The European Court of Justice and General Principles Derived from the Acquis Communautaire

Elise Poillot*  

Abstract  

This article aims to demonstrate and identify principles derived from primary legislation which govern European contract law. This demonstration is based on the consubstantial relationship, rooted in a market-oriented conception of Europe, which exists between principles set up by the European Union Treaties and those implicitly contained in secondary legislation. However, the view taken here is that not all ‘primary principles’ are shaped to integrate secondary legislation dealing with contract law. Only proportionality, effectiveness and, to some extent, non-discrimination prove appropriate in the context of contract law. The first part of the article supports the view that these principles have been used to remedy limits in European legislature competences in contract law. Part two takes the view that the principles have been used by the European Court of Justice as a tool of contractual policy making.

Keywords: Contract law; European Court of Justice; effectiveness principle; proportionality principle; non-discrimination principle

1. Introduction  

According to Giuseppe Mazzini, ‘[i]n politics, as in any other field, a principle inevitably leads to a system, a series of consequences, a process of applications easy to anticipate for persons with common sense’.1 This assertion certainly applies to European contract law. The aim of this article is to demonstrate the important role played by the European Court of Justice (ECJ) in such a process. To understand how such a process started, one must return to the foundations of European Union law.

At this point, two very important matters should be clarified. Firstly, for the purpose of this article, only principles set or implied by the EU Treaties and by the Charter on Fundamental Rights will be considered as general or constitutional principles. Secondly, despite the economic dimension of European law and its market-oriented nature, not all existing general/constitutional principles could play a role in developing contract law through the channel of the ECJ. Principles such as subsidiarity and sincere co-operation were not shaped to influence, even indirectly, the field of contract law.

* Professor of Civil Law, University of Luxembourg; email address: elise.poillot@uni.lu.

1 Giuseppe Mazzini, Repubblica e Monarchia (1865) Capit. I.
This might not be surprising with respect to the subsidiarity principle, which organises the sharing of powers between several levels of authority. As ‘a mere institutional principle’ it is strictly limited to the allocation of competences. Therefore, its use by the ECJ beyond controlling the legitimacy of action of the EU legislature was very unlikely.

Principles of transparency and trust (*Vertrauensprinzip*) could also not be used in the field of contract law. The former, now acknowledged as a constitutional principle by the ECJ and the academic world, has very much to do with the formal quality of EU legislation. It was thus difficult to extend its use outside this context. However, the transparency principle is a basic principle of EU legislation in the field of contract law (mainly linked with the so-called obligation of information).

The *Vertrauensprinzip* could possibly be used in contract law, as trust certainly is a basic principle in this field. However, its use by the ECJ has been limited to relationships between EU institutions and EU citizens.

The principle of sincere co-operation (EU Treaty Article 4), which reminds continental lawyers, and especially French ones, of the good faith principle is considered as a principle notably obliging the parties to collaborate during their contractual relationship. From this point of view, it could of course be used in contract law. However Article 4 of the EU Treaty only applies to relationships between the EU and Member States. This being said, and assuming that the principle of effectiveness derives from it, its influence in the field of contract law cannot be denied.

For the purpose of this contribution, the principle of freedom of movement and its various aspects is not considered, as its influence on contract law is too indirect. In the majority of ECJ decisions applying the principle, the national legislation at stake has been set aside. The Court’s doctrine has not modified the substance of contract law in this field, contrary to what the Court has done with cases concerning conformity between national law and secondary legislation. For all these reasons, only the following principles are dealt with herein: non-discrimination, proportionality and effectiveness (efficiency).

This being said, however, it should be made clear that the design of the Court’s competence within the framework of preliminary rulings and the use of teleological methods to interpret EU legislation has not allowed the Court directly to develop general principles in contract law on the grounds of these three constitutional principles. The Court has nevertheless been able to intervene in contract law through these principles, albeit indirectly, by using the principles to ensure the effectiveness of EU legislation in national legal orders. In this context, the Court has clearly used the general principles as a means to remedy the limits of competences allocated to the European legislature (see

---


section 2 below). In so doing, the Court has undoubtedly established contractual law policies through its jurisprudence (section 3).

2. General Principles as a Remedy to Limits on European Legislative Competences in Contract Law

As the chosen examples illustrate (section 2.2), some of the constitutional principles were used to ‘fill in some gaps’ in EU legislation, especially in the field of remedies. The reason for this lies in the fact that in EU legislation these constitutional or general principles could constitute the legal framework of European contract law. As such, they can be described as structural principles (section 2.1).

