

## Freedom of Contract: Mandatory and Non-mandatory Rules in European Contract Law

### Contents

<b>1. THE POSITION AND FUNCTION OF COMMON EUROPEAN RULES IN RESPECT OF MANDATORY AND NON-MANDATORY RULES OF CONTRACT LAW .....</b>	<b>1</b>
1.1. TWO FORMS OF INTRANSPARENCY .....	2
1.1.1. <i>Intransparencies due to differences in structure</i> .....	3
1.1.2. <i>Intransparencies due to differences in interpretation</i> .....	3
1.2. UNIFORM MANDATORY RULES OR A UNIFORM STRUCTURE OF CONTRACT LAW RULES IN GENERAL?..	4
1.3. THE IMPORTANCE OF NON-MANDATORY MODEL RULES.....	5
<b>2. EVALUATION OF LEGAL TECHNIQUES RESTRICTING FREEDOM OF CONTRACT .....</b>	<b>6</b>
2.1. THE FUNCTION OF CONTRACT LAW .....	6
2.2. CATEGORIES OF RESTRICTIVE DEVICES.....	7
2.3. PROTECTION OF RELIANCE .....	7
2.4. PROTECTION OF THE INTEGRITY OF CONSENT.....	8
2.5. SUBSTANTIVE INVALIDITY .....	9
2.6. IMPOSITION OF CONTRACTS AND ITS IMPOSTURES.....	13
2.6.1. <i>Where a non-discrimination principle is legitimate</i> .....	13
2.6.2. <i>... and where it creates fewer instead of more opportunities</i> ...	14
2.6.3. <i>...and is even contrary to the equal protection of the law...</i>	14
2.6.4. <i>... and destroying the open society</i> .....	15

The purpose of this paper is a reflection of the position and function of common European rules in respect of limitations to freedom of contract, and more specifically on the role of mandatory and non-mandatory rules in general. After dealing with this more generally in the first part, the article addresses in its second part the different techniques restricting freedom of contract that we find in the PECL, the *acquis communautaire*, or the draft ‘common frame of reference’ (CFR). It is especially critical of anti-discrimination laws.

### 1. The position and function of common European rules in respect of mandatory and non-mandatory rules of contract law

The preceding papers of the Tartu conference dealt with many questions surrounding the harmonisation of contract law in Europe, and its aims and methods. I will start from a moderate - and, in my view, rather realistic - perspective, which sees a future for multilevel contract law with different sources.

At least in the foreseeable future, private law is going to continue to spring from many sources, governmental and non-governmental. I will not enter here into the discussion of whether a contract itself can be seen as a source of law - which it does, in my view, to a certain extent.

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° This paper was originally presented at the Conference [European legal harmony: goals and milestones. 10th anniversary Juridica international](#), in Tartu on December 6, 2005.

As to governmental sources, on the other hand, we will, at least for the foreseeable future, have to accept living with, and continue to live with, a multilevel government with at least two legislative levels, those being the European Union and its member states. In many parts of Europe, we will continue to have three levels - namely, in federal states where regions have legislative powers, as is the case today for some jurisdictions even in the field of contract law. Further, the reality of harmonised law in this foreseeable future is going to be a law that is applied to a very large extent by national or regional judges in different languages, in contexts with different understandings of the harmonised law. Harmonisation does not equal uniformity.

Thus we have to find ways to organise this diversity, not to eliminate diversity but to organise it in such a way that it is contained within certain limits and is to a certain extent predictable. This is, in my opinion, especially necessary in the field of contract law, at least when we concern ourselves with freedom of contract. It is key to point out that we have to take care that the various limitations to freedom of contract should be predictable and contained within certain limits.

Am I, in so doing, avoiding the question of whether uniform contract law is necessary or not? This question is, at least to a certain extent, misleading because it all depends on what is meant by 'uniform contract law' and there are many possible answers apart from a mere 'yes' or 'no'. In its most radical sense, it would mean completely replacing national and/or regional contract law and transferring the competence in this field from national and/or regional legislators to some centralised European institution as a sole legislator, whereby the former surrenders every competence. It could involve installing concurrent powers, with priority given to the European rules. It could mean independent powers of both levels to formulate contract laws that are competing in practice, or at least competing in the case of international contracts. It could mean restricting national contract law to non-international contracts. It could mean the existing practice of piecemeal legislation on the European level with priority over national law but dealing only with specific questions, mainly in relation to consumer contracts. It could also entail a model law that, at least for the moment (and if it were up to me, also for the future), leaves it within the competence of national legislators to deviate therefrom. That is the American model of the Uniform Commercial Code, which is - and it is important to stress this - not a federal code but a code that has been adopted by most, if not all, state legislatures<sup>1</sup>. In this model, the state legislators retain their competence to change the model law if they wish; in reality, the force of the uniform law is so strong that they do not. That may, however, seem an ideal model from an ideal world, which probably is not made for the European Union.

