Justice for both

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

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6. CONCLUSION: THE MANY COLOURS OF ARTICLE 47

6.1 SYNTHESIS: ARTICLE 47 IN UNFAIR TERMS CASES

6.1.1 A chameleon-like provision

This book addresses the function(s) of a reference to Article 47 by the CJEU and by Spanish and Dutch civil courts in the context of the UCTD. As European citizens, we all have the right to effective judicial protection of the rights and freedoms EU law confers on us, including the rights we derive from consumer protection legislation. We act in our capacity as consumers on a day to day basis, and we all enter into contracts with standard terms and conditions. There is a wide variety of terms and an equally wide variety of ways in which they could be unfair, possibly with far-reaching consequences – e.g. by imposing excessive interest rates or severely limiting our procedural rights. The high number of references to Article 47 of the Charter in the CJEU's case law on the Unfair Contract Terms Directive, especially in cases originating from Spain, suggests it cannot be taken for granted that effective judicial protection for consumers is always available and accessible. In unfair terms cases, gaps and obstacles in national procedural laws have come to light that prevent consumers from exercising their rights vis-à-vis traders and/or national courts from protecting those rights effectively. The title of this book expresses that justice for both is not self-evident; there is a need to restore not only the transactional balance but also procedural inequalities.

Article 47 safeguards the fundamental right to an effective remedy before an independent and impartial tribunal established by law for everyone whose EU rights and freedoms are violated. At first sight, it confirms a universal maxim: where there is a right, there must be a remedy – a means of recourse to enforce the right or to obtain redress for an infringement of the right. Its application in practice, however, is more ambiguous. This book paints a picture of Article 47 as a chameleon-like provision, corresponding to a mosaic of functions it may fulfil in the context of the UCTD. It is multi-faceted, and its implications are influenced by the factual, legal and national contexts of the analysed case law. How it manifests itself depends, inter alia, on the (substantive and procedural) rights it pertains to and the (national) setting in which it is applied. This book seeks to answer the question how and why courts

make a reference to Article 47 in unfair terms cases. What can such a reference do?

This concluding chapter provides a synthesis of the findings in the previous chapters as well as an answer to the research questions raised in subsection 1.3.1:

What function(s) can Article 47 of the Charter fulfil in European private law adjudication, more particularly cases concerning the UCTD?

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

In this chapter, I will present three key findings. Firstly, there is a discrepancy between the wide ramifications Article 47 could have in theory and its application in practice (section 6.2). Different views have been expressed on the (added) value of effective judicial protection as an EU fundamental right, ranging from cautionary or dismissive to optimistic and hopeful. Article 47 has important features that distinguish it from the notion of (full) effectiveness in EU law, which curtails the procedural autonomy of the EU Member States. It holds the promise of autonomous procedural safeguards with direct effect. Some of its core components are less homogenous to effectiveness, in particular the right of access to court and the right to be heard, but also the principle of equality of arms. Article 47 has an accessory, open-ended character. Here lies both its main constraint and its strength. On the one hand, its application is confined to EU law, and it does not prescribe specific remedies. On the other, it has the potential to go beyond a minimum level of protection and even transcend the effectiveness of specific EU instruments such as the UCTD. The analysed case law nevertheless shows that, despite the high number of references in cases concerning the Directive, Article 47 has only played a modest role so far in the adjudication of unfair terms cases. An (alleged) infringement of one of its

core components may trigger its application, but it has not (yet) been used to set a positive standard beyond the broad requirement of justiciability, meaning that consumers must have a genuine opportunity to exercise their rights in court, and the court must be able to adjudicate those rights.

Secondly, a focus on the CJEU's case law gives only a one-sided representation of the functions of Article 47; it is only part of the picture. There is no juxtaposition between references to Article 47 by the CJEU and by national civil courts (section 6.3). Dutch courts do not approach the procedural protection of consumers as a fundamental rights issue. By contrast, Spanish civil courts have recognised a constitutional dimension in cases where the availability of judicial remedies for consumers was excluded or severely limited, which resulted in a denial of justice. This dimension may get lost when Article 47 gets conflated with (full) effectiveness in the CJEU's case law. The Spanish experience makes clear that Article 47 has discursive value in respect of the courts' responsibility to protect (substantive) EU rights as well as to ensure observance of procedural safeguards, which have been given further content in the context of the UCTD.

