The Economic Function of Good Faith in European Contract Law

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This is a very preliminary draft. Please do not quote

Introduction

Among legal scholars and practitioners, ‘good faith’ is often referred to as a fundamental principle, placed at the heart of the law and of all human interactions.¹ It is usually intended as to include duties of fairness, honesty, loyalty, disclosure of information and cooperation with contractual counterparties.²

However the precise definition of good faith as well as its practical role in solving disputes is anything but uniform and uncontroversial. Restricting the observation to the contractual sphere, different jurisdictions have showed different attitudes to such principle and currently there seems to be no generally accepted approach.

Against this background, the task of the groups³ in charge of drafting the Common Frame of Reference (CFR) for European Contract Law appears a daunting one with respect to the adoption of a uniform approach to good faith. It is maybe due to such difficulties that in the Draft CFR (DCFR) delivered at the end of 2007,⁴ a general principle of good faith applying to all situations during the

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¹ Hugo Grotius’ De jure belli ac pacis” is usually quoted in this connection.
² So-called ‘objective’ good faith. By contrast, ‘subjective’ good faith refers to the ignorance of certain facts… Subjective good faith is not the subject of this paper.
³ Study group and Acquis group.
⁴ Ref.
contractual life does not appear as such but has been split into separate provisions, differently from previous drafts and from the so-called Lando principles.\(^5\)

**Good faith in the law**

Defining good faith is a very difficult endeavour. Moreover, definitions are bound to reflect the historical evolution and the function that is assigned to such principle in different legal systems. Broad references to duties of honesty, fairness and cooperation with the contractual counterparty are very common, while a more precise determination is usually left to a case by case assessment. It is often heard that “you recognise good faith when you see it” and it has been argued that good faith can only be understood by reference to bad faith.\(^6\)

In international law, good faith is said to be a “fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived”. The actual application of the rules is to be determined “at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time”.\(^7\)

Despite the example of the above reference to the principle *pacta sunt servanda* as part of good faith, the function of such duty is usually said to be rather that of *limiting* party autonomy and freedom of contract.\(^8\) Interpreted in this way, good faith is immediately put in opposition to the function of contract law, as shaped by the principle of freedom, i.e. expected to maximise contractual parties’ satisfaction pursuant to their own preferences.

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\(^5\) Ref. Lando principles  
\(^6\) In the American scholarship, for example, Robert Summers “Good faith in general contract law and the sales provision of the Uniform Commercial Code”, 54 Va. L. Rev. 195 (1968): good faith as an “excluder”.  
\(^7\) O’Connor, Good Faith in International Law, 1991.  
\(^8\) See also in the CFR at II.-1:102:
The survey conducted by Whittaker and Zimmermann in 2000\(^9\) shows the existence of a varied legal landscape in Europe. To sketch just a few approaches: the German Civil Code expressly refers to good faith in relation to contractual interpretation and performance, while pre-contractual responsibility is recognised when causing the other party’s reliance. Despite earlier attempts at introducing good faith, English Common Law\(^10\) does not recognise a general duty as such\(^{11}\) either in performance or in negotiations, except for the case of misrepresentation.\(^{12}\) However, even English Law offers (piecemeal) solutions to many of the issues of “unfairness” that are dealt with through recourse to good faith in other legal systems. In France, the Civil Code imposes good-faith performance and imposes to contractual parties obligations deriving from “equity”, in connection to other legal doctrines, such as the “abus de droit”.\(^{13}\) Duties to disclose and certain obligations of cooperation and loyalty complete the picture.\(^{14}\) Belgian law, inspired by the French one, has showed a somewhat more extensive recourse to good faith. The Italian Civil Code refers to good faith in the context of negotiations, interpretation and performance of contract, and imposes a duty of good faith on both debtor and creditor in relation to obligations in general. However, the judicial reliance on the principle of good faith to solve disputes is quite limited. The new Dutch Civil Code attaches to contracts also obligations arising from good faith and declares inapplicable all contractual arrangements contrary to good faith.