2.1. From general principles derived from acquis communautaire to structural principles of contract law

As contract is an economic tool, it is not difficult to deduce that contract law principles are shaped to support the building and functioning of the market. It is no wonder then that principles set by the Treaties and the Charter, in addition to being formed for the use of contract law, are principles designed to support the building and the functioning of the Single Market. These principles are proportionality, effectiveness and, to some extent, non-discrimination, although there has been a change in the nature of the latter due to the evolution of EU legislation.

As a structural principle, non-discrimination both guarantees and places limits on the exercise of freedom of contract. Non-discrimination began basically as an economic principle; it was initially restricted in the Treaty of Rome to economic matters, i.e. the prohibition against discriminatory Member States’ legislation within the context of the common market. After the adoption of the Treaty on the Functioning of the EU (TFEU) and the Charter of Fundamental Rights, however, the meaning of non-discrimination as a constitutional principle evolved. Since it is now considered as a constitutional principle, discrimination is now also founded on gender, ethnicity or race. As a consequence, its content is less and less influenced by market ideology. This is a positive development, as the market-oriented nature of other principles should be counterbalanced. Hopefully, ‘constitutionalisation’ of contract law through the Charter will maintain the balance between market ideology and social justice.

Proportionality and effectiveness principles are also market-oriented in the original ideology of the EEC. However, the way in which they are used depends mostly on the

---


5 On which, see Chantal Mak, ‘Constitutional Aspects of a European Civil Code’ in Arthur Hartkamp and others (eds), Towards a European Civil Code (Wolters Kluwer Law and Business 2011) 332ff.
ideological direction given by the ECJ. Three different approaches can be identified in this respect.

The first approach leads to a balancing of rights through the proportionality principle. From this perspective, proportionality is perfectly appropriate to contract law, as it is a very useful tool to check the economic balance of a contractual relationship. In the case of unfair terms, judicial assessment of the unfairness of a contractual term is based on the control of the balance between the parties' rights and obligations.

The second approach is the consequence of the omnipresence of the principle of effectiveness in ECJ jurisprudence. It is common knowledge that the principle of effectiveness derives from the principle of ‘effet utile’. Its use in the framework of European contract law is the result of ECJ practice. However, it was soon integrated in Directives dealing with contract law, especially due to the fact that Member States were left to choose remedies independently. As its effect on contract law is presented in detail elsewhere, this principle is not discussed in depth here. It is, however, a core principle of European law, and an emerging principle of great interest in the area of contract law.

It can even be considered as a post-modern concept, not present as such in any civil codes or other legislation (in a broad sense) in the contract law field. It is certainly a promising tool in the areas of pre-contractual information and contractual performance, allowing the creation of interesting doctrines to fill gaps left in legislation. Its use would be permit, for example, a judge to extend remedies where no remedy has been provided.

The principle of effectiveness could also lead to selecting one remedy over another in a contractual context where several remedies are available. From this perspective, the example of pre-contractual information is very interesting. In many Member States – at least France, Luxembourg and Italy – no specific provisions have been adopted in cases concerning breaches of the pre-contractual obligation to inform the other party of the essential elements of the contract. By using the principle of effectiveness, a judge could decide that, according to the context, the appropriate remedy would be contract resolution (if required by one party) rather than awarding compensation. Another

---

6 See eg Norbert Reich, 'The Principle of Effectiveness and EU Contract Law', presentation at the SECOLA Conference on ‘Principles and Specific Rules in European Contract Law’ Messina, 1 June 2012.
8 See Reich (n 6).
9 For instance, the Consumer Rights Directive imposes on businesses several obligations of information. Sanctions are to be determined by the Member States with the exception of breach of the obligation to provide information on the existence of consumer withdrawal rights. Relying on the effectiveness principle, the Court could decide that a contract should be terminated were the business not to provide information on the main characteristics of the goods as required by Art 5(1) (a).
10 See Reich (n 6).
example can be taken from the 2011 proposal for a Regulation on a Common European Sales Law where remedies offered for non-conformity of goods are no longer subject to a hierarchy. In this context, the principle of effectiveness would give judges the opportunity to apply the most appropriate remedy. The ECJ could also rely on the principle of proportionality in order to balance the interests at stake and determine whether the remedy is proportionate to the prejudice suffered. However, with regard to the competence of the Court, such an activist approach to these principles has not yet arisen and remains highly improbable. In fact, the ECJ can only control conformity of national legislation to EU law by interpreting its substance and guide national judges in the interpretation of their own legislation in the light of European law.\(^\text{11}\) Although not directly using these structural principles, decisions of the Court have influenced national legislation on specific contracts. Some examples below help demonstrate this.