Thirdly, and this is where I see the primary significance of a reference to Article 47 in a concrete case (section 6.4): it may enhance the visibility of systemic issues by highlighting gaps and obstacles in, and creating space for, the effective judicial protection of EU (consumer) rights at the national level. Article 47 entails more than effectiveness if its core components are to be taken seriously. However, my conclusions are nuanced. Rather than being a universal remedy, Article 47 provides a starting point for a debate on the choice and design of remedies and procedures in light of EU consumer law and fundamental rights.

6.1.2 Overview of functions with examples from the analysed case law

In chapter 2, I have given an overview of several functions ascribed to Article 47 of the Charter in legal doctrine, and distilled them into five main categories. In chapters 3, 4 and 5, I have discussed evidence of these functions in the analysed case law, but not to an extent that proves it has become a yardstick or standard for national procedural law. Of all five categories, I have found examples of cases that display some of the indicators identified in section 2.6, which can thus be placed on the

spectrum between a conceptualisation of Article 47 as largely parallel to effectiveness (the first category) and Article 47 as a positive standard (the fifth category):

	Function (label)	**Indicators**
1.	LEGITIMISING FUNCTION (subsection 2.5.1)	- Reference to Article 47 merely serves as legitimation for CJEU interference - Parallel or supplementary to effectiveness; other functions cannot (clearly) be discerned
	Example:	- CJEU *Profi Credit*,[1201] in combination with strengthening function (see below)
2.	STRENGTHENING FUNCTION (subsection 2.5.1)	- Reinforcing effectiveness, but may go beyond - Express recognition of (restriction of) core components of Article 47 as fundamental rights issue - Rights-based, i.e. focus on procedural rights - Emphasis on consumer's perspective: availability of recourse
	Examples:	- CJEU *Profi Credit Polska*: confirms and consolidates *Banesto* and *Finanmadrid*,[1202] access to court as fundamental rights issue - CJEU *Kušionová*:[1203] confirms and consolidates *Aziz*, effective (judicial) remedy as fundamental rights issue
	EMPOWERING FUNCTION (subsection 2.5.1)	- Overlap with strengthening function, but: - Court-centered, i.e. focus on responsibility of courts - Emphasis on court's perspective: power or duty to intervene
	Examples:	- CJEU *Dunai*:[1204] mandate of national courts to provide effective remedy

1201 Case C-167/17 *Profi Credit Polska*; see subsection 3.2.4.

1202 Case C-618/10 *Banesto* and C-49/14 *Finanmadrid*; see subsection 3.2.3.

1203 Case C-34/13 *Kušionová*; see subsection 3.3.2.

1204 Case C-118/17 *Dunai*; see subsection 3.3.3.

		- Spain: AP Madrid on suspension of mortgage enforcement proceedings post-*Aziz*[1205] - Spain: AP Barcelona on admissibility of appeal by consumer-debtor in mortgage enforcement proceedings[1206]
3.	SIGNALLING FUNCTION	- Court could have opted for effectiveness but refers (instead or in addition) to Article 47 to signal an issue in the design of procedure - More than ornamental: potential fundamental rights violation indicates seriousness - Aim is to make deliberation explicit and/or to trigger debate (trialogue) about the need for change
	Examples:	- Referring court in *Finanmadrid*:[1207] delegation of judicial competences as separate fundamental rights issue
	TRANSFORMATIVE FUNCTION	- Overlap with signalling function, but: - Reference to Article 47 (is a factor that) triggers debate about an upgrade of national procedural law
	Example:	- Manifested at national level in *Sánchez Morcillo*:[1208] Spanish case before the CJEU on equality of arms in appeal
4.	ELIMINATORY FUNCTION	- Separate test from effectiveness, although outcome may be the same - Not necessarily a higher threshold, but different rationale - Vertical: basis to set restrictive procedural rules aside (judicial review)

1205 *AP Madrid (Sección 10ª)*, order no. 223/2015 of 9 July 2015, JUR\2015\186525; see subsection 4.3.3. Case C-415/13 *Aziz* is also discussed in subsection 3.3.2.

