to appeal, i.e. access to a higher instance (second jurisdictional level). However, if such a right exists, its exercise cannot compromise the primacy, unity and effectiveness of EU law.[570] Moreover, Article 47 encompasses the principle of equality of arms, which requires that litigating parties are not placed in a clearly less advantageous procedural position compared to their opponents.[571] This does not mean that expedited procedures, such as mortgage enforcement proceedings, can never be justified. There may be good reasons to give mortgage creditors direct access to enforcement on the basis of a non-judicial, enforceable instrument, to restrict the opposition grounds and/or to limit the possibility of appeal. However, questions may be asked about the balance struck between the interests at stake, in particular in light of the vulnerable position of consumer-debtors, as happened in Spain.[572] In this respect, *Sánchez Morcillo* can be seen as a sequel of *Aziz*. Article 47 was used as an argument to correct a procedural inequality between the parties; it amplifies the duty on the part of the legislature and the judiciary to compensate for the consumer's weaker position.[573]

Unlike individual consumers, consumer protection organisations are not automatically considered to be in an inferior position vis-à-vis traders.[574] They do not enjoy the same level of protection as individual consumers. Moreover, individual and collective actions have different

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569 It should nevertheless be noted that legal representation or legal assistance constitutes a specific factual circumstance that is irrelevant for the interpretation of EU (consumer) law: Case C-429/05 *Rampion and Godard Rampion v Franfinance*, para 65; Case C-497/13 *Faber v Autobedrijf Hazet Ochten*, para 47.

570 Case C-169/14 *Sánchez Morcillo I*, paras 35-36; C-169/14 *Sánchez Morcillo I*, View of AG Wahl, paras 42-43. See also Case C-421/14 *Banco Primus*, para 48.

571 Case C-205/15 *Toma*, para 54; discussed in subsection 2.2.1(iii). See also Case C-199/11 *Otis*, paras 71-72.

572 Irene Sabaté, 'The Spanish Mortgage Crisis and the Re-Emergence of Moral Economies in Uncertain Times' (2016) 27 History and Anthropology 107, 118–119. See further subsection 4.1.1.

573 Manuel Medina Guerrero, 'Derecho a la vivienda y desahucios: la protección del deudor hipotecario en la jurisprudencia del TJUE' [2015] Teoría y Realidad Constitucional 261, 273.

574 Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*, paras 49-50; Joined Cases C-381/14 en C-385/14 *Sales Sinués*, paras 26-27; Case C-169/14 *Sánchez Morcillo I*, para 46.

purposes and different legal effects.[575] Whilst the CJEU has not ruled out that consumer protection organisations can rely on Article 47, it held that Article 47 does not create standing for them to intervene in individual proceedings.[576] This confirms that Article 47 does not provide a stand-alone basis to bring a claim.

3.4.2 Restoring the procedural balance

Sánchez Morcillo I: a transformative function of Article 47

In *Sánchez Morcillo*, the CJEU reiterated that the principle of equality of arms is an integral element of effective judicial protection and a corollary of the concept of a fair hearing, as guaranteed by Article 47 of the Charter. Consumers must have a reasonable opportunity to present their case in conditions that do not place them in a clearly less advantageous position.[577]

After *Aziz*, a new ground for opposition against mortgage enforcement was introduced on the basis of unfair terms.[578] While the creditor could bring an appeal against a ruling which, upholding an objection raised by the debtor, terminated the enforcement, debtors were *not* allowed to bring an appeal in the reverse situation that their objection was dismissed. Even if they were consumers, they could not appeal the ruling on the basis of (alleged) unfair terms in the mortgage contract or any other ground. Thus, there was a difference in treatment between consumers and traders in their position as parties to the proceedings.[579]

It was the referring court in *Sánchez Morcillo* that linked the case to Article 47, read together with the UCTD. By doing so, it reframed a constitutional question as a consumer protection issue. A similar question had already been asked by another Spanish court, but without explicit reference to Article 47. That court had only mentioned the need for "adequate and effective means" and "the right to take action" of

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575 Joined Cases C-381/14 en C-385/14 *Sales Sinués*, para 30; Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési*, para 37.