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\(^9\) Ref.  
\(^10\) To be noted that other common law jurisdictions (for example the United States) have different chosen approaches.  
\(^11\) However, this is by no means the result of a monolithic and constant attitude of the English legal community, see the report by Zimmermann and Whittaker, page 42 ff.  
\(^13\) It has been noted that in fact the original motto was “if it is contractual, it is fair” thus leaving no room for limitations of the parties’ contractual freedom on fairness bases. See Whittaker and Zimmermann, page 34.  
\(^14\) However, the function of such obligations is disputed among jurists.
Besides appearing in national legal systems, good faith has also been analysed in the context of international law and is contained in some international law instruments, for example in the UN Convention on Contracts for the International Sale of Goods,\(^{15}\) albeit not as a “traditional” duty imposed on contractual parties.\(^{16}\) Good faith has made its appearance also in European Law, notably through the oft-cited directive on Unfair Terms and Conditions\(^{17}\) which has inspired some of the DCFR provisions, meant to incorporate the *Acquis.* Through EU law, good faith has penetrated also legal systems previously showing resistance to the adoption of the concept as such,\(^{18}\) although the measure of success of such introduction is controversial.\(^{19}\)

Broadly speaking, it seems that a principle that performance of a contract should be done in good faith is compatible with or conceivable in the majority of the legal systems, while there is much more controversy surrounding the imposition of a duty of good faith in negotiations. In fact, even when pre-contractual good faith is recognised, extra-contractual liability or equity are invoked, rather than standard contract law.\(^{20}\)

**Good faith in the DCFR**


\(^{16}\) As a result of a compromise between contrasting views over the duty of good faith and the role of the judges enforcing it.

\(^{17}\) Ref.

\(^{18}\) Of course, the absence of an express principle of good faith in a given legal system, did not necessarily imply a different approach to the solution of contractual disputes.

\(^{19}\) See Teubner Legal irritants …

The DCFR considers “Good Faith and Fair Dealing” as an “objective standard of conduct.”\textsuperscript{21} The subjective notion of good faith also appears in the DCFR, as a mental attitude characterised by an absence of knowledge.\textsuperscript{22} However such subjective notion will not be analysed in this paper.

The DCFR does not contain a real definition of good faith and fair dealing. However, in relation to the provision on performance,\textsuperscript{23} the comments to the DCFR refer to: “community standards of decency and fairness”, “due regard for the interests of the other party”, a requirement “not to act out of pure malice”. The use of an hendiadys, always combining “good faith” with “fair dealing”, seems to suggest the adoption of a more objective standard, based on known trade practices and to “fairness in fact” as opposed to internal motivation.\textsuperscript{24}

The Lando Principles, as well as earlier drafts of what would become the DCFR did in fact contain a general clause concerning good faith in all stages of contractual life:

II. – 1:105: Good faith and fair dealing (PECL 1:201)

1. A person has a duty to act in accordance with good faith and fair dealing in negotiating or concluding a contract or other juridical act and in exercising any right or performing any obligation arising from it.

2. The contract or juridical act may not exclude or limit this duty.

3. Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or

\textsuperscript{21} See Annex to the CFR. Please note that at the time of writing, the accessible version of the Comments and Notes (July 2008) is still unofficial and may have been subsequently changed.

\textsuperscript{22} Person “neither knew nor could reasonably be expected to know”. See Annex to CFR and provisions on representation, unjustified enrichment etc.

\textsuperscript{23} Article III.1:103:

\textsuperscript{24} See Comments to article III.1:103:
relying on a right which that person would otherwise have.

The published DCFR has abandoned this single and general formulation and has maintained a reference to “good faith” in a number of rules, each applying to a different stage of the contractual life, whenever good faith may be relevant. Accordingly, no general rule is proposed concerning common remedies for all instances of breach of the duty.