### 2.2. Selected case law

For the purpose of this study, only a series of cases dealing directly with the ‘constitutionalisation’ of contract law and effectiveness of remedies is scrutinised. Non-discrimination plays an important role in the process of ‘constitutionalisation’ of contract law as its special place within EU law has allowed fundamental rights to meet economics to some extent. The *Test-Achat* case\(^\text{12}\) proves to be a very interesting case from this perspective.

The case deals with Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to supply of goods and services – a principle which is said in the decision to be a ‘fundamental principle of the European Union’ under the Charter of Fundamental Rights. The preliminary ruling concerned the conformity of a Belgian statute with this principle. The statute authorised a form of discrimination called ‘a proportionate distinction drawn on the basis of gender’ for the purposes of calculating insurance premiums and benefits where gender was a determining factor in the assessment of risk. Here, risk assessment was based on relevant and accurate actuarial and statistical data.

Article 5 of the Directive permitted Member States to maintain such discrimination, thus providing a derogation to the principle of non-discrimination, although it stipulated reconsideration of the provision after a five year period. The *Test-Achat* case not only challenged the Belgian statute but also Article 5 of the Directive itself. The ECJ held that Article 5(2) of the Directive was invalid as it enabled the Member States to maintain, without temporal limitation, an exemption from the rule of unisex premiums and benefits, and worked against the objective of equal treatment between men and women. The interesting point here is that the Court’s decision clearly underlines the importance

---


of the non-discrimination principle, using a ‘constitutional’ vocabulary to give it a full constitutional value. The decision is undoubtedly amongst the first of a forthcoming series that will demonstrate the increased significance of the principle in any sector of contract law.\textsuperscript{13} And it will definitely have a huge impact on national legislation concerning sectors where the principle has customarily been regarded as important – areas such as labour or insurance law as is the case in, for example, Luxembourg and France. Moreover, \textit{Test-Achat} is undoubtedly more than a ‘gap-filler decision’. The fact that non-discrimination is considered a constitutional principle gives it a broader dimension. More than just affirming the importance of non-discrimination in contract law, this case emphasises the role of fundamental rights in the EU legal system. On the contrary, the ‘gap filling’ dimension of the principles of effectiveness and proportionality is certainly their main characteristics.

Surprisingly, in most of the Directives enacted in the field of contract law, remedies have been left to the discretion of Member States or have been broadly determined.\textsuperscript{14} There is, though, no institutional reason for such a choice.\textsuperscript{15} Moreover, Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees almost exclusively deals with remedies!

Further with regard to the issue of remedies, the Unfair Terms Directive is particularly interesting. Article 6(1) of the Directive stipulates that an unfair term is non-binding. The rather imprecise provisions were deliberately worded so as to leave a wide margin of appreciation for Member States’ legal mechanisms. It leaves Member States the possibility to implement the provisions of the Directive according to their legal culture. In France, for example, an ‘unfair’ term is considered ‘non-written’ (non-existent),\textsuperscript{16} whereas in Belgium it is void and in Luxembourg ‘non-written’ and void.\textsuperscript{17} While the European legislature determined generally the remedy for unfairness of a clause, it completely ignored, for unclear reasons, the procedural regime for assessing unfairness. One reason could be the reluctance to violate the principle of so-called Members States’ procedural autonomy.

Nonetheless, as a consequence, several preliminary rulings have been referred to the Court by national judges, all facing the same problem: consumers’ ignorance of their rights as consumers. The national courts have in each case been asked by businesses to

\textsuperscript{13} This principle has been used in various European projects on contract law, such as the Draft Common Frame of Reference (DCFR) Art III –1:105, which sets forth the principle of non-discrimination.
\textsuperscript{14} Directives usually contain standard clauses providing that Member States will determine the means to ensure compliance with the Directive’s provisions. See for example the Consumer Rights Directive Art 23(1) stating that ‘Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive’.
\textsuperscript{15} In her conclusions in the \textit{Invitel} case (n 11), Advocate General Trstenjak suggests that one of the reasons is ‘the legal nature of the directive’ designed as ‘an instrument for the harmonisation of legislation, which under Article 288 TFEU is binding as to the objective to be attained, while it is left largely to national bodies to choose the form and means of doing so’ (para 89).
\textsuperscript{16} ‘Non écrit’.
rule on whether consumers have been breached their contractual duties in contexts involving a possible unfair term – typically an arbitration clause or a jurisdiction clause. The consumers have usually not taken up the issue themselves. Faced with the lack of procedural provisions in the Directive, the national courts initially constructed a procedural regime using legal reasoning based on the principle of effectiveness. The ECJ subsequently weighed in with its views on procedural matters. From the *Oceano Grupo* case to the *Invitel* case, the Court constructed a doctrine on procedural effectiveness of unfair terms, which subjected the principle of procedural autonomy to unexpected boundaries. In the *Penzügyi* case, the Court even imposed on national judges an obligation to investigate in order to assess the unfairness of the term. To reach this conclusion, the Court referred to the principle of effective protection of the consumer, grounding the justification for this in the parties’ unequal bargaining power. Thus, in this area, the principle of effectiveness has proven to be a very effective tool in the hands of the Court in guaranteeing a high level of protection to consumers.