576 Case C-470/12 *Pohotovosť*, para 54.

577 Case C-169/14 *Sánchez Morcillo I*, paras 48-49.

578 See further section 4.4 on the national background and follow-up.

579 Case C-169/14 *Sánchez Morcillo I*, para 30.

consumers.[580] One possible reason for the reformulation of the question as an issue of *equality of arms*, is that it could be argued that the right of access to court and an effective (judicial) remedy was already sufficiently guaranteed after the legislative reform following *Aziz*.[581] Indeed, AG Wahl argued that the provision at issue already complied with the principle of effectiveness.[582]

The Commission submitted that the case was not about a lack of legal remedies or *ex officio* control of unfair terms as such, but rather about a procedural disadvantage for consumers that was contrary to the principle of equality of arms. This was particularly problematic in light of the UCTD, which is aimed at restoring the balance between consumers and traders.[583] According to the Commission, there should be "adequate and effective means" for consumers to take legal action and exercise their rights under the UCTD, as well as *ex officio* control of unfair terms; moreover, once a case comes before a court procedural equality must be ensured between the parties. Article 47 posed an additional requirement that could be violated independently from the principle of effectiveness.[584]

The CJEU held that the effectiveness of the rights the parties – i.e. consumers – derive from the UCTD implied a requirement of judicial protection. It found that the asymmetric appeal provision was indeed contrary to the principle of equality of arms or procedural equality.[585] In this respect, it was relevant that the object of enforcement was the consumer's family home, that the enforcement was based on an enforceable notarial instrument not subject to judicial scrutiny, and that the enforcement proceedings were expedited, i.e. subject to time constraints.[586] The imbalance between procedural rights accentuated the

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580 Case C-645/13 *Cajas Rurales Unidas v Méndez Sena*. Case C-169/14 *Sánchez Morcillo* was ultimately decided earlier, because the CJEU had ordered that it be adjudicated under the expedited procedure: ECLI:EU:C:2014:1388.

581 Case C-169/14 *Sánchez Morcillo I*, View of AG Wahl, points 65-67.

582 View of AG Wahl, point 77.

583 See Case C-169/14, Commission's written observations of 6 June 2014 (sj.c(2014)2009262), paras 66-67.

584 Ibid, paras 20, 30, 41 and 63.

585 Case C-169/14 *Sánchez Morcillo I*, paras 50-51. In its written observations, the Commission also referred to the right of non-discrimination in respect of the principle of procedural equality, para 56.

586 Case C-169/14 *Sánchez Morcillo I*, paras 38 and 41.

contractual imbalance between the parties.[587] Thus, the applicable procedural rules were incomplete and inadequate. The UCTD, read in conjunction with Article 47 of the Charter, precluded a system that reinforced the inequality of arms between traders (as creditors) and consumer-debtors in mortgage enforcement proceedings.[588] This could be seen as an instance of the eliminatory function of Article 47.

Article 47 also fulfilled a transformative function in *Sánchez Morcillo*, where it triggered a trialogue about an upgrade of the procedural framework between the referring Spanish civil court, the CJEU and the Spanish legislature. Whilst this transformative function manifested itself at the national level, it was instigated by the CJEU. The UCTD's (full) effectiveness only required a remedy – in the sense of a procedural means of recourse and/or *ex officio* control – in one instance. But the CJEU went a step further. Arguably it has gone too far, because Article 47 does not guarantee a right to appeal, and because initially the case did not even concern unfair terms.[589] The consumers involved lodged their objection before unfair terms could be raised in the mortgage enforcement proceedings. The court in first instance failed to perform *ex officio* control, and the ruling was given 3 days after the transitional period of one month for lodging a new objection had passed.[590] Thus, unfair terms did not play a role in the first instance. It was the referring appellate court that linked the case to the UCTD, thereby providing a link to Article 47 as well.[591]

It has been observed that the real issue in this case was not so much a procedural inequality as irreversibility, like in *Aziz*. The problem had simply been shifted to the phase of appeal. If there had been no possibility of appeal at all, i.e. for none of the parties, there might have

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587 Case C-169/14 *Sánchez Morcillo I*, para 46.