In particular, good faith is mentioned in relation to the interpretation of the DCFR itself as well as of any contract. Good faith and fair dealing is, moreover, explicitly mentioned at the beginning of Book II as a limit to party autonomy. Good faith shall guide pre-contractual negotiations as well as performance of the obligations arising from the contract. Following, and arguably expanding, the current acquis, good faith is part of the two-step determination of unfairness of non-negotiated (or standard) terms.

Good faith and fair dealing, unlikely the majority of the provisions in the DCFR, is indicated in II.–1:102: as one of the mandatory clauses that parties are not free to overrule. This general statement of principle is not accompanied by the specification of consequences and remedies for breach of such mandatory rule. The comments attached to this provision clarify that not all violations of mandatory rules imply cancellation of the contract and that the actual consequences for breach of good faith have to be searched in the specific provisions making reference to good faith.

25 I.–1:102:  
26 II.-8:102:, II.-9:101:  
27 II.-1:102:  
28 II.-3:301:, but see also provisions on mistake, fraud and misrepresentation.  
29 III.-1:103:  
30 In particular, the 1993 EC Directive on Unfair Terms in Consumer Contracts …  
31 II.-9:404:, II.-9:405: and II.-9:406:
However, the general assertion of the mandatory nature of good faith is qualified, at least in the case of performance,\(^{32}\) by the comments attached to the text of the DCFR: the comments explain that courts are expected to use good faith to fill in contractual gaps, and not to “correct” the contract or make it more “fair” than what the parties have explicitly regulated.\(^{33}\)

Good faith in the DCFR is a duty, not an obligation, thus implying that ordinary remedies may not be all *directly*\(^{34}\) available: specific performance is not possible and bad faith on one side does not legitimate reciprocating, while recovery of damages is in principle available.

In case of pre-contractual good faith, breaking off negotiations and other “bad faith” behaviours are a source of liability for “reliance damages”, i.e. the aggrieved party will receive compensation for expenses and losses incurred and work done (and in certain cases also for the lost opportunities) in reliance on the other party’s statement and behaviour as to the expected conclusion of the contract.

With regards to performance and in exercise of rights good faith is still considered a “duty” and not a “true” obligation. Hence, under this construction, courts may not impose damages when the letter of the contract has been respected, although the clause may, in abstract terms, be contrary to good faith. In consequence of lack of good faith (i.e. of decency and fairness) in performance, a party may be precluded from taking advantage of certain contractual terms which would otherwise be available.

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\(^{32}\) Article III.-1:103:

\(^{33}\) Comments to article III.-1:103:

\(^{34}\) However, good faith may be the basis for an implied term which in turn gives rise to a specific obligation.
The economic function of the principle of good faith

Good faith as a general duty has not been very often under the lenses of economic analysis scholarship,\(^\text{35}\) while it is easier to find economic analyses of more specific implementations of such “principle”.

It seems reasonable to start the analysis with the observation that the function of the duty of good faith (in negotiation as well as in performance) has to be put in the context of the function of the whole of contract law.

In very general economic terms, the final goal of contract law is to help market operators to maximise their own welfare (hence maximising the welfare of society). Contract enforcement by courts prevents mistrust of counterparties, discourages opportunist behaviour and encourages trade. Contract law enables people to cooperate, encourages efficient disclosure of information, secures optimal commitment to performing as well as optimal reliance, minimises transaction costs, fosters enduring relationships.\(^\text{36}\)

The duty of good faith, as a rule of contract law, is expected to serve the same economic purpose, similarly to other “general principles”, such as that *pacta sunt servanda*: in an economic view, both those “principles” are considered and evaluated not as values in themselves but in their suitability to increase the value of exchanges and hence welfare.

