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Good Faith in Consumer Contracts: Rule, Policy and Principle

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Introduction

This chapter considers the role of good faith in consumer contracts. It looks at a particular good faith *rule*. It also looks at the possibility of developing a *general principle* of good faith which could be used to shape consumer policy and aid the rational development of the law. The good faith rule under consideration is contained in the Directive on Unfair Terms in Consumer Contracts.[1] This Directive was implemented almost verbatim by the Unfair Terms in Consumer Contracts Regulations 1994.[2] An important aspect of the argument made below is that the good faith rule must be understood in the context of the consumer policy of the European Community. European consumer policy seeks, *inter alia*, to promote market integration by establishing a high level of consumer protection, and by generating consumer confidence. Information is the primary tool to be used in protecting consumers and generating confidence. The idea is to ensure that the consumer has information on all of the matters that affect his interests: or, to put this another way, the idea is that certain things should be transparent to the consumer. The next task is to identify just what it is that should be transparent to the consumer and what form this transparency should take. Following this, we must consider the limits of transparency. Even if a high level of transparency can be achieved, will this be sufficient to ensure consumer protection and confidence? If transparency cannot guarantee protection and confidence, then it has to be supplemented by

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[1] Council Directive 93/13/EEC, 5 April 1993, OJ L95/29.
[2] SI 1994/3159.

other measures of procedural fairness, and/or by direct control over the substantive distribution of rights and obligations.

Viewing the good faith rule in this context has certain implications. The rule states that sellers and suppliers must comply with the requirement of good faith in the context of the terms which they offer to consumers. We must interpret the requirement of good faith by reference to the European consumer policy which it seeks to further. This means that the contract terms offered by the seller or supplier to the consumer must be made transparent to the consumer. This necessarily implies that they be available and be in plain and intelligible language. It may also involve the contract being structured in a particular way, and/or the consumer having an extended period to examine the terms, and/or the seller or supplier explaining the meaning and effect of certain terms. These transparency measures are intended to protect the consumer interest by guaranteeing informed consumer consent to the contract terms. This may be enough to establish that the seller or supplier has acted in good faith. However, in some cases more may be required if there is to be a sufficient level of consumer protection and confidence. In the case of some terms it may be that there is only good faith where a choice of terms was available to the consumer. In other cases it may be found that the seller or supplier has acted contrary to the requirement of good faith by taking advantage of his superior bargaining position to impose terms which unduly compromise the interests of the consumer. In yet other cases (perhaps irrespective of questions of transparency, choice, or bargaining imbalance), the substantive terms may be so unfavourable to the consumer that the seller or supplier can be said to have failed to comply with the good faith requirement.

Having dealt with good faith as a distinct rule, I go on to consider the potential for using good faith as a general organising principle. I advance the view that a general principle of good faith, based upon respect for the legitimate interests of the consumer, would make a significant contribution to the rational development of law and policy. The framework for analysis of the consumer interest would be very similar to the framework applicable to the good faith rule already discussed. In other words, transparency would be seen as fundamental but not necessarily sufficient.

I suggest that we would need to proceed cautiously with such a general good faith principle. It could be difficult to transplant it forthwith as a common law concept which can override established rules and principles. Its role in most cases must be as a norm to which we should

aspire, and which should guide those who prepare and draft legislation or soft law measures.

The Good Faith Rule: Some Introductory Comments

The Unfair Terms in Consumer Contracts Directive/Regulations (hereinafter referred to as the "Directive/Regulations") apply to terms in contracts between sellers or suppliers, and consumers.[3] All terms must be in plain and intelligible language.[4] Under the Directive/Regulations a term used by a seller/supplier is unfair if:

> contrary to the requirement of good faith [it] causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer.[5]

If a term is unfair it is not binding on the consumer. However, the rest of the contract continues to be binding if it is capable of continuing in existence without the unfair term.[6] The test of unfairness does not apply to terms which define the main subject matter of the contract or the price.[7]

The first point to note is that the so-called requirement of good faith appears to be the overriding concept in the test of unfairness. It seems that the overriding question is whether the term is contrary to the requirement of good faith. In order to be contrary to the requirement of good faith one condition which must be satisfied is that the term must cause a significant imbalance in the parties' rights and obligations, and this must be to the detriment of the consumer. The point is that significant imbalance causing detriment seems to be a component part of the idea of acting contrary to good faith. Good faith itself seems to be the overriding issue.

It is absolutely necessary that we understand this good faith rule in the context of the European Community consumer policy which the Directive seeks to implement. European Directives are subject to

[3] Directive, art. 1(1); Regulations, reg. 3(1).
[4] Directive, art. 5; Regulations, reg. 6.
[5] Directive, art. 3; Regulations, reg. 4(1).
[6] Directive, art. 6(1); Regulations, reg. 5(1).
[7] Directive, art. 4(2); Regulations, reg. 3(2).

purposive interpretation,[8] and it is this European consumer policy which tells us the purpose of the Directive generally and the good faith rule in particular. It is important to give primacy to an autonomous European Community conception of the consumer interest. The good faith rule is, after all, a European Community rule. The good faith traditions of the national legal systems should, of course, be drawn upon. However, they must not, simply on the basis of their greater strength of tradition, be allowed to colonise this new and autonomous community rule.[9]

European Consumer Policy[10]

The Treaty of Rome as agreed in 1957 contained four explicit references to the consumer interest. Article 39 lists five objectives of the common agricultural policy, the fifth of which is "to ensure that supplies reach consumers at reasonable prices". Article 40 says that the organisation of agricultural markets shall exclude "any discrimination between producers and consumers within the Community". Under Article 85(3), if an agreement between firms is to be exempt from prohibition under Article 85(1), the agreement in question must allow consumers "a fair share of the resulting benefit". Under Article 86 abusive conduct by firms in a dominant position is exemplified by "limiting production, markets or technical development to the prejudice of consumers". None of these Treaty provisions create rights for consumers. They do, however, insist on certain consumer interests being taken account of. The consumer, then, is intended to be a beneficiary of the common agricultural policy and the policies on market sharing and abuse of market power.