588 Case C-169/14 *Sánchez Morcillo I*, para 50.

589 Della Negra (n 123) 1031. See also subsection 2.3.1.

590 Case C-169/14 *Sánchez Morcillo I*, View of AG Wahl, points 50-51. The Commission noticed this in its written observations, but found that the court's omission to exercise *ex officio* control did not render the procedural rules at issue contrary to the principle of effectiveness; see paras 18-19 and 51, respectively paras 33 and 39-40. The purpose of the principle of effectiveness is not to prevent the incorrect application of substantive legal norms by the national court. However, it was the lack of procedural equality that made it impossible for the appellate court to examine unfair terms *ex officio* and thus, to provide effective judicial protection (para 70). On the transitional period, see Case C-8/14 *BBVA*.

591 See further subsection 4.4.2.

been no violation of Article 47.[592] Perhaps an asymmetry in the parties' recourse to legal remedies – giving one party a second chance while denying it to the other – could even be justified in light of the creditor's privileged position as a mortgage holder.[593] But consumer-debtors would be in the same situation as pre-*Aziz* once the creditor brought an appeal, or – as in the case of *Sánchez Morcillo* – the court failed to perform unfair terms control. In this respect, the CJEU's decision is in line with *Aziz* and confirms that Article 47 is concerned with problems of justiciability.

Sánchez Morcillo II: accessory character of Article 47 as its strength and weakness

After a subsequent legislative amendment that introduced a right to appeal for consumers on the basis of unfair terms,[594] the referring court in the case of *Sánchez Morcillo* found that it still could not declare the appeal admissible. Under the amended provision, an appeal is only allowed against a ruling terminating the enforcement, disapplying an unfair term or rejecting an objection based on an unfair term. In the case at hand, none of these grounds applied. Therefore, the referring court made a new preliminary reference to the CJEU.[595] Apparently, the referring court was not prepared to give an expansive or *contra legem* interpretation on its own of the amended provision at issue; it wanted the CJEU to conclude that the amended provision was still incomplete and inadequate. This is a sign that national courts do not perceive the empowering function of Article 47 as being so strong as *Dunai* suggests.

It is questionable whether it should be held against consumers that a court in first instance fails to perform unfair terms control (*ex officio*) and whether it is justified that this cannot be remedied in appeal, especially if they have actively sought judicial protection. It could even be argued that an appellate court should always be able to assess unfair terms (of its own motion), as long as the case falls within the scope of the UCTD. However, in *Jőrös* and *Asbeek Brusse*, the CJEU had already made clear that this depends on national procedural rules (under the principle

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592 Díez García (n 541) 229–230, 241, 249. See also Case C-169/14 *Sánchez Morcillo I*, paras 43-43; Commission's written observations, para 69.

593 See also C-169/14 *Sánchez Morcillo*, View of AG Wahl, points 61-63, who referred to "the preferential nature of the enforceable instrument which the creditor has relied upon".

594 See further subsection 4.4.3.

595 Case C-539/14 *Sánchez Morcillo II*, para 50.

of equivalence).[596] If the appellate court has the power to examine of its own motion any grounds for invalidity of contract terms – because they are contrary to public policy or a mandatory statutory provision – that are clearly apparent from the elements submitted in first instance, it must perform *ex officio* control under the Directive as well. In Dutch civil procedure this is the case,[597] but in Spanish mortgage enforcement proceedings it is not. In this respect, *Sánchez Morcillo I* is an exception to the CJEU's deference to the Member States' national (procedural) laws in respect of appeal.