### **1.1. Two forms of intransparency**

In any case, I believe that the problem is not diversity in contract law as such; it is, rather, intransparent or unpredictable diversity in contract law. Now, there are two forms of this intransparency and unpredictability. In the first form, the rules limiting freedom of contract are substantially the same but look different; in the second form, they appear to be the same when they are, in fact, different.

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<sup>1</sup> Actually all states, with this reservation that Louisiana has enacted most provisions of the UCC with the exception of Article 2 (Sales law).

### **1.1.1. Intransparencies due to differences in structure**

The first form of intransparency is caused by the fact that rules limiting freedom of contract in different jurisdictions may be qualified differently and found in very different places under different headings according to different theories, even if they are the same in substance. For someone from another jurisdiction, the problem may thus be not that the rule is different but that it is not recognised. Also, where the rules are effectively different, the difference may not be very transparent, for the same reason. Substantially equivalent limitations to freedom of contract are to be found in some jurisdictions in the rules on formation of contracts, in others under the topic of validity, and in still other systems in rules on the contents of a contract. Rules that one may find in general contract law in some jurisdictions are addressed in relation to specific contracts in others. Rules that in some systems are drafted in the form of very specific predictable rules are in other systems hidden behind vague norms like good faith, reasonableness, public policy, and so on.

This difficulty is often as serious as substantive differences in law are, although it could perhaps be set aside more easily. It can be solved by using a common structure and common categories of rules in contract law. Under a common structure, it becomes much easier to see similarities and differences among jurisdictions; one no longer has to search through the whole of the law, in every possible place.

Transparency and predictability can thus already be enhanced substantially without imposition of uniform solutions on national legislative bodies, on the condition that a common structure and terminology can be found. In my opinion, national and/or regional legislators should indeed retain basic-level competence in private law, even in contract law - on the condition, however, of their competence being exercised in a more transparent way by using a common frame of reference in the sense of a common structure and terminology. Put more clearly, they could remain competent in respect of the way they fill in the content and at the same time lose competence for the overall scheme.

### **1.1.2. Intransparencies due to differences in interpretation**

The second type of unpredictability is linked to the use of vague norms or general norms, such as good faith and fair dealing, reasonableness, or public policy. As one can readily imagine, the vaguer a norm is, the larger the number of different interpretations it may have within a national system but also varying from system to system. These vague norms are means to create a fake legal unity such that people think the same rule applies but whereby it may be interpreted in very different ways. We should not forget that different jurisdictions have quite different national traditions in the relationship between judges and legal rules, as to the way in which judges interpret and develop legal rules.

Recently, in our Compilation and redaction team, we faced a very difficult discussion on the notion of implied terms (former PECL article 6:102<sup>2</sup>); it turned out that it was

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<sup>2</sup> The original PECL article was Article 6:102, “Implied Terms”, with the text:

- In addition to the express terms, a contract may contain implied terms which stem from
- (a) the intention of the parties,
  - (b) the nature and purpose of the contract, and
  - (c) good faith and fair dealing.

After discussion in the CRT, it became II.9:102, ‘Terms of a contract’ (PECL 6:102), which states:

difficult to agree on the rule concerning implied terms of a contract because Continental lawyers wanted to have an article granting the judges the authority to imply some terms that are hidden additional legal rules, whereas common lawyers did not want to leave so much open as their judges in any event have the authority to develop legal rules without having to hide behind implied terms of a contract. The same was true concerning the role of the principle of good faith: Continental lawyers need it in order to give judges the possibility of developing the legal rules step by step, a power for which common law judges do not need a vague norm on good faith. Again, the provision on good faith could be restricted to some extent with it having been made clear that the draft CFR accepted generally that judges do develop the law incrementally anyway and are authorised to do so.

It was clear to all of us that we need techniques that avoid petrification of the law and allow for development of the law through case law. Vague norms such as good faith are the traditional continental technique; I have defended elsewhere<sup>3</sup> the view that good faith and reasonableness precisely are instruments for organising a contained and predictable diversity. I must confess, however, that this is not the ideal technique: whereas it allows the necessary degree of diversity within a harmonised framework, it lacks transparency and predictability. For these reasons, I tend to share the opinion of our colleague Maurits Barendrecht, who argued that judges should have the authority to make new precise rules on a more concrete scale rather than invent new rules on the basis of very vague norms such as good faith.<sup>4</sup>

## **1.2. Uniform mandatory rules or a uniform structure of contract law rules in general?**

Whereas it is usually argued that, from the perspective of the ‘internal market’, the priority in the field of contract law consists in harmonising the diverse mandatory rules in order to eliminate substantive differences that cannot be resolved on the basis of party autonomy (and thus distort competition), the former leads me to a different conclusion. My priority is rather a common model law that defines the categories and terminology and has a full set of model rules, from which national or regional legislators can deviate. This is not a hard but piecemeal harmonisation, a pointillism of some uniform

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(1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages.

