

A new approach of Court of Justice of the European Union  
over the principles of EU law. C-101/08 Case Audiolux SA and others vs Groupe Bruxelles  
Lambert SA(GBL) and others, Bertelsmann AG and others

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Ever since the creation of the European Union under the Maastricht Treaty, the European Commission as well as the Court of Justice of the European Communities (currently, the Court of Justice of the European Union – CJEU) played an important role as veritable “watchdogs” of the Treaty provisions.

The distribution of competences between a central authority and its decentralized units lies at the heart of every political multi-level system, and this also applies to the European Union and its institutions as a legal community. The Court’s competences and attributions are comprised in the Treaty on the Functioning of the European Union (TFEU) article 263 (ex article 263 TEC) and the following. Thus, the Court reviews the legality of the acts of the institutions of the European Union, ensures that the Member States comply with their obligations under Community law and interprets Community law at the request of the national courts and tribunals. The CJEU has even been able to bring about implicit constitutional change because its members are constrained less stringently than most Supreme Court judges on the national level.

The role of the CJEU in the dynamics of the European Community is viewed, by some specialists, as exacerbated. For decades, the Court has interpreted the provisions of the treaties in a generous way and further enhanced it by law development, resulting in a systematic extension of the Court’s competences. In doing so, the Court relied on general principles of law, namely, its obligation of pronouncing a decision even when the law does not regulate, by resorting to general principles of Community law.

The general principles of law can be found in every law system, as they are the base on which legislation develops. The general principles of community law hold a particular place in the CJEU’s jurisprudence, covering the gaps in the law and interpreting the provisions of the Treaty. One of the most notable principles of community law from a doctrinarian point of view is the principle of equality and nondiscrimination, stated in decisions of the CJEU like the *Skimmed-Milk Powder* case<sup>1</sup>, *Sabbatini v. European Parliament*<sup>2</sup>. The principle of non-retroactivity was upheld by the Court in decisions like *Defrenne v. Sabena IF*<sup>3</sup>, *Regina v. Kent*

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<sup>1</sup> ECJ C-84/04, *Skimmed-Milk Powder v. Commission*;

<sup>2</sup> ECJ, C- 20/71, *Sabbatini v. European Parliament*;

<sup>3</sup> ECJ, C-43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena* ;

*Kirk*<sup>4</sup>. The principles of legal certainty, of legitimate expectations were also invoked in the case *Töpfer & Co. GmbH v. Commission*<sup>5</sup>, even though the case failed on its merits.

The Advocate General Trstenjak, in his opinion expressed in the *Audiolux* case<sup>6</sup> developed what, in his point of view, are the required conditions in order to classify a rule of law as a general principle: constitutional status, shared conviction in legal literature, general validity of the stated rule of law.

When interpreting the provisions of the EC Treaty by resorting to general principles of community law, the Court assumes a creative role, a role that is, in some legal specialists' opinion, an intrusion in the EU's law-making process. The Court thus identifies those generally accepted principles, corroborates them with some treaty provisions and uses them as a legal base for its decisions. The CJEU extracts these general principles by relating to the Treaty provisions and to the national law systems of the member states. When resorting to the latter, the Court finds that is not necessary for a rule of law to be accepted by all member states to become a general principle of community law, as it states in the *Hoechst v. Commission*<sup>7</sup> decision. It is important to bear in mind that no matter of its origin, a principle is always applied as a general principle of community law, and not national law. This is evident mostly when dealing with the protection of fundamental rights.

Two questions arise after analyzing the Court's competences as they are stated in the Treaty on the Functioning of the European Union:

1. Is the Court competent to establish general principles of community law?
2. These principles, once established, represent amendments or addenda to the Community's law system? And if the answer is positive, can the CJEU be considered a "de facto" legislator?

As regards the first point, the EC Treaty does not specify that the CJEU is competent to establish general principles of community law. Nevertheless, their development has been essential for the evolution of the EU and its objectives. This is why the doctrine tried to find legal grounds for the CJEU's ability to establish general principles of community law. The legal ground was found into an extensive interpretation of article 263 paragraph 2 (ex article 230 paragraph 2 TEC) and article 340 paragraph 2 TFEU (ex article 288 paragraph 2 TEC).

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<sup>4</sup> ECJ, C-63/83 *The Queen v. Kent Kirk*;

<sup>5</sup> ECJ, C- 112/77 [1978] *Gesellschaft mbH in Firma August Töpfer & Co. v. Commission of the European Communities*;

<sup>6</sup> ECJ C-101/08, *Audiolux and others*;

<sup>7</sup> ECJ joined cases C-46/87 and C-227/88 *Hoechst AG v Commission of the European Communities*.

Regarding the second point, if we analyze the role that general principles play in a national law system, we are tempted to answer that they do not represent an addendum to the Community law. At state level, general principles represent the foundations of the legal systems, the base the laws are inspired from. But Community law has a specific character, and as a result, as doctrine and the opinion of the Advocate General in the Audiolux case state, general principles of community law vary, as they result from the “spirit and economy” of the EC treaties or from the juridical order of member states.

In the situation in which the principles emerge from the provisions of the EC Treaty, we have shown that the Court has a purely interpretative role. But, when the Court identifies a principle relating to the law system of a member state, it enhances community law by abstracting new rules from a different law system and integrating them in the Community’s legal order. It can be interpreted that in this situation the Court exceeded its competences as stated in the European Union Functioning Treaty and acted as a “de facto” legislator.

On the other hand, even the principles that result from the interpretation of the treaty provisions may encourage controversy, because the incorrect interpretation of a legal provision means a modification or addendum to the law. Cases like Mangold<sup>8</sup> have established that a national law provision that encourages discrimination based on age is prohibited, even though the period of time in which the directive’s transposition in the law of the member state had not expired.

Drawing a conclusion, we must recognize and appreciate the important role that the establishment of the general principles of community law had for the evolution of the EU and its law system. But we also must admit that in the present, when the EU legal system reached a certain complexity, there is no need for the CJEU to engage in any other activity than that permitted expressly by the treaty.

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<sup>8</sup> ECJ C-144/04 Mangold v. Rudiger Helm.