The duty of good faith, as judge Posner put it, is “not a duty of candor” and does not prevent form entering into a contract to purchase something that the counterparty undervalues.\(^\text{37}\) Economic analysis has emphasised in particular two issues in which good faith plays a role: optimal disclosure of information and

\(^{35}\) Ref.
\(^{36}\) Cooter & Ulen
\(^{37}\) Market Street Ass. See also the comment by Todd D. Rakoff “Good Faith in Contract Performance: Marketstreet Associates ltd. Partnership v. Frey” in Harv. L. Rev. …
prevention of opportunistic behaviour. Information disclosure seems to be a more peculiar problem for the pre-contractual phase,\textsuperscript{38} while the risk of opportunism is certainly present during the whole contractual relationship.

In the same case referred to above, judge Posner stated that the concept of good faith is an approximation of “the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute”. Since parties want to minimise the costs of performance, a doctrine of good faith “is a reasonable measure to this end, interpolating it into the contract advances the parties’ joint goal”.\textsuperscript{39}

Schäfer & Ott synthesise the normative evaluation of good faith by referring to the criterion of whether “good faith increases or decreases the value of a resource”\textsuperscript{40} and indicate the four conditions to make such assessment: presence of asymmetric information costs, the information is productive, there is a good faith premium, there is a risk of opportunism.

Mackaay and Leblanc\textsuperscript{41} consider good faith as the opposite of opportunism. As opportunism is a very broad term encompassing a wide range of behaviours, the law needs an equally open ended and flexible instrument, which would be both able to accommodate the responses to opportunism, and compatible with the rule of law. Again, asymmetry in the position of parties is considered precondition for bad faith (or opportunism) as well as the undue advantage for one of the parties in excess of a certain tolerance.\textsuperscript{42}

Making reference to opportunism, a more familiar concept in economic analysis than good faith, does not eliminate the need of identifying what behaviour can be

\textsuperscript{38} See also W. Wils 1993 and G. De Geest contribution in L&E in civil law countries.
\textsuperscript{39} Market Street Associates
\textsuperscript{40} The economic analysis of civil law, page 385.
\textsuperscript{41} Mackay and Leblanc “The economics of good faith in the civil law of contract”, Nancy 2003
\textsuperscript{42} Ibidem, p. 11
considered opportunistic and hence be countered with the use of the legal tool of the duty of good faith.

Russi\textsuperscript{43} compares the use of a good faith standard to determine the “fairness” of a behaviour in the individual case before the court (having regard to the preferences of the specific parties) with the standard to assess the “reasonableness” of a conduct having regard to the “average” behaviour and concludes that the two standards are complementary with respect to good faith performance.

**Analysis of the CFR rules**

The duty of good faith in the DCFR is considered as a general clause or standard, encompassing different behaviours, as compared to a specific rule directed at regulating a particular case. It is stated to be mandatory and applicable, with specificities, in different stages of the contractual life.

In general, it can be noted that the text of the DCFR and of the comments betray the many difficulties encountered in devising a uniform rule for such a multifaceted concept. Despite the use of the same terminology of “good faith and fair dealing” in different provision, the function of the duty – hence its content – seem to be peculiar to the specific contractual situations envisaged (negotiations, performance, interpretation, determination of “unfairness” of clauses). Moreover, the relationship of good faith with other legal devices, such as the rules on fraud and misrepresentation and on long-term contracts, is not fully spelled out, thus leaving uncertainty as to the actual scope of application for the provisions on good faith.

\textsuperscript{43} Luigi Russi “Can good faith performance be unfair? An economic framework for understanding the problem” 29 Whittier Law Review 565
The following subsections will address more in detail from an economic perspective some contentious issues arising from the legal choices sketched out above.

1. Mandatory nature.

II.–1:102: Party autonomy

(1) Parties are free to make a contract or other juridical act and to determine its contents, subject to the rules on good faith and fair dealing and any other applicable mandatory rules. (...)

In the law and economics literature, it is widely claimed (or at least recommended) that good faith is (or should be) a default rule, not a mandatory rule, as a consequence of the function of preventing opportunism. But parties must be free to overrule the legal provision if they want so, because this maximises their joint surplus.