(2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to

(a) the nature and purpose of the contract;

(b) the circumstances in which the contract was concluded; and

(c) the requirements of good faith and fair dealing.

(3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.

(4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.

<sup>3</sup> M. E. STORME, ‘Good faith and contents of contracts in European private law’, 6. *Electronic Journal of Comparative Law* (<http://www.ejcl.org>), 2003 nr. 1, and @ <http://www.storme.be/goodfaithlleida.pdf>.

<sup>4</sup> J. M. BARENDRECHT, *Recht als model van rechtvaardigheid, Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming*, Tilburg 1992.

mandatory rules; on the contrary, it is a soft but full-scale model law. This model law should then be an obligatory reference for legislators, although they would retain the competence to deviate from it. Such deviation should, however, be explicit and specific, while still adaptable to the structure of the common frame of reference.

In a certain sense, this is a complete reversal of the actual process in place, whereby the rules of European law have priority over national law, and is a return to the dialectic of the old European *ius commune*, where the local law had priority over the *ius commune* law but was interpreted restrictively (*statuta sunt strictissime interpretanda, omissa statuto manent in dispositione juris communis*<sup>5</sup>). This dialectic is not fundamentally different from the relationship between statutes and common law in the Anglo-American tradition. Such a dialectic obliges national legislators to work within the structure of the common frame of reference, without being bound by the specific model rules in it. But it requires us to finally be willing to call into question the axiom of the priority of European law over national and regional law in this field.

### **1.3. The importance of non-mandatory model rules**

It is probably not necessary to develop before this readership again the arguments in favour of having default rules of contract law. Default rules play a very important role, although they are not mandatory and thus can be set aside by contractual clauses. Default rules are very useful, as they enable parties to make contracts without spelling out all the terms of a contractual relationship that are not yet determined by mandatory law, whereas the absence of default rules would oblige them to do so in every single case. This saves a lot in terms of transaction costs. Also, in a market economy where barter is replaced by contracts of sale or other contracts whereby the performance due from one party is expressed in monetary terms, the price mechanism can function only if it is possible to conclude a contract by merely agreeing on the object and the price, which requires that all other aspects of the contractual relationship can be left open because there are default rules.

Default rules also oblige the parties to be more transparent: when they deviate from default rules, they have to make that clear - first of all, to each other. This creates more transparency in contractual relationships.

Further, default rules are traditionally a form of guidance for judges \_ and, to a certain extent, even for legislators; they guide judges in the interpretation of norms invalidating contractual clauses or causing them to be set aside. Especially in order for one to judge the fairness or unfairness of contractual clauses, there must be some default model - the standard content of a contract - in reference to which the fairness of deviating contractual clauses can be evaluated. On this point as well, we face the difficulty of determining whether these default rules must be very precise or whether they can be rather vague, which is a permanent paradox in our exercise.

Especially in view of the harmonisation of contract law in Europe, default rules also have in an important function for mandatory consumer contract law. In meetings discussing the harmonisation of contract law and the common frame of reference, one often hears people arguing that we only need to harmonise the mandatory contract law, especially the consumer contract law, and that default rules must be left to the market or

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<sup>5</sup> See W. ZWALVE. 'Interpretatieproblemen voor de codificatie'. *Liber memorialis François Laurent*. Story Brussels 1989, p. 447 f.

to the national legislative bodies. However, mandatory consumer contract law builds, to a large extent, upon non-mandatory common contract law. Consumer contract law should remain in close contact with general contract law. The best solution is generally to have essentially the same rules for consumer contracts and for all other contracts but with some of these made mandatory in relation to consumers (and non-mandatory in other cases). This model has been followed to some extent in the drafting of the Consumer Sales Directive (the basic concepts of which go back to the CISG, the Vienna Sales Convention) and is being followed clearly in the Study Group. Is it worth noting as an aside at this point that there are no examples of it in the PECL, because the PECL dealt only with general contract law and not with specific rules for consumer contracts only; however, the PECL did incorporate rules that are found in consumer law but without making them mandatory in general. In essence, the mandatory consumer contract rules are general contract rules made mandatory only for consumer contracts. This method is to be preferred for several reasons, one of them being that the distinction between consumer contracts and non-consumer contracts is too simplistic. There are other contracts than B2B and B2C contracts, and there are also intermediate cases. These categories are useful, but, because they oversimplify the manifold reality of contractual relationships, they should not have too much effect either.