In a follow-up order – here referred to as *Sánchez Morcillo II* – the CJEU found that the second question was identical to the one already answered. From the perspective of the UCTD, consumers were provided with a reasonable opportunity to take legal action in conditions that did not place them in a clearly less advantageous position. Now the court responsible for the enforcement could assess the unfairness of contract terms and declare the proceedings invalid, consumer-debtors were no longer exposed to the risk of final and irreversible loss of their home and their legal protection was sufficiently guaranteed.[598] An objection based on grounds other than unfair terms did not fall within the scope of the UCTD.[599] The principle of equality of arms does not require that the parties are put on an equal footing in all circumstances.[600] Thus, the grounds for an appeal brought by (consumer-)debtors could be restricted to unfair contract terms, and the amended provision was found to be in compliance with the Directive.

Sánchez Morcillo I and *II* reveal that the accessory character of Article 47 can be both its strength and its weakness. The CJEU cannot provide a comprehensive solution for legal and socio-economic issues that transcend the UCTD;[601] its competence is tied to EU (consumer) law. The applicability of Article 47 cannot be stretched beyond the scope of EU

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596 Case C-397/1 *Jőrös*, paras 35-36 and 38; Case C-488/11 *Asbeek Brusse*, paras 45 and 51.

597 See further section 5.4.

598 Case C-539/14 *Sánchez Morcillo II*, paras 40-41 and 47-48.

599 Case C-539/14 *Sánchez Morcillo II*, paras 43-44.

600 See also Case C-543/14 Ordre des barreaux francophones et germanophone v Conseil des ministres, paras 40 and 42.

601 Sara Iglesias Sánchez, 'Unfair Terms in Mortgage Loans and Protection of Housing in Times of Economic Crisis: Aziz v. Catalunyacaixa' (2014) 51 Common Market Law Review 955, 973; González Pascual (n 515) 275–276.

law, i.e. the UCTD.[602] *Sánchez Morcillo* also shows how the CJEU's case law can 'invade' national procedural law, without entirely solving the underlying issue. The CJEU did not follow the same "generous approach"[603] as in *Aziz*, even though *Sánchez Morcillo* also concerned a shortfall in procedural safeguards against the final and irreversible loss of the consumer's family home. One explanation is that the CJEU intentionally restrained itself from further interference with Spanish civil procedure, or that it simply – but wrongfully[604] – assumed the consumers involved had a genuine opportunity to exercise their rights. In the end, consumers in the position of Mr. Sánchez Morcillo and Mrs. Abril García were only left with the option of bringing declaratory proceedings that would not suspend the enforcement, which is precisely the situation that, according to the CJEU, must be prevented.[605] The case of *Sánchez Morcillo* gave rise to multiple follow-up questions, which will be further discussed in chapter 4.

3.4.3 Focus of Article 47 on individual rights: *Pohotovosť*

The imbalance that exists between consumers and traders is not the same between traders and consumer protection organisations.[606] In *Pohotovosť*, the CJEU held that a refusal to grant such organisations leave to intervene in individual proceedings in support of a consumer does neither infringe the individual consumer's right to an effective judicial remedy, nor affect the organisation's rights to collective action as recognised by Article 7(2) UCTD.[607]

Pohotovosť concerned the enforcement of an arbitral award against a consumer in Slovakia. A local consumer protection organisation (HOOS) sought leave to intervene in the enforcement proceedings on the ground that the appointed bailiff who was the enforcing authority had in the past been employed by the creditor – Pohotovosť – and thus, was not impartial. It also claimed that the court had failed to provide the

602 See also C-598/15 *Banco Santander*; discussed in subsection 3.3.2.

603 Case C-482/12 *Macinský*, Opinion of AG Wahl, point 41.

604 Carrasco Perera and Lyczkowska (n 541) 10–12. See further subsection 4.4.3.

605 Case C-539/14 *Sánchez Morcillo II*, para 31.

606 See e.g. Case C-413/12 *Asociación de Consumidores Independientes de Castilla y León*, paras 49-50; Joined Cases C-381/14 en C-385/14 *Sales Sinués,* paras 26-27.