1206 *AP Barcelona (Sección 4ª)*, order no. 196/2014 of 18 September 2014, JUR\2014\297187 and *AP Barcelona (Sección 1ª)*, order no. 253/2014 of 26 September 2014, JUR\2015\10332; see subsection 4.4.3.

1207 C-49/14 *Finanmadrid*; see subsections 3.2.3 and 4.2.3.

1208 Case C-169/14 *Sanchez Morcillo I* and Case C-539/14 *Sánchez Morcillo II* (pertaining to the same case); see subsection 3.4.2 and section 4.4.

		- Horizontal: parameter for substantive assessment of unfair terms (judicial control)
	Examples:	- CJEU *Aqua Med*:[1209] suggests that Article 47 entails a different test (vertical dimension) - The Netherlands: *Van Marrum/Wolff*[1210] (horizontal dimension)
5.	GENERATIVE FUNCTION	- Article 47 as (separate) source of positive requirements - Compliance with autonomous procedural safeguards may go *against* effectiveness
	Example:	- CJEU *Banif Plus Bank*:[1211] gives content to right to be heard (see also the impact on Spanish and Dutch procedural law) - Various examples from Spain and the Netherlands on reception of *Banif Plus Bank* at the national level[1212]
*	RECONCILIATORY FUNCTION	- Article 47 as a hinge between EU and national exigencies to resolve (perceived) tension
	Examples:	- Spain: TS in *AUSBANC*[1213] and AP Barcelona in the *Aziz* case[1214]
*	RHETORICAL FUNCTION	- Reference to Article 47 shows awareness of the fundamental right at stake, but does not question existing norms as such - Argument for an expansive interpretation of national law (higher level of protection)

1209 Case C-266/18 *Aqua Med*; see subsection 3.2.4.

1210 *Gerechtshof Leeuwarden* 5 July 2011, ECLI:NL:GHLEE:2011:BR2500; see subsection 5.2.1.

1211 Case C-472/11 *Banif Plus Bank*; see subsection 3.5.2.

1212 Sections 4.5 and 5.5. respectively.

1213 *Tribunal Supremo (Sala de lo Civil)*, judgment no. 1916/2013 of 9 May 2013, ECLI:ES:TS:2013:1916; see subsection 4.5.2.

1214 *AP Barcelona (Sección 15ª)*, judgment no. 407/2014 of 15 December 2014, JUR\2015\86196; see subsection 4.5.2.

	Example:	- The Netherlands: *Pharma Slovakia*[1215]

This overview is not exhaustive. For a comprehensive summary of my case law analysis I refer to the interim conclusions of the corresponding chapters. Not in all cases could a separate function be discerned, for different reasons – for instance, because the reference to Article 47 was not adopted by the CJEU, or because it was purely ornamental. This corroborates my finding of a discrepancy between the functions of Article 47 in theory and in practice: it does not always live up to its (potential) discursive value. The overview also reveals divergence between the functions of Article 47 in the case law of the CJEU and the case law of Spanish and Dutch civil courts. Its empowering function, in particular, discernible in CJEU cases, is not really picked up by national courts, with a few exceptions. What is more, I have identified two additional functions of Article 47 – a reconciliatory function and a rhetorical function – that do not seamlessly fit into one of the five categories. This also shows that the (added) value of Article 47 is ultimately determined by the meaning attached to it by courts themselves, as reflected in their decisions.

6.2 ARTICLE 47 IN CJEU CASE LAW: DISCREPANCY BETWEEN THEORY AND PRACTICE

6.2.1 Article 47 as enhanced effectiveness

The CJEU's case law on the UCTD acknowledges the importance of justiciability in a broad sense. It has uncovered procedural issues that transcend the UCTD and highlight the importance of effective judicial protection. Various authors have drawn attention to Article 47's potential to reinforce a rights-based, court-centred approach, where it may call for extra scrutiny – from the CJEU, but also and especially from national courts that must provide effective judicial protection in cases falling within the scope of EU (consumer) law. When Article 47 is read in conjunction with the UCTD, the link between substantive and procedural protection changes its colours. The mere existence of a remedy is not

[1215] *Gerechtshof Arnhem-Leeuwarden* 11 July 2017, ECLI:NL:GHARL:2017:5961; see subsection 5.2.1.