## **2. Evaluation of legal techniques restricting freedom of contract**

### **2.1. The function of contract law**

In discussing the restrictions on party autonomy and freedom of contract, we should not forget that the very first function of contract law is not to impose certain forms of behaviour but, rather, to enable certain forms of behaviour, to enable parties to exchange goods and services in the marketplace. Contract law enables exchanges that would otherwise not take place, by giving certainty to parties as to promises made by other parties. I know that some literature on the economic analysis of law has argued that we could do without contract law and that tort law is sufficient in itself; this requires a rule qualifying breaking of promises as a tort. In such a system, damages would, however, have to be measured in terms of only the reliance interest and not the expectation interest. I will not discuss this here at length, but I tend to believe that a separate contract law is a useful thing and that when a contract is concluded or a promise made, the protection of the expectation interest is the better rule.

One of the great advantages of contract law and leaving the determination of the goods or services to be exchanged to the market participants is precisely that this approach does not involve centralising the decision-making concerning the damages to be paid (or other sanctions in cases of breach) in the hands of the government or in the hands of a judge. The law is not determining the content of every single exchange; it is creating a framework, which allows a market to function. Contract law is an essential part of that framework, competition law another one. Contract law can function properly only if one has a body of competition law also, if fundamental guarantees are in place that there is sufficient access to the market for new competitors, for new providers of goods and services. In that sense, rules of competition law are not restricting freedom of contract; on the contrary, they are creating it.

As should be evident, this does not mean that everything should be subject to the market mechanism and treated as a mere commodity. Traditionally, many 'values' were excluded from the market, *extra commercium*; they were protected against the market

and in that sense excluded from party autonomy. Misconceptions concerning human freedom have gradually subjected many of these human values to market forces, with, e.g., the near abolition of anything that can seriously be called family law as one result in many Western European countries. This is, however, again outside the scope of the topic I address here.

## **2.2. Categories of restrictive devices**

If we look at the various rules and principles found in European and national law that restrict freedom of contract, we can distinguish five categories of such rules or principles. Thereby we have to take into account as well the restriction of the freedom to conclude a contract or not to do so, such as the restrictions on the freedom to choose with whom one wants to, or does not wish to, establish a contract and the restrictions of the freedom to determine the contents of one's contracts. These rules consist of, in summary:

- (1) rules protecting reliance even when it deviates from the intention of the parties;
- (2) rules protecting the integrity of consent;
- (3) general norms relating to illegality;
- (4) specific mandatory rules on specific types of terms in contracts in general, or in certain types of contracts;
- (5) norms imposing contracts upon parties not willing to enter into a contract, or imposing extra transaction costs, especially so-called non-discrimination rules.

## **2.3. Protection of reliance**

A first set of rules deals with the protection of reliance between the parties. These are not really restrictions on freedom of contract and party autonomy, and they are contrary to only one specific interpretation of party autonomy. The reliance principle is clearly present in the PECL. We find it already in Article 2:102 of the PECL, 'Intention', which reads:

The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

I would call this a typical expression of the moderate reliance doctrine. This rule relates to the question of whether a contract has been concluded or not, but it is also relevant for the contents of contracts. Parties can avoid being bound by a statement or conduct by making clear that they do not intend something that might otherwise reasonably be deduced from it.

If we look next at the rules on interpretation of contracts, we come to Article 5:101 of the PECL, which consists of three paragraphs. The first gives priority to the common intention of the parties where there is a common intention and it can be established. If a common intention cannot be established, other interpretation rules enter into play. These reliance-based rules are found in paragraphs 2 and 3. According to para. 2, "[i]f it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the

first party”. Thus, if a party is aware of the intention of the other party but does not warn that other party that he disagrees, he is bound by the intention of said other party. Finally, para. 3 states that “[i]f an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances”, thus referring to the normal meaning of terms. The article has to be supplemented, *inter alia*, by Article 5:103, setting forth the *Contra Proferentem* Rule: “Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party which supplied it is to be preferred.”

These are all classical rules. They are not limitations to freedom of contract as such. They only oblige people who are concluding a contract to express themselves more clearly. There is nothing wrong with that.

Another important rule is found in Article 6:101 of the PECL, on “Statements giving rise to contractual obligations”. This relates to the difficult borderline between contractual and non-contractual obligations, and especially between contract and pre-contractual information. As most contract law systems do, the PECL proceed from the idea that contract rules protect the expectation interest (‘positive interest’) and not only the reliance interest in the narrow sense of that expression (‘negative interest’), and thus follow the classical distinction between contract and tort. According to this classical distinction, statements not becoming part of the contract can give rise to damages only in tort; this also applies to pre-contractual information. Article 6:101 provides a rule for deciding upon the extent to which pre-contractual information becomes part of the contract - *c.q.*, constitutes a promise.<sup>6</sup>

## 2.4. Protection of the integrity of consent

A second series of rules deals with the protection of the integrity of consent. In the PECL we find the traditional defects of consent addressed, such as mistake (4:103),

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<sup>6</sup> The original PECL version (which is to be modified in the draft CFR) reads:

Article 6:101: Statements giving rise to Contractual Obligations.