607 Case C-470/12 *Pohotovosť*, paras 53-54. See also Case C-448/17 *EOS KSI Slovensko*, para 41.

consumer with protection against unfair terms under the UCTD. The leave to intervene was denied, not only because the organisation was a third party, but also because the enforcement proceedings were considered to be not (fully) contentious.[608]

Consumer protection organisations can contribute to ensuring effective access to justice for consumers.[609] However, the CJEU found there is no EU legislation (yet) governing the role of such organisations in individual proceedings.[610] In the absence of such legislation, the CJEU found that neither Article 38 of the Charter nor Article 47 impose an interpretation of the UCTD that would encompass a right to intervene. The intervention of a consumer protection association is, according to the CJEU, not comparable to legal aid, which under Article 47 must be made available to those who lack sufficient resources. Moreover, in so far as consumer protection organisations can rely on Article 47, their rights to collective action are not affected and they could still directly represent individual consumers if mandated to do so.[611]

Pohotovosť illustrates, firstly, the focus of Article 47 on individual litigants and individual rights, although many cases brought before the CJEU have an impact that goes beyond the individual case.[612] Secondly, *Pohotovosť* shows that its application has boundaries: the CJEU cannot single-handedly introduce a procedural link between individual and collective litigation on the basis of Article 47. In so far as Article 47 has a signalling function in this respect, it is primarily directed at the (European or national) legislature as an argument to regulate this.[613]

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608 See Case C-470/12 *Pohotovosť*, para 17.

609 See e.g. Proposal for a Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC COM/2018/0089 final – 2018/089 (COD). On Monday 22 June 2020, the European Parliament announced a deal has been reached on the first EU-wide rules on collective redress.

610 Case C-470/12 *Pohotovosť*, para 46.

611 Case C-470/12 *Pohotovosť*, paras 52-55. On the relation between individual and collective actions, see further subsection 4.5.3.

612 See also Micklitz and Reich (n 43) 807.

613 See further Reich, *General Principles of EU Civil Law* (n 71) 128.

3.5 RIGHT TO BE HEARD

3.5.1 Introduction: a generative function of Article 47

The case law discussed in this section confirms that the fundamental right to effective judicial protection and (full) effectiveness are not synonymous. The core components of Article 47 of the Charter cannot be bypassed simply by reference to the UCTD's objectives. Certain measures may be justified to enhance the effectiveness of consumer protection under the Directive, but not at the expense of essential procedural safeguards, such as the trader's right to be heard.

The right to be heard has an external dimension: the effects of a (judicial) decision cannot be extended to the detriment of third parties that have not participated in the proceedings,[614] at least not without giving them an opportunity to be heard as well (*Biuro podróży 'Partner'*).[615] The right to be heard also has an internal dimension, i.e. within the process: the parties must be given an opportunity to set out and contradict each other's views (*Banif Plus Bank*).[616] In this respect, a requirement of adversarial proceedings or contradictory debate could be discerned.[617] In civil proceedings, both parties – consumers and traders – must have the chance to present their views to the court, otherwise this may result in a denial of justice.[618]

The wording of the CJEU in *Banif Plus Bank* and *Biuro* implies that Article 47 provides autonomous procedural safeguards for the adjudication of EU rights that are not (completely) aligned with the principle of effectiveness. This is Article 47 in its generative function: in both cases, the CJEU specified the substantive aspects the parties should be heard about. This is another manifestation of the connection between substantive and procedural protection that characterises Article 47, as

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614 See also Case C-472/10 *Invitel*, Opinion of AG Trstenjak, point 60: "[A]n *erga omnes* effect adversely affecting persons not party to the proceedings would be difficult to reconcile with the principles of a fair trial, particularly as such persons would be denied an opportunity to express their views on the accusation of using unfair terms in contracts before a judgment affecting them was delivered".