In contracts where performance takes place over a period of time, different contingencies may materialise, risking to frustrate the interests of contractual parties. To eliminate such risk, parties could specify all such events ex ante. However, specifying all contingencies in a contract is very costly, which is the source of contractual incompleteness. A duty of good faith will serve a useful economic purpose if it helps parties to reduce the transaction costs connected to the contract by covering a number of contingencies, thus avoiding the need to specify them.

44 See O. Williamson, for example, referring to a general clause to protect from “the hazards of contractual incompleteness”
45 “‘Good faith’ is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.” Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d at 1357. Quoted by Posner in Market Street Associates.
In this sense, a gap-filling rule concerning a duty of good faith is in principle, and subject to the choice of the appropriate design, desirable. Parties wanting something different from what would normally be considered good faith behaviour (e.g. performance in the middle of the night or withdrawal from a long-term contract with a very short notice) would always have the option of specifying it.

It is worth recalling here that, according to the comments to the DCFR, good faith will remain in the background whenever the parties have “carefully regulated” their relationship. While this remark seems to suggest precisely a “default” role for good faith, at the same time it seems to encourage parties to spend time negotiating as many clauses as possible, thus denying the cost-saving function mentioned above. The implicit economic function could in such a case be that of information-forcing default rule: when a party has very peculiar needs, such rule would force openness and disclosure, thereby reducing ex post enforcement costs.

By contrast, if good faith were to prevail over explicit contractual clauses and constitute an effectively mandatory provision, from an economic perspective it would have to be justified on the basis of the existence of a “failure” in the contractual mechanism that cannot be corrected with other means.

It is difficult to imagine what kind of failure could take place in this case. As mentioned above, beyond references to decency, morality and cooperation with the counterparty, it seems that usually the problem that the law tries to correct through a duty of good faith is an asymmetry in information connected to a risk of opportunism. Non mandatory rules are usually enough to correct this kind of problems and in forcing disclosure of relevant information.47

47 I. Ayres and R. Gertner, cit..
In abstract terms, a mandatory duty of good faith would be justified in case of *unavoidable* contractual incompleteness, which is normally the case in reality, coupled with a *structural* risk of opportunism,\(^{48}\) which is probably restricted to particular circumstances rather than a general condition of contractual relationships.

A tension seems to transpire out of the text of the DCFR which states in several occasions in the formal rules\(^ {49}\) the mandatory nature of the fundamental duty of good faith, but then adds comments referring to its gap-filling function and to the respect of explicit contractual clauses.

Given the different nature of the comments as compared to the black letter rules, it would be advisable to clarify the nature of good faith by including appropriate references already in the text of the rules or to avoid the mention of the mandatory character altogether.

Another correcting device could perhaps be found in the rules on interpretation, where it is stated that judicial gap-filling inspired, *inter alia*, by good faith (to protect parties from “unacceptable risks”) does not apply when the gap was deliberate and parties had accepted the consequences.\(^{50}\) While it is not completely clear under which circumstances a gap can be presumed to be deliberate, it does seem to suggest that an express contractual clause would prevail over an implied duty of good faith.

2. Good faith in negotiations.

\(^{48}\) See Williamson. Schäfer & Ott page 392 observe that opportunism is a market failure and that it may affect certain markets more than others (used cars, for example), but it is not clear whether in such context they would recommend a mandatory duty of good faith, prevailing over textual specifications.

\(^{49}\) General principle cited above, repeated in the rule on good faith in negotiations and in good faith in performance: *The duty may not be excluded or limited by contract.*

\(^{50}\) II.–9:101: Terms of a contract: (4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.
II.–3:301: Negotiations contrary to good faith and fair dealing

(1) A person is free to negotiate and is not liable for failure to reach an agreement.

(2) A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing. This duty may not be excluded or limited by contract.

(3) A person who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for any loss caused to the other party to the negotiations.