- (1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:
  - (a) the apparent importance of the statement to the other party;
  - (b) whether the party was making the statement in the course of business; and
  - (c) the relative expertise of the parties.
- (2) If one of the parties is a professional supplier which gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.
- (3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking.



fraud (4:107), and threats or coercion (4:108).<sup>7</sup> The mistake rule is to a large extent centred on the question of giving false information or retaining information; in the latter case, the question is also which of the parties had to provide the information. Finally, there is also a general rule on avoidance for excessive benefit or unfair advantage (PECL, Art. 4:109); in the new draft, the title of the article is to be ‘Unfair exploitation’. The new title makes it even clearer that the excessive benefit as such does not make the contract unfair; it is not objective balance that is required but the protection of the integrity of consent. Nor does imbalance as such constitute a ground for avoidance; there has to be a form of exploitation. The exploitation of dependence, trust, ignorance, needs, distress, improvidence, or the inexperience or lack of bargaining skills of the other party is a necessary element in order for the contract to be set aside. Surely, there is a danger of arbitrariness because of the rather vague character of the norm, and especially because it also applies to individual terms even when they have been individually negotiated. Although such a norm can lead to serious limitations of freedom of contract, it is a reasonable price to be paid for extending the market mechanism to weaker participants. The alternative to such a rule is a much more serious limitation of freedom of contract, consisting of regulation of the contents of contracts, strict price control, etc. The PECL rule does not install a doctrine of *iustum pretium* or something similar; this extra control does not apply to the price as such. If there are sufficient guarantees for normal functioning of the market, this is also the correct solution.

Further, the PECL have extended the control over terms that are not individually negotiated, as found in the unfair terms directive for consumer contracts, to all contracts (Art. 4:110). This article is not being revised, and the existing consumer *acquis* shall be integrated more specifically. The PECL adhere to the classical rule that this extra control does not apply to the core terms, such as price, and to individually negotiated terms.

Finally, some other rules can also be seen as protecting the integrity of a contract, such as rights of withdrawal (mainly in consumer contracts) and some requirements as to form. They are absent from the PECL but found in the *acquis* and are to be integrated into the draft CFR.

## 2.5. Substantive invalidity

Some national systems, the PECL, and the draft CFR have different types of provisions leading to a judgement of substantive invalidity of a contract or contractual clause:

- a general clause that contains an independent ground for invalidity (15:101 PECL),
- rules spelling out the effects on the validity of the contract of prohibitions or mandatory prescriptions found in other rules of law (15:102 PECL), and
- rules invalidating specific types of clauses.

Examples of the last category are:

- the rule providing for the possibility of terminating contracts set forth as applying for an indefinite time (Art. 6:109 of the PECL), in order to avoid a situation where, in general, people can be bound for the rest of their life to a contract;

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<sup>7</sup> A ‘fifth’ defect of consent can be found in Article 3:205 of the PECL, on avoidance by a principal of a contract concluded in his or her name by a representative involved in a conflict of interest.

- the rule restricting penalty clauses (PECL, Art. 9:509);
- the rule restricting exemption clauses (PECL, Art. 8:109);
- the rule restricting agreements concerning prescription (PECL, Art. 14:601); and
- many other examples from the consumer *acquis* or in rules on specific types of contracts.

I will concentrate now on the general clause containing an independent ground for invalidity, found in the PECL's Article 15:101, 'Contracts contrary to fundamental principles':

A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

Differing from Article 15:102, this rule first of all provides an independent ground for invalidity that is formulated in very general terms. It also dictates as a necessary consequence the voidness of the contract, even though it was - *ex hypothesi* - freely concluded by the parties to it. This is clearly a very strong restriction on freedom of contract. And with all due respect to my colleagues who drafted or adopted these rules, I do believe that this is the wrong type of rule.

First of all, this rule is superfluous where the principle infringed upon is also embodied in a mandatory rule of law, as Article 15:102 precisely states that the normal procedure is to look at the purpose of the rule, the seriousness of the infringement, and some other elements. Or, rather, Article 15:102 declares the contract void even if there is no mandatory rule that is violated or where the purpose of the mandatory rule does not require the contract to be void and is satisfied with a less drastic effect. Nevertheless, if the infringed principle can be called 'fundamental', the contract must be void. It is clear that such a rule is too broad, too general.

It is too general for two reasons. First, the notion of "principles recognised as fundamental in the laws of the Member States of the European Union" is too vague. If we look at the comments to this article, we find that it refers to a very long list of fundamental principles: the fundamental freedoms set forth in the EC Treaty (free movement etc.), the market competition principles in the EC Treaty, all of the rights listed in the European Convention on Human Rights, and even all of the human rights contained in the excessively long list of the EU Charter on Human Rights (also incorporated into the draft 'Constitution'). The comments even stress that the article refers to a very broad conception of fundamental principles.