[8] For another example of a discussion of the good faith rule in its European Community context see R. Brownsword, G. Howells, T. Wilhelmsson, "Between Market and Welfare: Some Reflections on Unfair Terms in Consumer Contracts" in C. Willett (ed.), *Aspects of Fairness in Contract* (London, 1996), 25.

[9] See the discussion by T. Wilhelmsson, *Social Contract Law and European Integration* (Aldershot, Brookfield USA, Singapore, Sydney, 1995), 100; Roppo, "La nuova disciplina delle clausole abusive nei contratti tra imprese e consumatori" *Rivista di Diritto Civile* (1994), 277; S. Weatherill, "Prospects for the Development of European Private Law through "Europeanisation" in the European Court" (1995) *European Review of Private Law* 307.

[10] On European consumer policy generally, see S. Weatherill, *EC Consumer Law and Policy* (London, 1997); and Bourgoigne, "European Community Consumer Law and Policy: From Rome to Amsterdam" (1998) *Consumer Law Journal* 443.

Consumers are also intended to benefit from the Treaty provisions on free movement of goods, persons and services. These provisions are contained in Articles 30, 48 and 59 respectively. Free movement of goods, persons and services is supposed to aid market integration by preventing market partition. However, free movement is also assumed to generate competition and consumer choice (which choice should be greater in an integrated market which is larger than individual national markets). This, in turn, is assumed to bring to bear market discipline on sellers and suppliers, providing them with an incentive to provide good quality and safe goods and services at reasonable prices. In other words, free movement and closer European market integration are supposed to protect the economic and safety interests of consumers.

However, there are limits on the capacity of free movement and closer integration (operating alone) to protect these consumer interests. One problem is that so much is dependent on consumer choice acting as a discipline upon what is provided by sellers and suppliers. But consumer choice is of limited effectiveness as a discipline if it is not fully informed choice. Consumers are likely to have limited information about the possible quality and safety risks associated with complex goods and services; the terms upon which they are supplied; and the legal framework which determines their rights and obligations as consumers. If consumers do not have information in relation to a given issue, then they cannot make a rational assessment as to their interests in respect of that issue, and whether these interests may be under threat. Unless significant numbers of consumers can make such an assessment, no market signal can be sent to sellers and suppliers as to what consumers regard as being in their interests. As such, sellers and suppliers are not under pressure to compete with each other to act in the interests of consumers.

If free movement of goods and services does not in itself provide consumers with sufficient information, then the obvious response is for the law to insist on disclosure. The idea must be that sellers and suppliers should be required to disclose, or otherwise make transparent, certain information. At the very least, this must include that information which is necessary for consumers to be informed as to the quality and safety risks associated with products or services, and the terms upon which the products or services are supplied. It might also be argued that sellers and suppliers should disclose to consumers those elements of the broader legal framework which affect the consumers rights, obligations and remedies.

Transparency, in the context of these sorts of issues, increases the chance that consumers will make fully informed decisions to enter into

contracts. In addition, the aggregate of informed consumer contracting decisions should impose a discipline upon sellers and suppliers, forcing them to offer goods and services which, in substance, come closer to reflecting what an informed consumer market wants. On one view, as long as these information rules are adhered to, this operates as a sufficient protection of the consumer interest. The argument would be that the market failure, caused by lack of consumer information has been corrected, and that the market is now more fully responsive to consumer preferences. Of course, even on this view, there would still need to be the capacity to set standards in relation to the supplier's substantive responsibilities in those cases where the information rules have not been adhered to. For example, if a term has not been made transparent, then the view could be that the law should disallow the seller or supplier from relying upon it if it seems to allocate rights or obligations in a way that the consumer would be unlikely to have agreed to if he or she had been aware of it.

However, there is a more welfarist view which would hold that there should in all cases be a minimum level of substantive protection.[11] On this approach, for example, the consumer should be protected from certain sorts of terms, even although these terms were transparent and the consumer was prepared to agree to them. A welfarist perspective is also likely to wish to take account of the weaker bargaining position of a consumer in deciding what level of protection to give. Welfarism may also be concerned to promote choice. This must be distinguished from a free market conception of choice. For the free marketeer, choice is a desirable (and likely) result of the operation of a free market. It is regarded as likely that free markets will produce choices (in the sense of alternatives) between the products offered, the services offered, and the terms upon which they are supplied. The free marketeer will countenance measures, such as improved transparency, designed to improve the operation of markets. If choices are produced as a result, then the free marketeer will regard this as a good thing. However, if choices are not produced, then the free marketeer may take the view that this is because insufficient numbers of customers insisted upon such choices existing. In the absence of some other market failure the free marketeer will be content with this and regard it as an efficient result.[12] The welfarist on

[11] On welfarism generally, see R. Brownsword, G. Howells, T. Wilhelmsson, *Welfarism in Contract Law* (Aldershot, 1994).