615 Case C-119/15 *Biuro*; see further subsection 3.5.3.

616 Case C-472/11 *Banif Plus Bank*; see further subsection 3.5.2.

617 See e.g. Beka (n 31) 199; Gerstenberg (n 124) 610.

618 On the concept of denial of justice and the notion of *indefensión* in the Spanish legal system, see further section 4.5 in particular.

well as its different rationale: it pertains to the adjudication of (substantive) EU rights, even when it does not contribute to the effectiveness of EU law per se. Article 47 also appears to guarantee the right to an effective (judicial) remedy in case of an alleged infringement of its core components, especially the right to be heard.[619] Litigants can invoke such an infringement to (attempt to) overturn decisions that are unfavourable to them, as *Biuro* shows.

3.5.2 *Banif Plus Bank*: qualifying the duty of *ex officio* control

Banif Plus Bank was the first judgment in which the CJEU confirmed that Article 47 is binding on national courts when they adjudicate cases under the UCTD. They must observe the rights of defence, in particular where they apply EU (consumer) law of their own motion.[620] In earlier case law, the CJEU already recognised the principle of *audi alteram partem* – i.e. the right to be heard – as a basic principle of the Member States' legal systems under the procedural rule of reason test,[621] which may justify a certain procedural rule in light of the principle of effectiveness. Under the principle of equivalence, it can also be regarded as a matter of public policy if national law classifies it as such. In *Banif Plus Bank*, it was formulated as an EU fundamental right, irrespective or on top of national procedural rules. This may not seem revolutionary, but the impact of *Banif Plus Bank* at the national level should not be underestimated, as will be shown in chapters 4 and 5.

The CJEU emphasised that 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, especially when the court decides a dispute on grounds it has identified of its own motion.[622] Thus, the court must invite each party to the dispute to present their views, with the opportunity to challenge the views of the other party – in accordance with national procedural rules,[623] but presumably also if those rules do not (explicitly) provide for this. In the

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619 See subsection 2.3.1.

620 Case C-472/11 *Banif Plus Bank*, para 29. See also subsection 2.3.1.

621 See subsection 2.5.2.

622 Case C-472/11 *Banif Plus Bank*, paras 29-30; with reference to C-89/08 *Commission v Ireland*, paras 50 and 54 – but that case pertained to proceedings before the EU Court of First Instance, not national courts.

623 Case C-472/11 *Banif Plus Bank*, para 36. See also Case C-488/11 *Asbeek Brusse*, para 52.

context of the UCTD, this means that the party must be able to respond to the court's finding that there are grounds for invalidity of contractual terms.[624] This presumably encompasses both the unfair nature of the terms as well as the legal consequences of such a finding.

In so far as *ex officio* control of unfair terms is an expression of the (full) effectiveness of the UCTD,[625] this can be limited – or rather: qualified – by Article 47 of the Charter.[626] The CJEU has held that consumers can give their (free and informed) consent to the terms in question, even if the court finds they are unfair.[627] This could be seen as a counterbalance to the CJEU's determination to enhance the Directive's effectiveness.[628] It would nevertheless go too far to derive from *Banif Plus Bank* that observation of the right to be heard would compromise the protection provided by the UCTD for the benefit of consumers. There is no one-on-one relationship between an improvement of the (procedural) position of one party and a deterioration of the (substantive) position of the other.[629] Indeed, the CJEU found that the right to be heard is "not incompatible" with the principle of effectiveness.[630] The level of consumer protection is not necessarily diminished when both parties to the dispute – consumers as well as traders – are heard: in the same proceedings, the court can still declare the terms at issue to be unfair and therefore not binding if the trader cannot defend their use. Rather than limiting the Directive's (*ex officio*) application, hearing the parties gives the court the opportunity to align its decision with their submissions. Article 47's function(s) in this respect will be further explored in section 4.5.