This is going too far, especially because the article does not qualify at all the way in which a principle has to be infringed upon in order for the contract to be rendered void. Any type of infringement of such a principle leads to the voidness of the contract.

This contrasts against the tradition of the *ius commune* as well as the *Code Napoléon*. These more balanced legal systems did not use such a general idea. Instead, more specific categories of illegality were employed - essentially, three categories, upon which I shall now elaborate a bit more:

**(a) Performance of the contract would be illegal.** The first category consists of contracts where the object \_ in the sense of the agreed or promised performance \_ is in itself illegal, where 'in itself' means 'irrespective of the counter-performance'. A clear example is contracts whereby one promises to commit a crime or to do something that constitutes a crime. Another example is the contract whereby one engages in practices

restricting competition or a contract whose performance requires that a non-licensed party carry out an activity that only licensed professionals may perform.

Even in this first case, voidness is not always the required sanction. That depends on the *ratio legis*, which can be the protection of the other party, or of third parties in general, or of the general interest. Further, the contract should not be deemed illegal if the performance is promised only on the condition of its not being illegal.

**(b) The *vinculum iuris* is illegal.** A second type of illegality is found where the performance is not illegal but it is contrary to fundamental principles of law to be bound by such a promise. The correct sanction is not voidness in the strict sense but - in most cases - unenforceability. Some examples may be of use here. Such a contract could involve a promise to marry another person (engagement); its performance is legal, but the promise cannot be binding: while it is not going to be forbidden to marry that person, one cannot be legally bound by a promise to do so. Other examples include a promise of some strictly personal act, which should not be enforceable; a promise to work for a certain employer until the age of retirement; a promise to engage oneself in an activity entailing unacceptable danger; and a promise to give blood. Further examples may include contracts whereby one promises in general to refrain from acquiring property or administering one's own property, or contracts excessively restricting the right to alienate specific goods or property.

However, not every contract whereby one engages oneself not to exercise certain fundamental freedoms is illegal in the sense of (at least) being unenforceable. Clauses in contracts limiting, e.g., freedom of speech 'on the job', freedom to engage in certain activities on rented premises, etc. should in general be held to be valid even though they limit fundamental freedoms. Such clauses should be invalid only when the party stipulating them has a monopoly, or at least a dominant position, in the marketplace **and** the stipulated restriction cannot reasonably be justified by the nature of the job, the premises, etc. Even in those circumstances, the sanction should instead be voidability, a sanction that would probably already follow from the article on unfair exploitation. But, again, the standard of infringement of a fundamental principle is insufficient to dictate voidness.

**(c) The exchange is illegal.** Finally, there is a third category of illegal contracts in the *ius commune*, one for which there is no promise of either a performance that is illegal in itself or a performance to which a person should not be held bound but is an illegal exchange. The contract is illegal because the promise of a performance that is in itself legal (e.g., payment of a sum of money) should not be made in exchange of the agreed counter-performance. The traditional formulation of this case is that it is not the object that is illicit but the cause of the contract (illicit cause). A clear example is the promise to pay a sum of money to a person as compensation for his or her commission of a crime (either a promise to a person who has already committed the crime or a promise to pay in the event that a crime is committed later). The object of the promise - to pay a sum of money - is not illegal, but the cause in the sense of exchange is. Other traditional examples include a promise to reward someone if (s)he marries or divorces a certain person, a promise to pay for sexual intercourse, etc., but in listing these examples, it already becomes clear that such contracts are not necessarily void in all situations. There are some contracts that have always been accepted and at least indirectly deal with these kinds of exchange, such as donations in view of and on condition of marriage (e.g., by parents to their children).

For this category it is also explained that certain promises may take the form of a gratuitous promise or a donation, but not of a promise for value, especially for money - a traditional example would be blood or organs, which may in many legal systems be donated but not sold. In other cases, conditional promises may be effected whereby the object of the condition is something that could not be held in obligation (the examples mentioned under 'b' above) - but such a condition is not always void.

The *ratio legis* is, in essence, that certain human values - such as family relationships, sexual relationships, etc. - should remain *extra commercium*, not simply being treated as commodities, which can be bought and sold. Many of these values have come under pressure of commodification in recent times, as I have mentioned above. The law should maintain rules preventing these values becoming such commodities and therefore keep them away from the market or allow them to be marketed only under special conditions. Surely, there is something like a marriage market in our societies, but it should nevertheless be kept separate from other markets and not take the form of a monetarised market.