[12] This seems, broadly, to be the approach of M.J. Trebilcock, "An Economic Approach to the Doctrine of Unconscionability" in B.J. Reiter, J. Swan (eds), *Studies in Contract Law* (Toronto, 1980), 379.

the other hand may not be content. The welfarist may take the view that good quality choices should be available even although the market has not produced them naturally.

If this sort of protection is to take place, or even if transparency standards are to be set, then it is clear that there must be the scope for positive regulation. European law recognises this in two ways. First of all there is some scope, within the basic framework of the law on free movement, for member states to protect consumers. Article 30 seeks to prevent trading rules which hinder free movement of goods. This provision is, however, qualified by Article 36. Under Article 36, rules which are restrictive of free movement of goods are acceptable if they are "justified on the grounds of . . . (*inter alia*) the protection of health and life of humans, animals or plants". Under the "*Cassis de Dijon*" principle, national measures designed to protect consumers' economic interests may be allowed despite their restrictive effect upon the free movement of goods and services.[13]

Article 36 and the "*Cassis de Dijon*" principle operate in a permissive fashion in relation to national regulatory rules which protect consumer interests. However, the second way in which European law provides scope for positive regulation is via Articles 100, 100a and 129a. Here the power to regulate in the consumer interest is given to the Community itself. Article 100 and Article 100a are both concerned with harmonisation rules which are necessary for the completion of the internal market. Article 100a was introduced by the Single European Act 1987. Measures can be adopted under Article 100a on the basis of qualified majority voting (QMV), while under Article 100 unanimity is required.[14] As a result of this, Article 100a is becoming the favoured basis of law making in this area. The Unfair Terms in Consumer Contracts Directive was adopted under Article 100a as were various other Directives.[15]

Article 100a provides for the adoption of measures:

> for the approximation of the provisions laid down by law, regulation or administrative action in member states which have as their object the establishing and functioning of the internal market.

[13] Case 120/78 *Rewe-Zentrale AG* v. *Bundesmonopolverwaltung für Brantwein* [1979] ECR 649 (*Cassis de Dijon*).

[14] See the discussion of QMV in S. Weatherill, P. Beaumont, *EU Law* (London, 3rd edn, 1999), chs 3 and 5.

[15] See, for example, Council Directive 90/314, OJ 1990 L 158/59 (Package Travel Directive) and Council Directive 94/47, OJ 1994 L 280/83 (Timeshare Directive).

It is, of course, immediately noticeable that there is no explicit reference either to consumer protection or the consumer interest in Article 100a. The rationale for adoption of consumer protection measures under Article 100a is that market integration is hindered by the existence of variation as between the consumer protection laws of the member states. In the pursuit of market integration it is, therefore, necessary to introduce some degree of harmonisation of consumer protection laws.

Transparency should be a fundamental element of this protection. As I have said above, this is necessary to ensure informed consent by consumers and to impose market discipline upon suppliers. It seems that transparency is in fact a fundamental element of the European Community conception of the consumer interest. The main evidence of this comes from the various soft law measures produced over the years; and the influence these have had on the Directives adopted. By "soft law" I mean the various resolutions and action plans which have emanated from the European Commission and the Council of Ministers in relation to consumer policy. The first of these was the Council Resolution of 14 April 1975 which contained an Annex entitled a "Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy".[16] Five basic rights were asserted here: (a) the right to protection of health and safety; (b) the right to protection of economic interests; (c) the right of redress; (d) the right to information and education; and (e) the right of representation (i.e., the right to be heard). This Resolution has been followed by a series of other Resolutions and Action Plans.[17] These have, in varying ways, re-asserted the five basic rights from the 1975 Resolution. One thing which is particularly noticeable, and relevant to our discussion, is that consumer information and education seem to have been given an increasingly high priority over the years. The second and third Three Year Action plans begin by citing information and education as top priorities. Such soft law provisions do not have binding legislative effect. However, these soft law consumer initiatives, and their particular emphasis on transparency, have had a very direct effect upon the legislative process. Various Directives have imposed transparency requirements on sellers and suppliers of goods and services.[18] Most importantly, in our

[16] OJ 1975 C91/2.

[17] Three Year Action Plan 1993–95, Com. (93) 378 and Three Year Action Plan 1996–98, Com. (95) 519.

[18] See Council Directive 87/102, 22 December 1986, OJ 1987 L42/48 (concerning Consumer Credit) amended by Council Directive 90/88, 22 February 1990, OJ 1990 L61/14. See also the Package Travel and Timeshare Directives, n. 15 above.

present context, the 1975 resolution is cited in the Preamble to the Unfair Terms in Consumer Contracts Directive.[19] The general idea of transparency in European Community law and policy seems to be that it is a fundamental requirement. The consumer should always be "conscious of his rights and responsibilities".[20] The belief is that this will help individual consumers to give informed consent and to enforce their rights; and, further, that it will improve competition between sellers and suppliers.[21]

The next question we must ask is whether the European Community conception of the consumer interest is restricted to the need to ensure this minimum level of transparency in relation to important issues affecting consumers, or, whether it goes further. Is European law also in the (more welfarist) business of giving a degree of protection to the consumer in relation to issues affecting his interests even where the risks in question have been made transparent to the consumer? There is certainly no doubt that, in the context of health and safety, the answer to this is—yes. The General Product Safety Directive imposes a general "safety" requirement,[22] and the Product Liability Directive imposes liability on producers and others for damage caused by a "defect" in a product.[23] Transparency is indeed relevant to the conception of what is safe and what constitutes a defect. For example, the product may be supplied with warnings which serve to better inform the consumer as to how to use it safely.[24] However, transparency is only one factor. A product will not be safe or non-defective simply on the grounds that the risks were made transparent to the consumer. Irrespective of transparency, certain risks will be considered unacceptable.