Compensation is another part of contract law that has been penetrated by the principle of effectiveness. This is very clear in the *Leitner* case. Simone Leitner, an Austrian citizen, went on vacation having been ‘sold’ a package holiday. She was not very lucky. She contracted salmonella poisoning on her trip and had to spend most of her vacation in bed. Under Austrian law, the non-material damage caused by the loss of her holiday could not be compensated. Therefore, a court of first instance refused to award her such compensation. Its decision was challenged and the appellate court, surmising that the interpretation of Directive 90/314/EEC on package travel, package holidays and package tours could lead to a different outcome, submitted a preliminary ruling to the ECJ asking it to assess the conformity of Austrian legislation with the provisions of the said Directive. Simone Leitner was eventually lucky, as the Court held that Austrian law was in breach of EU law in this respect. The reasoning of the Court did not expressly refer to the principle of effectiveness, but is clearly oriented in that direction. The Court took the view that ‘the existence in some Member States but not in others of an obligation to provide compensation for non-material damage would cause significant distortions of competition as non-material damage is a frequent occurrence in that field’. It also highlighted that:

---

18 See Reich (n 6).
19 Joined Cases C-240/98 to C-224/98 *Océano Grupo Editorial SA v Roció Murciano Quintero (C-240/98)* and *Salvat Editores SA v José M. Sánchez Alcón Prades (C-241/98), José Luis Copano Badillo (C-242/98), Mohammed Berroane (C-243/98) and Emilio Viñas Feliú (C-244/98)* [2000] ECR I-04941; *Invitel* (n 11).
21 On several occasions the Court has held that ‘[t]he imbalance which exists between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract’. See *Oceano Grupo* (n 19) para 27; Case C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-10421 para 26; and Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579 para 31.
22 Case C-168/00 *Simone Leitner v TUI Deutschland GmbH & Co. KG* [2002] ECR I-02631.
the Directive, and in particular Article 5 thereof, is designed to offer protection to consumers and, in connection with tourist holidays, compensation for non-material damage arising from the loss of enjoyment of the holiday is of particular importance to consumers.

The Court went on to imply a general right to non-material compensation in the field of package holidays, holding that national legislation excluding such compensation would breach EU law, and imposing on all Member States a duty to compensate non-material damages for holiday loss. In doing so, the Court strongly influenced national legislation in this sector through the principle of effectiveness.

As for the principle of proportionality, its use seems particularly appropriate to controlling the adequacy of a remedy in a contractual or otherwise legal context. Two cases support this approach. In the Messner case, a woman bought a computer through a distance contract for 278 euros. More than six months after the delivery, the computer display became defective. She informed the seller, who refused to repair the defect free of charge. When Mrs Messner realised she had not been informed of her right of withdrawal, she decided to revoke the contract, as this was still possible under German law. The seller claimed she was under the obligation to pay compensation for the use of the computer and requested 316 euros from her.

The German court sought a preliminary ruling from the ECJ as under the second sentence of Article 6(1) and 6(2) of Directive 97/7/EC the only charge that may be imposed on the consumer by reason of the exercise of her right of withdrawal is the direct cost of returning the goods. It was held that German law, which requires a consumer to pay fair compensation, was not in breach of EU law when the consumer makes ‘use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment’. Such a possibility should, however, be:

in accordance with the purpose of that Directive and, in particular, may not adversely affect the efficiency and effectiveness of the right of withdrawal. Such would, for example, be the case if the amount of compensation, such as that referred to in the previous paragraph, were to appear disproportionate in relation to the purchase price of the goods at issue or also if the provision of national law were to place on the consumer the onus of proving that he did not use those goods during the period for withdrawal in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.

Overall, the principle of proportionality arguably played a minor role in the Court’s reasoning in this case. Nonetheless, what is interesting here is the use made of it in order to balance the rights of consumer and sellers.