enough; it must also be effective in light of the Directive, which aims to restore the balance between consumers and traders. The CJEU has repeatedly affirmed the 'obligation to protect' on the part of courts that follows from Article 47. Accordingly, I support the claim put forward by, inter alia, Reich, Gerstenberg and Collins[1216] that, at least in theory, Article 47 intensifies the responsibility of national courts as European courts. It may strengthen the procedural rights of citizens in their capacity of European consumers and holders of EU rights. It may also empower courts, as protectors of those rights, to give a remedy-oriented interpretation of the applicable procedural rules or to set conflicting norms aside (see e.g. *Dunai*).

The CJEU's references to Article 47 in unfair terms cases indicate a focus on the availability of judicial remedies under reasonable procedural conditions (see e.g. *Profi Credit*). While this may legitimise (further) CJEU interference in national (procedural) law, it is hard to identify the distinguishing features of Article 47 in the CJEU's case law. Article 47 is not used in its eliminatory or generative function as such, i.e. as a separate test or source of positive requirements – with the exception of the right to be heard, which translates into national (procedural) law. Article 47 is mostly applied as enhanced effectiveness, e.g. where it is referred to in respect of the need for an "effective procedural path" to obtain a substantive remedy (*Sziber*) in light of the obligation of the Member States and their national courts to ensure that unfair terms are not binding on consumers and to provide "adequate and effective means" to that end (Articles 6 and 7 of the UCTD).

Article 47 gives content to procedural guarantees in light of the UCTD. For instance, an asymmetric appeal prohibition in mortgage enforcement proceedings against consumer-debtors was found to be contrary to the principle of equality of arms (*Sánchez Morcillo*). As such, Article 47 may amplify the compensatory function of civil procedure in consumer litigation. This is legitimated by the need to ensure substantive protection under the UCTD. However, the CJEU has not provided any further guidance as to what constitutes an effective (judicial) remedy in this context, e.g. what time-limits are acceptable. Article 47 may preclude procedural conditions that are too restrictive, but it does not prescribe which conditions would be reasonable instead. My analysis reveals the

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[1216] See subsection 2.5.1.

kind of deference or sensitivity to be expected from the CJEU, given its institutional position, Article 47's constraints and a functional approach towards proceduralisation under the UCTD. The CJEU appears to view Article 47 as not only accessory, but also ancillary: it enhances substantive consumer protection, not procedural protection as such.

6.2.2 A mismatch between effectiveness and a fundamental rights perspective

At the same time, my analysis corroborates a mismatch between the CJEU's focus on ensuring the effectiveness of EU law and an EU fundamental rights perspective. Conflating Article 47 with effectiveness may obfuscate the real issue: a shortfall in judicial remedies or procedural safeguards, irrespective or on top of a lack of substantive protection. This, in turn, may exacerbate the subordinated position of consumers vis-à-vis traders, which is all the more salient where they risk losing their family home in the course of mortgage enforcement proceedings (see e.g. *Kušionová*). A reference to the Charter marks a problem with judicial protection (Article 47) – here in view of the right to housing (Article 7) – that is more profound than just a failure to perform *ex officio* control of unfair terms. The case law on expedited procedures shows how restrictive procedural rules that are generally legitimate may become problematic when they are considered in light of the risk that consumers are prevented or deterred from going to court. As a result, courts may be circumvented or completely side-lined.

The case of *Finanmadrid* exemplifies that a procedural breach could constitute a separate violation of Article 47, which nevertheless remains underexposed in the CJEU's judgment. *Ex officio* control cannot entirely compensate for procedural inequalities between consumers and traders – *de facto*, in terms of the knowledge or financial means required to take legal action, or *de jure*, in terms of (insufficient) judicial remedies. It does not remedy the preclusive effect of procedural obstacles per se, such as (a constellation of) time-limits and costs. Article 47 pertains to the availability and accessibility of an effective judicial remedy for infringements of substantive *and* procedural rights. It does not necessarily have to entail a higher threshold than effectiveness or lead to a different outcome, but it provides a different rationale for judicial protection. Whether it is excessively difficult or virtually impossible for consumers to exercise their (substantive) rights – in court or otherwise –