But what is the position of European law in relation to the economic interests of the consumer? Is transparency sufficient in itself, or is it more welfarist, being in the business of protecting the consumer's economic interests, even where compromise of these interests was made transparent? For example, is the consumer to be protected from certain economic risks *per se*? Is the consumer to be protected against economic risks where he is in a weaker bargaining position than the supplier? Is choice to be insisted upon, or at least promoted, even where it has not

[19] Recital 8.

[20] See n. 16 above.

[21] See the discussion by S. Weatherill, "The Role of the Informed Consumer in European Community Law and Policy" (1994) *Consumer Law Journal* 49.

[22] Council Directive 92/59, June 1992, OJ 1992 L288/24, art. 1.

[23] Council Directive 85/374, 25 July 1985, OJ 1985 L210/29, art. 1.

[24] Directive 92/59, art. 2(b) and Directive 85/374, art. 6(1).

been produced naturally by market forces? In order to give a proper answer to such questions it is necessary to say a little more about the Treaty of Rome and the general trajectory of EC consumer policy. We have already seen that Articles 100 and 100a seek harmonisation of rules in order to further integration. However, Article 100a(3) gives more detailed guidance on the appropriate content of harmonisation measures. It provides that:

> the Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental and consumer protection, will take as a base a high level of protection.

This provision is now supported by the new Article 129a of the Treaty which provides that:

> The Community will contribute to the attainment of a high level of consumer protection through:
> (a) measures adopted pursuant to Article 100a in the context of the completion of the internal market.
> (b) specific action which supports and supplements the policy pursued by the member states to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

Three important observations can be made about these provisions. Firstly, it is noticeable that in Article 129a the protection of the various consumer interests (including economic interests) is mentioned separately from the provision of information to consumers. This in itself suggests that the provision of information cannot be seen as synonymous with, or sufficient for, adequate protection. Secondly, there are the references to a *high* level of consumer protection. This confirms that a high level of transparency should be a fundamental requirement. It also suggests, however, that consumer interests should be protected even where their possible compromise has been made transparent. The third point relates to the reasons for requiring a high level of protection. If we read Articles100a and 129a together, it seems that there is a purely welfarist strand to the approach: in that a high level of consumer protection is seen as something which is thought to be desirable in itself. However, there is also a mixed welfare/market strand, in that the high level of protection is something which is thought to be necessary to aid completion of the internal market. The internal market rationale for a high level of consumer protection seems to be based upon the need to encourage cross-border shopping by generating consumer confidence.

The connection between these two policy strands may be seen by looking at the Preamble to the Unfair Contract Terms Directive itself. Recitals 5 and 6 read as follows:

> Whereas, generally speaking, consumers do not know the rules of law which, in Member States other than their own, govern contracts for the sale of goods and services; whereas this lack of awareness may deter them from direct transactions for the purchase of goods or services in another Member State. Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts.

It has been argued by Weatherill that:

> This envisages a consumer who is active in the market, not simply a consumer who passively awaits the economic advantages of integration. That activity will be induced only where the consumer has sufficient confidence to treat the market as border-free. That confidence is engendered only where the crossing of a border has no detrimental impact on the consumer's minimum level of legal protection.[25]

So, on this view, we can see the Directive as aiming at creating a confident body of consumers who will make use of and enhance the development of the internal market. The consumer confidence issue has been seen as important since at least as early as the Sutherland Report of 1992. This report saw lack of consumer confidence as being a significant obstacle to the practical achievement of the internal market.[26]

We can conclude, then, that the EC model of the consumer interest is one in which a high level of transparency is a fundamental requirement. However, it is also one in which welfarism and the need to generate consumer confidence may demand that a high level of protection be delivered by means additional to transparency. In the context of consumer contract terms this has the following implications:

(1) *Transparency*

First of all it is clear that if transparency is a fundamental requirement, then terms should be transparent irrespective of value judgements as to

[25] Weatherill, n. 9 above, 315.
[26] *The Internal Market After 1992: Meeting The Challenge*.

their substance. It is not, in other words, simply a matter of making terms transparent if these terms are in some way substantively unfair to the consumer. European Community consumer policy, as I have noted, aims to inform consumers of their "rights and responsibilities". This is seen as being fundamentally important in its own right since it promotes informed consent, helps in the enforcement of rights, and also improves competition.

Terms should be available at the time of the contract. They must also be clearly expressed, so that the consumer is in a position to understand what is on offer and to compare this with the terms offered by other suppliers. For terms to be clearly expressed they must obviously be in language which the average consumer can understand. The wording should not be overly verbose or legalistic and should be generally easy to follow. Terms must also be in decent sized and generally legible print. However, account must also be taken of the number of terms involved, the general complexity of the issues and the time available for consideration. The terms should be clearly enough structured under appropriate headings so that a reasonable consumer is able to assimilate the information, and able to understand and distinguish between different issues. The consumer should, in particular, be able to identify key rights and responsibilities.