25 Ibid para 27.
The ECJ adopted a similar approach in the cases of Putz and Weber. Both cases concerned the installation of defective tiles whose non-conformity appeared once they were glued on the wall. The issue at stake was the conditions of their replacement. The Court held that if disproportionate costs were imposed on the seller ‘it is appropriate to reduce the consumer’s right to reimbursement of the costs of removing the goods not in conformity and of installing the replacement goods’. In doing so, national judges will:

have to bear in mind, first, the value the goods would have if there were no lack of conformity and the significance of the lack of conformity, and secondly, the Directive’s purpose of ensuring a high level of protection for consumers.

Of course, in both cases, and contrary to the cases where the principle of effectiveness had been used, the principle of proportionality was not mentioned as such. However, the ratio decidendi of the case, if I may use this expression in this context, is certainly based on it.

All of these cases clearly show that constitutional principles may be key elements for the Court to fill the gaps left by the legislature. By filling such gaps, the Court has inevitably established legal policies through its jurisprudence.

3. General Principles as a Tool of Judicial Policy Making in Contract Law

With the exception of the principle of non-discrimination, which, as a fundamental right, applies to any kind of contract, the use of constitutional principles by the ECJ has led to the establishment of sectoral policies due to the sectoral approach of the EU legislator in the field of contract law (see further section 3.1 below). All the preliminary rulings submitted to the Court refer to a precise question in the context of a specific Directive. In this context, it is very difficult to confirm the actual or potential establishment of general policies (see further section 3.2). Difficult does not, however, mean impossible. Thus, we cannot exclude the possibility of some general policies being established.

3.1. Existence of sectoral policies

These policies can more precisely be described as sectoral and sub-sectoral. The sectoral approach adopted by the EU legislature, through the approximation of laws, limits, of course, the scope of the Court’s policies in the matters at issue, and theoretically precludes national law from being influenced outside them. In fact, in all the cases mentioned, points of impact are limited to specific matters, such as the issue of

---

27 Ibid para 76.
28 Ibid para 76.
compensation or remedies. Yet, what is particularly interesting about these sectoral policies is that they differ from one sector to another.

In consumer contracts, Court policy regarding the procedural regime of unfair terms is undoubtedly ‘social’. By obligeing the judges to raise _ex officio_ some legal issues, the Court noticeably favourable the effectiveness of consumer protection. This is particularly clear if a comparison is made with credit and outdoors contracts, two sectors where the Court has held that it was only a possibility. The decisions dealing with consumer or employee compensation also demonstrate a tendency to favours the weakest party.

On the contrary, when limiting the rights of consumers to the reimbursement costs of removing defective goods and installing replacement goods, under certain circumstances, the Court implements a more market-oriented policy. As for the _Messner_ case, the policy underpinning the ruling can be described as a balanced one, taking reasonable care of the interests of all the parties.

These differences in policy orientation are clearly the result of the instrumental function of constitutional principles in the field of contract law. Their ‘neutral content’ makes them flexible and adaptable to any ideology one wants to promote.

The principle of effectiveness, for example, shows that different conclusions will be reached according to what judges’ aims are. If the target is to protect consumers or employees, the use of effectiveness will serve as a social approach to a contract. If the goal is to have a contract performed, then a market-oriented policy will probably underpin the decision. This flexible nature leads to approaches that can be very different from one case to another.

Of course, this is not very surprising, as the flexible nature of principles allows them to be used in many different ways. Furthermore, as two scholars point out, the ‘coexistence between the many sector and purposive regulatory techniques and traditional market-based solutions of private law administered _ex post_ by the courts, is not necessarily harmonious’. As a consequence, the ECJ’s use of these principles is not very easily predictable. However, this unpredictability is acceptable so long as the Court operates through prospective overruling and does not implement or develop policies that make coordination with national legislation difficult. From this perspective, it is certainly satisfying that these policies are still limited to specific sectors.

### 3.2. Difficulties in establishing general principles

As has been demonstrated, it is difficult to say that constitutional principles could lead to the implementation of general policies in contract law by the ECJ, with the exception, of

---

course, of the non-discrimination principle. Whether these principles can be used in any other sector of contract law can however not be disputed. However, the strict limitation of the competences of both legislator and court restricts either from doing so in an activist manner.

The legislature has not (yet) been recognised as holding any competence in the field of ‘general contract law’. The Court is strictly bound by questions referred to it and will answer them on the basis of the autonomous interpretation principle, which limits the influence of the Court’s decisions to the scope of the legislation at stake. But the more EU legislature adopts legislation in the field of contract law, the more it will be possible for the Court to rely on constitutional principles to establish general policies. From this point of view, the possible promulgation of a regulation for a common European sales law could be the start of such process.

Whether this will happen is another question. There remain many uncertainties surrounding general principles derived from the Acquis communautaire.