is a different question than whether an "excessive restriction" occurs of procedural requirements of Article 47 (see *Aqua Med*). The latter places emphasis on respect for the core components of Article 47, rather than on the effective enforcement of EU (consumer) law. Judicial protection can be seen as both a process and a goal in and of itself. Article 47 is not merely instrumental; its rule of law connotation goes beyond the objectives of specific instruments of EU law. Article 47 has normative content and intrinsic value; it is more than a function of the limitations placed on the Member States' procedural autonomy.[1217] Indeed, it holds the promise of autonomous procedural safeguards – or rather: hybrids, consisting of diversified rules at the national level that conform to certain EU-wide, judge-made standards, reflecting Van Cleynenbreugel's observation of guided deference by the CJEU.[1218]

The contrasting dynamics between Article 47 and effectiveness become visible in cases like *Banif Plus Bank*, where the duty of *ex officio* control was qualified by the fundamental right to be heard of both consumers and traders. Another example can be found in the case of *Asturcom*. As the Opinion of AG Trstenjak shows, Article 47 can support the argument that there should always be (a form of) judicial control in order to prevent that consumers are deprived of their right of access to court and/or rights of defence. A similar argument can be made in respect of the delegation of judicial functions to court registrars, e.g. the power to issue orders for payment (see the referring court in *Finanmadrid*). In this respect, it could be helpful to differentiate between rules that regulate the course of judicial proceedings, and rules that impinge on Article 47's core components. The latter may give rise to a self-standing violation of Article 47, as the "excessive restriction" test in *Aqua Med* seems to imply. Article 47 warrants the observance of procedural rights and safeguards in and of themselves.

Notwithstanding Article 47's potential to increase the visibility of effective judicial protection as an EU fundamental right, the CJEU's case law hardly puts it into action, or is ambivalent at most. My country reports reveal how this ambivalence affects the impact of Article 47 on Spanish and Dutch law.

1217 See Case C-61/14 *Orizzonte Salute*, Opinion of AG Jaäskinen, cited in subsection 2.5.2.

1218 See subsection 2.4.2.

6.3 ARTICLE 47 IN SPANISH AND DUTCH CASE LAW

The references to Article 47 by the CJEU and by Spanish and Dutch civil courts converge to the extent that they show how Article 47 may justify an interpretation of national (procedural) law in such a way as to expand consumer's procedural rights and/or the scope for judicial intervention. Such a reference to Article 47 may also have a signalling effect; it indicates a possible fundamental rights violation, which highlights the seriousness as well as the urgency of remedying the consequences.

However, my analysis shows divergence between the CJEU and the analysed national case law in three important aspects. Firstly, at the national level, Article 47's empowering function is not as strong as it might seem. Spanish and Dutch civil courts seem hesitant to disregard or supplement procedural rules on the basis of Article 47 alone, without CJEU back-up. Secondly, whilst the CJEU's case law on Article 47 could be construed as a cautious attempt at open constitutionalisation, the fundamental rights dimension remains largely hidden in Dutch unfair terms cases. For Spain, it is the opposite; the cases referring to Article 47 have a clear constitutional background. But interpretations of national (procedural) law diverge, and some courts adopt an outright restrive approach towards the effective judicial protection of individual consumer rights. Thirdly, my analysis reveals tension between the CJEU's instrumental approach towards consumer protection under the UCTD on a systemic level, and a more tailored approach in concrete cases before national (civil) courts. This emphasises the importance of making clear what (conflicting) rights and interests are at stake, and how they should be balanced against each other.

6.3.1 Spain: a clear constitutional dimension

The references to Article 47 in Spanish unfair terms cases can only be understood against the background of the many requests for preliminary references Spanish civil courts have made to the CJEU. In the aftermath of the 2008 financial crisis, Spanish civil courts have reframed issues affecting vulnerable debtors as issues of consumer protection under UCTD. They have pinpointed deficiencies in the national procedural framework, which are especially problematic when there also exists a lack of substantive protection. The analysed case law demonstrates how a shortfall in judicial protection in (expedited) procedures involving

consumers can be problematic of its own. It may not only aggravate the substantive imbalance; it also allows creditors to circumvent judicial control and enforce claims against consumers that are based on unfair terms or otherwise unfounded. This undermines the Directive's effectiveness, and may result in a denial of justice if consumers are effectively denied an opportunity to exercise their rights. The fact that rights originating in EU law are at stake adds an extra layer, and triggers the applicability of Article 47 of the Charter. Thus, consumer adjudication in Spain has acquired a clear constitutional dimension.