A regime such as this would be a considerable advance on what either common law or the Unfair Contract Terms Act 1977 have been able to achieve. At common law a term is not binding upon the consumer unless it has been incorporated into the contract. In the case of unsigned documents, the basic common law rule is that the consumer must have reasonable notice of the terms if they are to be treated as having been incorporated into the contract.[27] Constraints on length preclude here a detailed analysis of how this law is applied. However, it is usually thought to be satisfied if there is an acceptable form of notice to the effect that the terms exist.[28] Terms do not necessarily need to be physically available. There is no general requirement that the terms be in plain language or decent sized print; nor is there any general requirement that the contract be structured in a rational and understandable fashion. Things are somewhat different in the case of terms which can be regarded as particularly onerous or unusual: where special steps must be taken to draw these to the attention of the consumer.[29] This means that the consumer will at least be aware of such terms. However, it is

[27] *Parker* v. *S.E. Railway Co.* (1877) 2 CPD 416.
[28] *Ibid.*
[29] *Interfoto Picture Library Ltd* v. *Stiletto Visual Programmes Ltd* [1989] QB 433.

not clear if it also follows that the term must be in sufficiently plain language that it can be understood. In any event it must be remembered that this special disclosure rule probably only applies to those terms at the extreme end of the unfairness spectrum.

If the consumer signs a contractual document (assuming that there has been no fraud by the supplier), it seems that under the common law he is bound by it, even without reasonable notice that it contains terms.[30] As with unsigned documents there is no requirement of plain language, decent sized print or rational structuring. It is not clear whether the rule about particularly onerous or unusual terms even applies to signed documents, but it is quite possible that it does not.

The Unfair Contract Terms Act 1977 applies a reasonableness test to a variety of exemption clauses.[31] But it cannot be said with confidence that transparency is a prerequisite to a term passing that test. It is true that the Act does expressly mention transparency, but it does not do so in the context of consumer contracts.[32] And in the application of the reasonableness test by the courts there is rarely a mention of transparency.[33] It is also very important to recognise that the Unfair Contract Terms Act only applies to certain positively defined exemption clauses. It does not apply to exemption clauses falling outside these definitions, nor does it apply to other sorts of terms, such as those which impose an obligation or burden of some kind upon the consumer.

(2) *Substance, Choice and Bargaining Power*

As well as demanding transparency, a regime which seeks both to provide a high level of consumer protection and generate consumer confidence will need to be able to take account of the substantive nature of terms in deciding whether to enforce them. This might take place as follows. If a consumer has agreed to a term which is harsh in substance, the law might ask whether a choice (in the sense of a reasonable alternative) was available from the seller or from a local competitor. It might be, for example, that a term excludes all liability for consequential loss and a consumer agrees to this term. However, this seller, or another

[30] *L'Estrange* v. *Graucob Ltd* [1934] 2 KB 394.
[31] Section 11.
[32] See Sched. 2, para. (c).
[33] When the House of Lords set out criteria which should always be considered they did not include transparency. See *Smith* v. *Eric S. Bush* [1990] 1 AC 831.

local seller, may offer a more expensive product or service, but one in which some or all liability for consequential loss is accepted. If this other package is viewed as a reasonable alternative, that may help to justify the harsh exclusion to which the consumer nevertheless chose to agree. Equally, if no alternative package exists, then this may help to confirm the unfairness of the exclusion to which the consumer had no choice but to agree. Substance may also interact with an analysis of the bargaining positions of the parties. If a term is harsh in substance, then it may be further condemned by the fact that the consumer was not in a strong enough bargaining position to persuade the seller to offer anything better. Equally the term may be justified if the consumer was in fact in a strong bargaining position but chose not to take advantage of this to obtain a better term. Substance might also have its own independent dynamic. Terms may, for instance, be so harsh in substance that they cannot be justified either by the existence of consumer choice or by strong consumer bargaining strength. Equally, there may be terms which are mildly, but not grossly, unfair in substance and which are compensated for by other more favourable terms.

This kind of regime was never adopted by the common law. At common law the lack of a reasonable alternative is relevant in the context of the duress doctrine. Here, however, the lack of a reasonable alternative must have been brought about by an illegitimate threat of some kind emanating from the other party: e.g., a threat to break a contract, or commit a tort or a crime.[34] It is not sufficient that the lack of an alternative was brought about (as in the typical seller-consumer relationship) simply by market forces. English equitable rules may have some scope to take account of gross abuse of a superior bargaining position,[35] however, this has not been regarded as generally applicable to the seller-consumer relationship. Finally, some terms are controlled at common law purely on the basis of their substance. Here, however, we are talking about closely defined categories of terms, such as penalty clauses. There is no generally applicable control which has been applied to the terms in consumer contracts.

As already mentioned, the Unfair Contract Terms Act applies a test

[34] See *Universe Tankships Inc. of Monrovia* v. *International Transport Workers' Federation* [1982] 2 All ER 67 (HL). See also the discussion in H.G Beale, W.D. Bishop, M.P. Furmston, *Contract Cases and Materials* (London, 3rd edn, 1995), ch. 34.

[35] See N. Bamford, "Unconscionability as a Vitiating Factor" (1995) *Lloyd's Maritime and Commercial Law Quarterly* 538.

of reasonableness. And that test does take account of the substantive nature of the terms, the choices available to consumers, and the bargaining strengths of the parties.[36] But as I have already noted, it only applies to certain positively defined exemption clauses and related devices.