**(d) Other categories and conclusions.** It is not helpful to replace these well-defined categories of illegality with a vague and general norm on fundamental principles. It is not helpful either to add a fourth category wherein neither the performance nor the exchange is illegal but illegality would follow from illegal intent or purpose of the contract. Also, the fact that a party in performing a contract might act illegally - e.g., by using illegal child labour or otherwise exploiting persons or by violating tax laws - is not a good standard. Such circumstances should render the contract void only if the other party participates in the illegality by exploiting this, such as by charging higher rent for letting the tenant engage in illegal or immoral activities on the rented premises, being complicit in tax fraud, negotiating a rebate in exchange for allowing the other party to act illegally, etc. - precisely the conditions under which the contract would already fall into our third category.

I hope the foregoing has shown that we do not need a vague rule such as that of PECL Article 15:101 but instead would benefit from more precise rules on types of illegality. The legal effect of 'fundamental principles' - especially if intended to be a very wide category, such as everything that might, by some, be called a human right - cannot be put in a Procrustean bed of voidness only. The appropriate remedy is often another one than voidness, and voidness does not always advance the fundamental principle either.

Also, some fundamental principles are more fundamental than others. It is always very dangerous to have such a general transversal provision. The same is true, by the way, for Constitutional instruments dealing with fundamental freedoms. Some constitutions are in this respect clearly superior to others - namely, when they have precise rules on restrictions and remedies. The European Convention on Human Rights and the German Constitution have, for the most part, followed this wise model. The EU Charter has, regrettably, applied the opposite model, with vague general rules about the restrictions to fundamental rights and freedoms, such as Article II-52 ff. of the draft EU Constitution - and especially the infamous Article II-54 on the prohibition of abuse of rights: "Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein." Such a rule assigns too much importance to some rights and not enough to others, by treating them all as equally fundamental. Such a rule also shifts too much power over restriction of fundamental freedoms like freedom of contract toward

bodies that are not democratically legitimated, such as courts, certain other governmental bodies, or non-governmental organisations.

I conclude that a vague general principle on voidness for infringement of fundamental principles is not very helpful and is actually often wrong.<sup>8</sup>

## **2.6. Imposition of contracts and its impostures**

The final point of this paper deals with rules imposing contracts, or at least contractual negotiations, upon a party not willing to conclude such a contract. There are, in essence, two techniques for doing this: the direct and indirect. The indirect mode is seen where conclusion of a contract is made a condition for receipt of some benefit. For example, in order to receive subsidies from the government, to obtain a certain monopoly, to receive a certain licence, or the like, one is obliged to conclude contracts with any person soliciting a certain good or service. I will, however, deal only with direct interference with contractual freedom. The main form of such interference consists of so-called anti-discrimination law, in so far as it applies to the conclusion of contracts<sup>9</sup>.

Such rules are very different from the former type of technique. They do not protect reliance, they do not protect integrity of consent, they do not restrict the content of a contract by setting aside unfair terms, and they do not protect the fundamental freedom except in a very indirect way. They impose contracts by entitling persons - in theory, every person but, in practice, only members of protected groups - to obtain a contractual benefit from certain categories of persons in the market and sometimes even persons not so engaged. I have serious doubts about this technique as a legitimate approach limiting freedom of contract.<sup>10</sup>

### **2.6.1. Where a non-discrimination principle is legitimate ...**

It is correct that non-discrimination is a traditional and justified principle for public services and for services provided by monopolists. In those cases, the principle is legitimate, because there is no alternative. If there is a monopoly on a certain service, which may thus be provided (or in fact is provided) by a single provider only, such a monopolist should be obliged to offer that service equally to all members of the society in question. It is the monopoly that justifies an obligation to treat all members of a given society equally. This is legitimate only with respect to goods and services that the

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<sup>8</sup> Meanwhile, the Compilation and redaction team for the draft CFR has decided to modify Article 15:101 of the PECL by means of an article that reads:

A contract is void to the extent that (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.

<sup>9</sup> See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

<sup>10</sup> I have developed my critique of anti-discrimination law in other respects in some other contributions, such as the 2005 G. de Molinari lecture 'De meest fundamentele vrijheid: de vrijheid om te discrimineren' (The most fundamental freedom: The freedom to discriminate), at <http://www.storme.be/vrijheidsprijs.pdf>, inter alia.

market cannot provide, in exceptional cases where unique centralised planning and decision-making is better for the society than is decentralised decision-making by market participants. This may be the case for some public services, but it is not for goods and services in general.