The case of *Sánchez Morcillo* forms a striking example. The referring court (re)formulated its question under the UCTD to bring in Article 47. The fundamental rights angle of this case was informed by the *Tribunal Constitucional*'s formalistic approach towards the procedural rights of mortgage debtors. This shows there were other motives on the table than solely the need to protect consumers against unfair terms; a reference to Article 47 may indicate the need to redress structural imbalances in the civil justice system. It adds a different perspective than effectiveness, and resonates with national constitutional language. The CJEU seems to have acknowledged this by explicitly adopting the reference to Article 47, and condemning the asymmetric position of consumers and traders as regards the right of appeal in light of the principle of equality of arms.

Sánchez Morcillo exemplifies a trialogue between national courts, the CJEU and the national legislature on the level and scope of effective judicial protection for consumers. The CJEU's case law has led to legislative reforms in Spain, which, in turn, have changed the course of the procedures at issue and could be seen as hybridisation in the procedural sphere – insofar as cases fall within the scope of the UCTD (*Sánchez Morcillo II*). This reflects Article 47's transformative potential, where it results in an upgrade of national (procedural) law, as envisaged by Gerstenberg and Reich. A reference to Article 47 in its signalling function may even be instrumental in its own way, as a means to achieve an ulterior goal – e.g. to set a reform into motion, with the aim of opening up rigid procedural rules that limit the court's space to offer a solution in a concrete case. Where Article 47 operates as a correction mechanism, this also reminds us of the leverage function of fundamental rights in private law.

The signalling function of Article 47 is more than symbolic; the implication that a fundamental rights violation must be prevented or remedied has persuasive authority in judicial reasoning. As such,

Article 47 has an empowering function where it can provide an argument for an expansive interpretation of national procedural law. For instance, the AP Barcelona allowed an appeal brought by consumer-debtors in mortgage enforcement proceedings before the law was changed, for which *Sánchez Morcillo* paved the way. And after *Aziz*, the *Audiencia Provincial de Madrid* found that the prohibition of suspension of mortgage enforcement proceedings while declaratory proceedings are pending ran counter to Article 47. This prohibition still exists, even if it could be said that the CJEU invented a new remedy – interim relief – in *Aziz*. The ensuing confusion led to contradictory judicial decisions and new preliminary references to the CJEU.

This lays bare the scattered nature of the manner the CJEU's case law has been received in the Spanish legal system. Article 47 as a tool to enhance the effective judicial protection of consumers has not been embraced across the board. On the contrary: Article 47 is sometimes invoked in defence of procedural principles such as *res judicata*, without giving sufficient consideration or justification to how this may negatively affect the protection of individual consumer rights. Spanish civil courts struggle to reconcile the CJEU's case law with the "classic rigidities of civil procedure".[1219] The active role courts are required to take fits uncomfortably with the principle that the parties take the procedural initiative and determine the ambit of the dispute. Interestingly, the *Audiencia Provincial de Barcelona* in the *Aziz*-case and the *Tribunal Supremo* in a landmark decision on *cláusulas suelo* resorted to Article 47 to coordinate between this principle and *ex officio* control. Here, Article 47 fulfilled a reconciliatory function; it resolves the (perceived) tension between EU and national exigencies. The court's task is to facilitate the litigating parties and uphold their subjective rights. The parties must have an opportunity to exercise their rights and to present their views, so that the court can take a decision based on their submissions. Giving them the chance to be heard respects their autonomy and avoids a denial of justice (*indefensión*).

[1219] *Tribunal Supremo*, cited in subsection 4.5.2.