The Good Faith Rule Revisited

The good faith rule, as it is expressed in the Directive/Regulations, would appear to accommodate the approach to contract terms which I have said is necessary. The preamble to the Directive seems to sum up the concept of good faith by referring to an obligation on the seller or supplier to take into account the "legitimate interests" of the consumer.[37] A key interest in entering into a consensual arrangement must surely be the ability to give informed consent. All aspects of transparency must, therefore, be relevant to good faith. Indeed it must surely be the case that if a term is unfair in substance, then transparency is a necessity if the term is to stand any chance of satisfying the good faith requirement. The next question, however, is whether there is a precondition that term be transparent *per se*. In other words do terms have to meet a certain standard of transparency irrespective of their substantive content? I have made the point above that this is what is demanded by European Community consumer policy. However, there is some doubt as to whether the Directive/Regulations do in fact require comprehensive transparency in the case of all terms irrespective of their substantive content.

The Directive/Regulations do however say, in a separate provision from the good faith test, that all terms must be in plain and intelligible language. However, rather ironically, it is not clear what sanction is available if a term is not in plain and intelligible language. The provision reads as follows:

> A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language, and if there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.[38]

It must be assumed that whether terms are plain and intelligible is to be

[36] See *Smith* v. *Eric S. Bush*, n. 33 above.
[37] These criteria originated in Recital 16 of the Preamble to the Directive.
[38] Directive, art. 5; Regulations, reg. 6(1).

judged by the standards of the average consumer. But if terms fail this test, what is the sanction? If there is doubt as to their meaning they will be interpreted favourably to the consumer. This can be seen as a sanction of sorts. The problem, though, is that it is not at all clear that a term which is not plain and intelligible will always have a doubtful meaning. It depends on what it means to say that there is doubt about the meaning of a term. If this is also judged by the standards of the average consumer, then it may be that whenever a term is not plain and intelligible by these standards, there will always also be doubt as to the meaning of the term. However, if the question of doubt as to meaning is to be judged by the standards of lawyers, then the interpretation rule will not always be an effective sanction where terms are not plain and intelligible. The term in question may not be plain and intelligible by the standards of the average consumer, whilst by the standards of a lawyer there may be no doubt as to its meaning.

Even if doubt as to the meaning of a term is judged by the standards of the average consumer, so that the interpretation rule serves as a useful sanction where terms are not plain and intelligible, we still have a problem. Plain and intelligible language is only one aspect of transparency. A term may well be in plain and intelligible language. This, however, does not necessarily mean that it was physically available for inspection. Moreover, even if the term was available for inspection and consideration, it is arguable that it might be found to be in plain and intelligible language despite being in small print and, also, despite being hidden in a complex set of terms which lack a rational structure.

There is, however, another way of looking at the plain and intelligible language requirement. It could be argued that, rather than being a separate rule, the requirement is, in fact, supportive of the good faith rule. There is some support for this approach in the opening provisions of the Directive. The scope of the Directive is said to be the control of "unfair terms".[39] Nothing is said of the distinct and separate control of terms which are not in plain and intelligible language. Given that terms are said to be unfair if they are contrary to the requirement of good faith, it could be concluded that the plain and intelligible language requirement only exists to support the requirement of good faith. It is true that neither of the specific provisions cross-refer to each other. This, however, could simply be an example of the rather loose approach to drafting which is sometimes found in EC Directives. Perhaps the

[39] Article 1(1).

intention is that good faith incorporates the plain and intelligible language requirement as well as those other aspects of transparency which, I have suggested, are not necessarily covered by the plain and intelligible language requirement, namely: availability; opportunity for consideration; decent sized print; and a rationally structured contract. It seems that the Office of Fair Trading, in discharging their regulatory functions under the Regulations, may support this analysis. They seem to take the view that transparency covers all of these sorts of issues.[40] But this simply brings us back to where we were before: all aspects of transparency are relevant to good faith. It does not tell us whether a term can be unfair, and therefore not binding, purely upon grounds of intransparency.

The wording of the good faith test does, in fact, leave some room for doubt as to whether a term can be contrary to good faith, and consequently be unfair, purely upon the basis that it is intransparent in some way. A term is unfair if:

> contrary to the requirement of good faith it causes a significant imbalance in the rights and obligations of the parties under the contract to the detriment of the consumer.

Even assuming that good faith is the overriding issue, it seems fairly clear that for a term to contravene the good faith requirement it must cause a significant imbalance in the parties' rights and obligations. Most of us would probably assume that the reference to "rights and obligations" is a reference to the substantive nature of the terms of the contract. If this is the case, then surely an imbalance in rights and obligations is something which results from the fact that the substantive features of a term favour the seller or supplier, and that the substantive features of any terms which are favourable to the consumer are insufficiently favourable to strike a fair balance. It then seems to follow that in order for a term to contravene the good faith requirement it must, in its substance, contain some feature which is unfair. On this approach it would seem to be impossible that a lack of transparency could, in itself, cause an imbalance in rights and obligations. The lack of transparency may well have caused the consumer to agree to the term. But if that term is not substantively unfavourable, then no imbalance in rights and obligations has been caused.

There is, of course, another way of reading the good faith test which would allow a term to fail it (and, consequently, be unfair) purely on the

[40] *OFT Bulletin on Unfair Contract Terms*, Issue No. 4, 13.

basis of lack of transparency. Perhaps an imbalance in "rights and obligations" *can* be caused by a term which, though intransparent, is not substantively unfair to the consumer. The argument could be that a consumer's rights under a contract go beyond the substantive rights allocated by the express and implied terms of that contract, and include the procedural right to be fully informed as to all of the terms of the contract. On this approach intransparency, of itself, causes an imbalance in rights and obligations. I would submit that the good faith test should be read in this way, so as to meet the demands of European Community consumer policy.