(4) It is contrary to good faith and fair dealing, in particular, for a person to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

Good faith in the pre-contractual phase seems to complete (and thus is different from) the provisions on fraud, misrepresentation or threat.\textsuperscript{51} It especially covers (a) breaking off negotiations and (b) negotiating without real intention of reaching an agreement. Such a provision is very contentious, being especially alien to the common law tradition.\textsuperscript{52}

The idea that good faith may oblige a party to pursue negotiations till the end and to actually conclude the contract, collides with the general principle of party autonomy, as well as with the economic function of contracts of maximising parties’ joint surplus. At a very basic level, if over the course of negotiations, a party realises that the contract is not to his or her advantage, the legal system should not mandate the conclusion of such contract.

In fact, the core of the problem, that a duty of good faith in negotiations is meant to correct, seems to be that of protection of desirable reliance: parties may make

\textsuperscript{51} See (draft) comments to article II.–3:301:

\textsuperscript{52} See Farnsworth
investments and incur costs already while negotiating a contract, when they can rely on the expectation of a positive outcome of the negotiations.\footnote{W. Wils contended that losses incurred by one potential party should be reimbursed when the other party has misrepresented the chances to conclude the contract or the amount at stake and that this can be achieved through the imposition of a duty of honesty. W. Wils 1993 “Who should bear the costs of failed negotiations? A functional inquiry into precontractual liability” Ref.}

In an economic perspective, investments in reliance increase the value of a contract, hence the parties’ joint surplus. While reliance on performance of an already existing contract certainly deserves more protection, nevertheless it may be desirable that parties engage into value-enhancing investments already in the negotiation phase, when they can reasonably rely that a contract will be concluded.\footnote{See Bebchuk and Omri Ben-Shahar (2001) 30 J. Legal Stud. 423} However, not every investment in reliance should be protected by the law, but only \textit{efficient} reliance. The economic function of a duty of good faith in this phase would therefore be that of protecting only the reliance that is efficient. The more such early investments are necessary and the more relationship-specific they are, the more anticipated protection can be granted.

The typical remedy in such case would be that of reliance damages, or negative interest, which is consistent with the statements contained in the (draft) comments to the DCFR. However, if the legal device of good faith is chosen to achieve this result, its content should be adequately tailored to cover only as much compensation as to ensure an efficient reliance.\footnote{See Bebchuk and Omri Ben-Shahar for examples of specific liability rules.}

The comments to the DCFR contain illustrations of cases of breaking-off negotiations\footnote{Illustration 3: Case of a software programmer.}. In one of the illustrations, one of the parties supplies to the other a project containing substantial information already during negotiations, in order to show to the counterparty its ability and its commitment. The other party uses the information to obtain a cheaper contract with a third party. In such case, a relationship-specific investment intended to maximise the value of a contract would deserve protection. In absence of such protection, potential parties may
refrain from supplying all the necessary information for fear of opportunistic behaviour; the counterparty may, in turn, not have enough information to decide whether the transaction is advantageous. At the end, potentially advantageous contracts may not take place.

However, to assess the actual risk of underinvestment in reliance, all incentives for the parties to invest have to be considered, including those deriving from pressure by competitors in the market, before concluding that legal intervention is necessary. 57

With respect to the illustrations concerning negotiating with no intention to conclude a contract,58 however the case seems less strong. The interest of the parties is in separating “serious” potential counterparties from the non serious ones.59 This feature may not be observable by parties and even by courts ex post, which would render the legal protection moot. Besides, legal intervention could be unwarranted when parties can correct the problem by themselves, for example by sending signals.

3. Optimal level of specification of legal rules

Another problematic aspect of good faith is the optimal level of specification of such duty. Economic analysis of law prescribes that the choice between rules and standards be dictated by the relative size of the various costs involved with formulation, interpretation and enforcement of the rule.60

A general principle has higher enforcement costs but better adaptability to circumstances.61 Moreover, vague clauses seem best able to reduce enforcement

58 Illustrations 1 and 2: Case of applicant for a senior position in a Spanish factory.
59 This case may be akin to Akerlof’s story about the market for lemons. Ref.