6.3.2 The Netherlands: no constitutionalisation of consumer cases

In the Netherlands, the right to be heard as guaranteed by Article 47 of the Charter has also been invoked to emphasise that the court must take the position of both parties and the circumstances of the case into account when it performs *ex officio* control. The impact of Article 47 has been mostly indirect; there are still very few explicit references to it in Dutch unfair terms cases. In chapter 5, I have discussed that Dutch civil courts seem to have found other ways to ensure effective judicial protection of consumers under the UCTD, inter alia through a coordinated approach taken by lower courts towards consistent interpretation of (open) procedural norms. The *Hoge Raad* has provided guidance, in particular as regards the role of the court in default and appellate proceedings. This could explain why Dutch civil courts are less inclined to look for solutions in EU law. Consumers' procedural rights and the scope for judicial intervention are not as restricted as in Spain.

Moreover, unlike in Spain, there is no centralised system of constitutional review in the Netherlands. In so far as procedural issues are constitutionalised, it is within the scope of Article 6 ECHR, a trans-substantive provision that guarantees a minimum level of protection. While Article 47 of the Charter has obtained its own identity due to the link with EU law, Dutch civil courts mistakenly assume that Article 6 ECHR and Article 47 of the Charter are interchangeable. In the high-profile *StAR* case on judicial review of arbitral awards in consumer cases, only Article 6 ECHR was referred to – despite a clear connection to consumers' fundamental right of access to court, a necessary prerequisite for judicial intervention. In the few cases that do contain a reference to Article 47, it is mentioned in one breath with Article 6 ECHR and/or Article 17 of the Dutch Constitution.

However, there are indications that such a reference is not just ornamental. A few Courts of Appeal have gone beyond what was required by the UCTD's (full) effectiveness and held that arbitration clauses in consumer contracts must be considered as unfair – before they were placed on the black list. These Courts used Article 47 in its empowering function, i.e. as an extra argument to re-enforce their reasoning why access to court should not be excluded upfront. It was one of the parameters in the substantive unfairness assessment of arbitration clauses, and a reason to eliminate them from consumer contracts. In a way, this could also be seen as an instance of its signalling function: a call

for blacklisting arbitration clauses, ahead of legislative change. A weaker form is a reference to Article 47 in its rhetorical function: the applicable norms are not questioned as such, but the reference to Article 47 shows awareness of the fundamental right at stake (*Pharma Slovakia*).

Interestingly, Dutch civil courts have used the notion of "effective judicial protection" as a justification for an expansive, consumer-friendly interpretation of remedies, even outside the scope of EU law. It has discursive value, similar to Article 47. Especially in respect of norms with a protective purpose, it may be a powerful argument to stress the link between substantive and procedural protection. Courts must provide both types of protection, if necessary of their own motion, with due regard for the parties' right to be heard and within the ambit of the dispute.

Unlike in Spain, the CJEU's case law on the UCTD has not been codified in the Netherlands, leaving courts more flexibility. However, there is arguably a lack of clarity or predictability in respect of the way procedural safeguards are observed. When the court performs *ex officio* control, this may lead to questions as to the extent of the parties' right to be heard or complaints that this causes unacceptable delays. More importantly, a case-by-case approach may hide patterns in the way courts deal with systemic issues, e.g. the deterrent effect of costs, which can only be discovered through samples of individual judgments. A reference to Article 47 may not only contribute to the visibility of such issues, but also empower courts as well as litigants to overcome them. A judgment by the Court of Appeal 's-Hertogenbosch – albeit in a data protection case – exemplifies how Article 47 could be used to signal to citizens that (the prospect of) a cost order should not discourage them from exercising their EU rights in court.[1220]

The mismatch between effectiveness and an EU fundamental rights approach could partly explain why Dutch civil courts hardly refer to Article 47 at all. A technocratic reading of the CJEU's case law obscures the rationale of effective judicial protection in the context of the UCTD. Article 47 emphasises the systemic responsibility of courts to address not only situational, but also structural problems, especially where consumers are prevented or deterred from going to court. In this respect, Article 47 could give a European dimension to the debate on access to

[1220] *Gerechtshof 's-Hertogenbosch* 1 February 2018, ECLI:NL:GHSHE:2018:363; see subsection 5.1.2.

justice and the prevention of opportunistic debt collection practices in the Netherlands as well.