Whether or not the good faith test does have the effect of making transparency a fundamental requirement, it must surely be the case that it is, very important to good faith. In particular it must be that if a term is at all unfair in substance, then it must be transparent in order to stand any chance of satisfying the good faith requirement. But what if such a term is indeed transparent? Is it possible that the term can still be contrary to good faith on the basis of its substantive makeup; on the basis of lack of choice; or on the basis of the weak bargaining position of the consumer? I have argued above that the high level of protection required by European consumer policy may necessitate transparent terms being found to be unfair on these other grounds. I have also argued that there should exist a regime in which the law takes account of the substantive nature of the terms of the contract, the choices available to the consumer, and the relative bargaining strengths of the parties. I have further argued that these factors should be able to operate for or against enforceability. They should, in other words, be able to confirm the fairness of a term which causes significant imbalance but which is transparent. Equally they should be able to confirm that, despite the transparency, the term is unfair. The test does seem to have the capacity to facilitate such an approach.

When assessing good faith it is relevant to consider generally whether the seller or supplier has dealt fairly and equitably with the consumer.[41] This seems to involve an assessment of all of the interests of the consumer, both substantive and procedural. So, for example, it may be that the degree of significant imbalance and detriment caused by the substance of the term is so great that it fails to satisfy the good faith requirement. It may also be that the existence (or lack) of a choice is seen as confirming or denying the existence of good faith. Choice is not

[41] Regulations, Sched. 2, para. (d).

mentioned explicitly. However, choice is certainly an important factor in the German good faith concept,[42] and it is generally believed that this concept was strongly in mind when the Directive was drafted. As far as bargaining strength is concerned, the Directive/Regulations say explicitly that this is relevant to good faith.[43] It must be, therefore, that this can be a determining factor.

Objective or Subjective Good Faith?

Based on the analysis so far, we can conclude our discussion of the good faith rule by dealing with a perennial good faith issue. This is the question as to whether we are talking about subjective or objective good faith. By subjective good faith I mean "honesty in fact", the sort of issue which is under scrutiny in the "good faith purchase" scenario in transfer of title cases.[44] By objective good faith I mean a legally imposed standard of behaviour which is not constructed by reference to the subjective perceptions of the party in question.[45] It is clear that our good faith rule is an example of objective good faith. What matters, for example, is whether the terms are transparent, not whether the supplier believed them to be. Any significant element of subjectivity would clearly undermine the general goals of EC consumer law and policy which the rule is supposed to serve. We cannot obtain a high level of protection and confidence if the approach is dictated to by the subjective perceptions of the supplier.

A General Principle of Good Faith

Finally, I would like to suggest the need for an underlying general principle of good faith in consumer contracts. In the space available here I cannot provide a comprehensive analysis of the issues involved.

[42] See H.W. Micklitz, "*La Loi allemande relative au règime juridique des conditions générales des contrats du 9 décembre 1976. Bilan de onze années d'application*" (1989) 41 *Rev. Int. Droit Comparé* 101.

[43] Regulations, Sched. 2, para. (a).

[44] On subjective good faith, see E.A. Farnsworth, "The Concept of Good Faith in American Law" *Centro di Studi e Richerche di Diritto Comparato e Straniere, Saggi, Conferenze e Seminare 3*, Rome, April 1993; and S. Waddams, "Good Faith and Reasonable Expectations" (1995) *Journal of Contract Law* 55.

[45] Farnsworth, n. 44 above. The subjective/objective debate is considered in more detail elsewhere in this volume by Forte and MacQueen.

However, I would like to adumbrate some general proposals which will hopefully serve as a stimulant to debate. For more than forty years there has been growing, sometimes heated, academic debate as to whether there should be a general principle of good faith in contract law and, if so, what form such a principle should take.[46] It has, in fact, been in the context of commercial contracts that many fear good faith might do harm. There are, for example, concerns that good faith would cause commercial uncertainty. There are also concerns that good faith would undermine party autonomy and the unbridled pursuit of self interest.[47] There are those who believe that, in the context of commercial contracts, such values are not only important in themselves, but are vital if the market economy is to flourish. It is probably fair to say, however, that even those who are most sceptical about good faith are less worried about its potential effects in the context of consumer contracts than in the purely commercial sphere. This diminished concern may be explained partly because of a lack of interest in consumer contracts. It is also because less money tends to be at stake in consumer contracts, so that the implications of uncertainty are less significant. There is probably also a sense that those who buy goods or services in a private capacity are genuinely deserving of some protection.

However, it is one thing to say that consumers should be protected. It is another thing to say that this protection should take place by a reference to a general principle of good faith. Even if such a principle would be relatively harmless, we should know what its positive benefits would be. Howells has approached the issue from one angle.[48] He notes the limitations of the good faith rule in the Unfair Terms Directive/Regulations. The rule does not apply to purely pre-contractual or post-contractual relations.[49] Clearly a general principle of good faith would have at least something to say about these issues. The most significant observation made by Howells is that if good faith is to be pervasive and effective, then private law is a wholly inadequate vehicle for its achievement. There must be an emphasis upon public, collective and reflexive

[46] For a seminal 1950s discussion see R. Powell, "Good Faith in Contracts" (1956), 9 *Current Legal Problems* 16.

[47] For an excellent overview of the good faith debate, see R. Brownsword, "Positive, Negative, Neutral: the Reception of Good Faith in English Contract Law" in R. Brownsword, N.J. Hird, G. Howells (eds), *Good Faith in Contract: Concept and Context* (Aldershot, Brookfield USA, Singapore, Sydney, 1999), 13.

[48] G. Howells, "Good Faith in Consumer Contracting" in Brownsword *et al*, n. 47 above, 91.