3.5.3 *Biuro podróży 'Partner'*: giving substance to the right to be heard

The divergence between the (full) effectiveness of the UCTD on the one hand and Article 47 of the Charter on the other becomes even more visible in *Biuro podróży 'Partner'*, a Polish case about a national register of

624 Case C-472/11 *Banif Plus Bank*, para 32.
625 Case C-472/11 *Banif Plus Bank*, para 28.
626 Della Negra (n 123) 1026; Nowak (n 127) 8; Safjan and Düsterhaus (n 14) 17.
627 Case C-472/11 *Banif Plus Bank*, para 35. See also Case C-243/08 *Pannon*, para 35; Case C-260/18 *Dziubak*, para 53-54.
628 Leone (n 68) 75.
629 Wilman (n 30) 483.
630 Case C-472/11 *Banif Plus Bank*, paras 33-34.

standard contract terms that have been declared unfair in individual or collective proceedings. This register is aimed at enhancing the effectiveness of the prohibition on the use of unfair terms.[631] This should, however, not come at the cost of depriving the parties of effective judicial protection. Whilst it may be effective to impose fines on traders who use terms that are deemed to be equivalent to those in the register, this may be at odds with their right to be heard. When the case concerns a national scheme transposing the UCTD and therefore its implementation, the fundamental rights of the EU legal order must be observed.[632] The CJEU confirmed that *any* person whose rights guaranteed by EU law might be infringed is entitled to an effective remedy. In the absence of a scheme of effective judicial protection for traders, the UCTD must be interpreted in light of Article 47.[633]

In *Biuro*, the CJEU found that where traders were not a party to the proceedings culminating in the entry of certain terms in the register, they must have the opportunity to challenge both the equivalence of their own terms to previously registered terms as well as the amount of the fine.[634] AG Saugmandsgaard Øe stated that traders should also be able to contest that the terms they use are unfair, which is broader than a mere equivalence assessment and would possibly require courts to assess the same set of terms multiple times.[635] In his view, the trader's right under Article 3(2) of the UCTD to furnish arguments and evidence in order to discharge the burden of proof forms part of the more general and extensive right to a hearing, arising from Article 47 of the Charter.[636] The objective to put a "swift and effective stop" to the use of unfair terms and to avoid a "multiplicity of judicial procedures" could not justifiy a restriction of the trader's right to a hearing.[637]

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631 Case C-119/15 *Biuro*, para 34. For a more detailed and elaborate description of the case, see Joasia Luzak, 'You Too Will Be Judged: Erga Omnes Effect of Registered Unfair Contract Terms in Poland' (2017) 6 Journal of European Consumer and Market Law 120.

632 Case C-119/15 *Biuro*, para 25.

633 Case C-119/15 *Biuro*, paras 26-27. See also subsection 2.3.1.

634 Case C-119/15 *Biuro*, paras 42-43.

635 Case C-119/15 *Biuro*, Opinion of AG AG Saugmandsgaard Øe, point 64. See also Luzak (n 631) 121–122.

636 Opinion of AG AG Saugmandsgaard Øe, point 60.

637 Opinion of AG AG Saugmandsgaard Øe, point 67.

A relevant distinction with *Banif Plus Bank* is that *Biuro* concerned administrative proceedings. In civil proceedings, it is about invalidity of the terms at issue, not about a fine. Still, the right to be heard equally applies in civil proceedings; it could be submitted that, parallel to *Biuro*, it pertains to the (alleged) unfair nature of contract terms and to the legal consequences of a finding of unfairness. The added value of the CJEU's reference to Article 47 mainly appears to be that its link with EU law gives *substance* to the right to be heard.

3.6 INTERIM CONCLUSION: FUNCTIONS OF ARTICLE 47 IN CJEU CASE LAW

The case law analysed in this chapter exemplifies how the functions of Article 47 of the Charter may play out in the CJEU's case law. It also shows how Article 47 has had an impact upon what the CJEU requires from the Member States and, in particular, from national courts in the context of the UCTD.