6.4 JUSTICE FOR BOTH

To conclude, Article 47 of the Charter is a chameleon-like provision with many colours: it requires further interpretation, depending on the context in which it is applied. It can blend in with effectiveness, but it can also stand out on its own merits; where it is placed on the spectrum depends on the court that refers to it. Through a comparison of Spanish and Dutch case law, this study has shown that Article 47's (added) value in practice is in the eye of the beholder: Spanish civil courts appreciate its functions differently than their Dutch counterparts.

My analysis of the Spanish case law shows that a reference to Article 47, even in a single case, may enhance the visibility of systemic problems with the justiciability of EU (consumer) rights. In this respect, I agree with Tridimas and Gentile[1221] that fundamental rights language might have a strong signalling effect. How an issue is framed matters for the way it is approached and resolved. Whilst the CJEU appears to be primarily concerned with the UCTD's (full) effectiveness, other issues have come to light that touch on the fundamental right to effective judicial protection as such. By conceiving these as constitutional issues, Spanish civil courts have highlighted shortfalls that were more profound than a failure to perform unfair terms control (*ex officio*) – in particular, a lack of (access to) judicial remedies for consumers, which could result in a denial of justice.

The categorical protection of consumers as weaker parties requires courts to compensate for a substantive (i.e. transactional) imbalance as well as procedural inequalities. Calls have nevertheless been made for a more tailored approach, i.e. a true balancing of the rights and interests at stake in the circumstances of the case. A narrow vision of effective judicial protection focuses on the court's active role for the benefit of consumers; a broad understanding also accounts for due process as an end in itself. At the same time, the Spanish experience teaches us that, even from a due process perspective, the problem is not overprotection of consumers. Spanish procedural law seems to systematically favour

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[1221] Subsection 2.5.2

traders, creditors and repeat players by endorsing their privileged position. Within the framework of the UCTD, their right to be heard may qualify the court's *ex officio* powers or duties; but Article 47 should not be used as an argument to preserve existing inequalities. "Justice for both", to borrow Eleanor Roosevelt's words, means that structural imbalances should be identified as such and removed or compensated for as much as possible.

To the extent that there is still a 'civil justice gap' in unfair terms cases, it exists on the side of consumers, not on the side of traders. In this respect, I see Article 47's (unfulfilled) potential in its discursive value. Courts may use Article 47 to openly deliberate about (perceived) tensions between EU and national law, propose possible solutions and thus contribute to closing the gap. Article 47 may provide a new source of inspiration; even if it only reaffirms pre-existing rights and principles, it recognises effective judicial protection as an EU fundamental right. Concerns of overextension, in the sense that Article 47 would be capable of expanding the CJEU's competences or blurring the boundaries of judicial law-making, seem to be unfounded so far. Rather, Article 47 provides an anchor point for the discourse on effective judicial protection, especially where conflicting rights and interests are at stake.

Article 47's chameleon-like nature suits an approach of guided deference by the CJEU, which leaves room for interpretation and balancing by national (civil) courts. Article 47 is an open provision rooted in EU law that does not impose specific solutions from above, but empowers courts and litigants from below. It pushes for a broad view on the role of civil courts that reconciles national (procedural) law with an EU consumer law perspective. Article 47 seems to leave space to take other factors into account next to the objectives of the UCTD, such as the proper administration of justice, but this should not come at the cost of depriving private parties of effective judicial protection. Article 47 is less instrumental, less alien to private law and civil procedure than effectiveness, because it recognises that individual rights deserve protection in and of themselves. As such, it seems to fit better into the private law discourse than the effectiveness paradigm. Rather than being an incursion on party autonomy and procedural autonomy, Article 47 may provide a route that is more in harmony with the role and reasoning of civil courts.

For the viability of Article 47 as an EU-wide standard, however, further guidance or clarification as to what effective judicial protection

entails is crucial. Article 47 can be both a shield and a sword; what matters is in whose hands it is put – strengthening what, or empowering whom? Article 47's chameleon-like nature could transform into capriciousness if it would be used as a counterargument to restoring the balance for consumers. Therefore, I concur with calls made for open constitutionalisation to openly address questions about the balance struck at different levels. Otherwise, the fundamental rights aspects of consumer adjudication will remain invisible or allow for a reductionist approach that does not do justice to the rationale of effective judicial protection in this context. Not Article 47 itself, but the courts bringing effective judicial protection into practice must show its colours.

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