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costs by discouraging parties from litigating over non substantial deviations from their wishes.  

On the other hand, with standards, the judicial process becomes more complicated and judicial errors are more frequent due to the difficulty of tailoring the general clause to the specific circumstances and the specific parties. Nevertheless, such errors should not be overestimated either: judges develop professionalism and experience and can always rely on trade usages etc.

The ability of parties to contract around rules or standards also varies and can influence the optimal design of a legal provision.

When it comes to good faith, most legal systems seem to prefer the reference to a standard, rather than of specific rules. The use of the standard by courts, however, seems to have become widespread when the need arose to develop legal rules for new situations, while it subsequently shrunk.

The preference revealed by the text of the DCFR seems mixed: in principle, a general standard is used, albeit with specific provisions in different phases of contractual life. However, more precise rules – arguably or declaredly – implementing the standard in specific situations or with regard to specific
contracts, have also been codified. Moreover, a set of specific rules is explicitly advocated in one of the comment with respect to certain jurisdictions.\textsuperscript{67}

The overall impression is that in the DCFR specific provisions for specific problems better achieve the desired results rather than struggling with a unitary duty of good faith.

\textit{4. Harmonisation of the duty of good faith}

Perhaps even more than with other contract law provisions, harmonisation of good faith at the European level is very controversial among legal scholars. As recalled above\textsuperscript{68} different legal systems have adopted divergent approaches to good faith, with the English one outright refusing a general clause in favour of specific rules.

Despite the text of the DCFR contains some provisions referring to good faith, in the comments annexed\textsuperscript{69} we find express reservations as to the opportunity of extending a general duty of good faith to jurisdictions where it was not in use. The choice is, of course, left to the (future and hypothetical) European legislator, to whom, however, recommendation is made to add more specific provisions for the benefit of the judges not accustomed to the general principle.

In the perspective of economic analysis, harmonisation of contract law in general seems to rest on a relatively weak basis\textsuperscript{70} and the same can be said about the provision on good faith and fair dealing. Additionally, such rule has problems of its own when it comes to the harmonisation issue.

\textsuperscript{67} Comments to Article III.-1:103: See also below.
\textsuperscript{68} Cross-ref.
\textsuperscript{69} Available in draft version of July 2008.
\textsuperscript{70} Ref. to Gomez, Chirico, Van den Berg etc.
Even accepting the plausibility of the arguments in favour of a uniform European Contract Law, this could conceivably be achieved even without the inclusion of a general duty of good faith and fair dealing, which therefore needs a specific analysis.

Unfortunately, it does not seem easy to reach a conclusion on the desirability of harmonisation of good faith. Besides the difficulty of assessing the expected costs associated to the choice of a uniform rule on good faith and the usual uncertainty as to the success of its implementation, additional doubts derive from the lack of clarity on a number of important points.

The function(s) of good faith, as the above discussion has showed can hardly be subsumed under a single heading, when all the instances in which it is relevant are considered (from negotiation to performance and so on). Moreover, the above discussion has taken an efficiency perspective. However, the DCFR rules may be expected (by its drafters, by the authorities or other stakeholders) to fulfil also other functions, with fairness and redistribution being one candidate. In conformity to established scholarship, economic analysis does not support harmonisation of the provisions on good faith if this is indeed expected to fulfil a redistributive function.

More generally, the lack of clarity concerning the function of the DCFR and its future use as a legislative instrument at the European level adds to the difficulty of tackling the harmonisation issue and the mere fact that a good faith provision is generally included in national civil codes is not enough to automatically extend the same approach to a European enterprise.

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71 On the discussion about the multiple functions and the use of good faith, see Hesselink, M. “The concept of good faith”, in Towards a European Civil Code 3rd Ed. …, chapter 26, page 471…
72 Ref to Chirico Function of ECL SSRN
73 Ref.
74 Tool box, model law, revision of the acquis etc. See Commission’s documents Ref.
75 See Jan Smits Barcelona paper.