In *Profi Credit Polska*, *Kušionová* and *Sziber*, Article 47 fulfilled a strengthening function vis-à-vis the (full) effectiveness of consumer protection under the UCTD. Not every procedural issue is a fundamental rights issue, but it might become one in cases where the right to take legal action is severely limited or entirely excluded. Article 47 highlights the importance of access to judicial remedies, which should not be a mere formality. If consumers cannot exercise their (substantive) rights under reasonable procedural conditions, this might give rise to a violation of Article 47. Both *Profi Credit Polska* and *Kušionová* can be seen as a step towards open constitutionalisation: the CJEU acknowledges, or at least shows awareness of, the fundamental rights dimension. Even if no violation is found, a reference to Article 47 indicates that the justiciability of EU (consumer) rights might be at stake.

Article 47 may be used as a negative yardstick to preclude a constellation of restrictive procedural conditions, such as time-limits and costs. In *Aqua Med*, Article 47 fulfilled an eliminatory function where the emphasis was placed on an "excessive restriction" of *procedural* rights. The core components of Article 47 deserve protection in themselves. At the same time, Article 47 stresses the link between substantive and procedural protection. In *Sziber*, the CJEU found that an "effective procedural path" must be offered to consumers to obtain a substantive remedy. This could be regarded as a positive requirement, just like the

existence of an effective judicial remedy against unfair terms in mortgage enforcement proceedings (*Kušionová*, *ERSTE Bank*). In this respect, Article 47 could be said to have a generative function as well.

In *Dunai*, Article 47 fulfilled an empowering function in respect of the role of courts. They must provide effective judicial protection under EU (consumer) law, if necessary by setting aside restrictive procedural conditions or disregarding judicial practices that are contrary to Article 47 (in its eliminatory function). The empowering function of Article 47 is also reflected in AG Trstenjak's Opinion in *Asturcom*, where she referred to Article 47 as an argument to widen the scope for the judicial review of arbitral awards in respect of unfair terms. In its judgment, the CJEU nevertheless showed deference to the laws of the Member States.

In *Finanmadrid*, the CJEU was not inclined to attach any (independent) meaning to Article 47 either, as long as unfair terms control was ensured at some stage of the proceedings. AG Szpunar's Opinion and the Commission's observations in *Finanmadrid* nevertheless demonstrate how Article 47 may provide a different rationale for judicial intervention: courts do not only ensure the application of EU (consumer) law, but also the observance of procedural safeguards, such as the rights of defence (see also *Banif* and *Biuro*). The CJEU's case law reveals a generative function of Article 47, where it gives content to procedural safeguards in the context of UCTD, in particular the right to be heard. If the parties – consumers as well as traders – do not have a genuine opportunity to present their case to the court, this may result in a denial of justice.

Effective judicial protection and effectiveness are not opposites; they may converge, complement or even amplify each other. But the two types of protection also diverge. *Ex officio* control does not (fully) remedy a shortfall in procedural rights and safeguards. In this respect, Article 47 may also fulfil a signalling function, as it did in AG Kokott's Opinion in *Margarit Panicello*. Kokott referred to Article 47 to highlight a flaw in the design of the procedures at issue, which might not only allow traders to circumvent unfair terms control, but also be at odds with the consumer's rights of defence. To some extent, Article 47 even has transformative potential that will be further explored in chapter 4. Where *Profi Credit* triggered a debate on order for payment procedures in Poland, *Aziz* and *Sánchez Morcillo* did the same for mortgage enforcement proceedings in Spain. *Sánchez Morcillo I* shows how Article 47 can play a role in restoring

the balance between consumers and traders by removing (unjustified) procedural inequalities that deter or prevent consumers from exercising their rights.

The question remains when restrictions of the right to an effective (judicial) remedy are excessive; or, phrased more positively, what exactly constitutes an effective procedural path. Article 47 in and of itself does not provide any further guidance. Therefore, it will be examined in the two subsequent chapters how the CJEU's case law is received and implemented at the national level, as well as whether and to what extent the above-mentioned functions of Article 47 trickle down to the case law of national (civil) courts.