### **2.6.2. ... and where it creates fewer instead of more opportunities ...**

However, to impose an obligation to treat all members of a society equally on market participants without monopoly or dominant position creates collective impoverishment. Equal opportunities generally mean fewer opportunities, not more.<sup>11</sup> Under this approach, it is not left to the many citizens with varying needs and preferences to decide which characteristics of other persons they consider relevant when negotiating and concluding contracts. Instead, legislators or, even worse, judges decide whether characteristics of other market participants with whom a person is willing or not willing to undertake a contract are relevant and proportionate and therefore legitimate in the eyes of the legal system. We give judges the power to determine in each individual case whether a preference of a contracting party for another contracting party is in that case relevant and proportionate - and thus legitimate unequal treatment or forbidden discrimination. We are completely centralising this evaluation in the hand of judges, but in a well-functioning market, an open market, irrational discrimination is penalised by the market itself<sup>12</sup> in a process of decision-making that is at once more democratic and a creator of more opportunities. If there is no monopoly, if access to the market is open, there are always going to be service providers who precisely fill the gap that is left by those who discriminate without a rational basis. The problem is that, in reality, the factors that a centralised decision-maker, like a legislator or judge, considers in general to be irrelevant or unacceptable for application in refusal of contracts (ethnic background, nationality, sex, etc.) are in reality relevant in many individual cases.<sup>13</sup> Probably not in general but in specific cases they can be perfectly rational and/or perfectly relevant.

### **2.6.3. ...and is even contrary to the equal protection of the law...**

Moreover, imposing a duty not to discriminate gives the impression of equal protection being assured, but it is a far cry from guaranteeing equal protection. It is, rather, a form of social harassment, stimulated by the law; under the guise of equal rights, it grants unequal rights to members of certain categories against members of certain other categories.

It is unequal in two respects. Firstly, it imposes duties only on service providers, sellers, or employers, whereas the other party in the market remains free to discriminate, maybe not in theory but in all cases in practice. The employee still has the possibility to discriminate against employers in deciding whether (s)he wants to take a job or not, but

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<sup>11</sup> See, for example, R. EPSTEIN, *Equal Opportunity or More Opportunity? The Good Thing about Discrimination*, Civitas Institute for the Study of Civil Society, London 2002.

<sup>12</sup> Compare R. EPSTEIN (see note 10), p. 19.

<sup>13</sup> Compare R. EPSTEIN (see note 10), p. 13: "The factors regarded by anti-discrimination law as irrelevant for decision making are in fact highly relevant."

the employer does not have this opportunity, so we see a form of unequal treatment under the guise of equal treatment.

Secondly, in practice such rules grant rights or claims only to members of protected categories, even if these protected categories are not necessarily always the same (e.g., in certain contexts, it may be women and in others it may be men, etc.).

In an earlier contribution<sup>14</sup>, I developed an explanation addressing why these anti-discrimination laws have developed in recent decades. The main reason is that the welfare state has made many more promises than it can fulfil. The welfare state has promised heaven on earth to all citizens, and it is impossible to deliver on these promises because, in order for this to be done, taxes should have been doubled. As the state can no longer pay for its promises by shifting the burden to the taxpayers as such, it pays for them by granting claims to any citizen against any other citizen \_ or, more precisely, against those persons who are so unfortunate as to be the nearest to be attacked with such claims. For the state, it is a much cheaper approach; it doesn't cost anything.

#### **2.6.4. ... and destroying the open society**

The way states have granted citizens the right 'not to be discriminated against' - i.e., the right to attack and harass other citizens who are active in markets or in civil society - is also destroying the open society and creating a society of distrust. Instead of favouring access of so-called weaker parties to goods and services, it prevents goods and services from publicly entering the market. Especially risk-averse parties will simply not make any public offers any longer, instead offering their goods and services only within private networks. I would be very stupid to publish a job offer if I have a good chance of finding a qualified person to fill the position without making public that I am looking for someone and thereby risking this social harassment based on anti-discrimination laws. As a result, the 'weaker parties' for whom such laws are said to be made get even fewer opportunities, unless the state intervenes with even more totalitarian policies, interfering even in the strictly private spheres and networks. Insofar as the lack of chances to obtain certain goods and services of certain categories of persons is really a serious problem, there are much better solutions than anti-discrimination laws - solutions that are transparent, more equal and just, and less disturbing of legal certainty. These solutions require improving access to markets for new offerors, spreading the social risk to all by means of transparent taxation, and providing tax advantages for those who shoulder more than their share of this social responsibility. By contrast, anti-discrimination laws are forms of concealed taxation but unjustly spread, creating legal uncertainty and stimulating social harassment.

Let me thus finish with my *Ceterum censeo*: all prohibitions against discrimination by citizens without a monopoly have to be abolished.

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<sup>14</sup> M. E. STORME. 'De juridisering van sociale verhoudingen van de negentiende eeuw tot vandaag' in D. Heirbaut, G. Martyn, R. Opsommer (ed.). *De geschiedenis van het recht in de twintigste eeuw*, Iuris Scripta Historica series, Royal Flemish Academy of Sciences and Arts, Brussels 2006, p. 27 ff., earlier in J. Velaers (ed.), *Vrijheid en gelijkheid: de horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet* Maklu Antwerpen 2003, p. 147 ff.