[49] *Ibid*., 96–7. See also Directive, art. 4(1); Regulations, reg. 4(2).

regulation.[50] I certainly agree with these views. However, I would argue that the whole fabric of control must be underpinned by an organising good faith principle which could aid the rational development of the law. This principle would be based upon the idea of respect for the legitimate interests of the consumer.

We must identify the range of ways in which the interests of consumers are affected. Transparency must be emphasised as the primary requirement. The ways in which consumer interests are affected must always be transparent to consumers. We must then consider to what extent the protection of the consumer interest should go further than this. This sort of approach would help us to focus on developing a rational and comprehensive framework of consumer interests. We have talked, for example, about the economic interests of consumers, and about how it is in the economic interests of consumers that there be protection from unfair contract terms. But the economic interests of consumers are affected by *all* of the ways in which the law shapes the relationship (e.g., via rules on formation and remedies), *and* by the ways in which the law allows the parties to shape the relationship. We must think about the extent to which these rules fairly balance the interests of the parties; and whether features which are unfavourable to the consumer should be amended substantively or at least made more transparent to the consumer.

The law relating to insurance contracts provides a good example of the potential application of such an approach. Here the consumer must disclose to the insurer all facts of which he is aware and which are also material to the underwriting of the risk, even if the consumer does not appreciate that they are material facts. If the consumer fails to disclose such facts to the insurer, and this failure has induced the insurer to enter the contract, then the insurer may avoid the contract, even although the fact which has not been disclosed is unconnected with the circumstances giving rise to the claim.[51] This duty of disclosure arises by virtue of insurance contracts being viewed as contracts of the "utmost good faith". This good faith principle also requires the insurer to disclose material facts to the insured consumer. However this does not really take proper account of the consumer interest. There is usually very little or nothing in the way of fact for the insurer to disclose to the consumer.

[50] Howells, n. 48 above, 102–10.

[51] See the discussion in C. Willett, N.J. Hird, "Consumer Protection in Insurance Contracts" in Cartwright (ed.), *Consumer Protection in Financial Services* (The Hague, London, Boston, 1999), chapter 10.

The real problem for the consumer is the broad and onerous nature of his own legal duty of disclosure, and the surprisingly draconian consequences of his failure to meet this legal duty. At the least, the consumer must surely have a legitimate interest in being told of the nature of his duty of disclosure and the highly detrimental consequences which will ensue if he is in breach. This approach has in fact been taken by the Statements of Insurance Practice where it states:

> If not included in the declaration, prominently displayed on the proposal form should be a statement:
> (1) drawing the attention of the proposer to the consequences of failure to disclose all material facts, explained as those facts an insurer would regard as likely to influence the acceptance and assessment of the proposal.
> (2) warning that if the proposer is in any doubt about facts considered material he should disclose them.[52]

The Statement of Practice also goes beyond this transparency based approach, and actually limits the substantive right of the insurer to avoid the obligation. The insurer is not supposed to repudiate for non disclosure of any material fact which a policy holder could not "reasonably be expected to have disclosed".[53] We must now consider putting this sort of approach onto a legal footing.[54]

Insurance contact law is, of course, only one area in which my general principle of good faith might require a rethink and reform. There are other ways in which the law may compromise (or permit compromise of) the economic and other interests of consumers. Many, although perhaps not all, of these are already adequately regulated. However, there are also new ways in which traditional consumer interests may be compromised; and new types of consumer interest which might be recognised. Genetically modified foods provide a good example of something which may be a *new* threat to consumer health and safety interests. The first priority must obviously be the most rigorous transparency, so that consumers may know whether a product contains any genetically modified material. There is already a European Community Regulation on this subject and improved national rules are

[52] Association of British Insurers, Statement of General Insurance Practice (1986), s. 1(c).

[53] *Ibid*., para 2(b).

[54] For a discussion of reforms of this nature in other jurisdictions, see D. Friedmann, "The Transformation of 'Good Faith' in Insurance Law" in Brownsword *et al*, n. 47 above, 311.

currently under preparation.[55] However, there must obviously be a debate as to whether the risks are so considerable or uncertain as to demand going beyond transparency to an outright ban.

A good example of a *developing* consumer interest arises in relation to the environmental impact of products. Consumers are increasingly keen to buy products which do not have a negative impact upon the environment. Retailers and manufacturers, however, are inclined to make vague claims about the "environmentally friendly" or "ozone friendly" nature of their products, and such claims may well encourage consumers to buy the product. These claims may have very little substance to them and yet they may not actually be false: so that they avoid attracting civil liability for misrepresentation or criminal liability under the legislation relating to trade descriptions. At the very least, consumers have an interest in the introduction of some form of proactive transparency in this context. Some work has already been done on this by the Code of Advertising Practice, according to which, advertisers should be able to substantiate claims, and should not make vague environmental claims.[56] Again, we must think about putting this rule onto a legal footing.

Concluding Comment

I have argued for the introduction of a general principle of good faith which could aid the rational development of the law. We could work towards transplanting such a general good faith principle into the common law of consumer contracts. However, we must proceed cautiously in this regard, thinking carefully about the way in which it would interact with established rules and concepts. In particular, we must avoid causing "irritancy" to perfectly good rules and concepts.[57] In the main we should see good faith as a norm to which the law should aspire and which should guide those who prepare and draft legislation or soft law measures.

[55] See the EC Regulation on Genetically Modified Soya and Maize Labelling, 1139/98, 3 June 1998, OJ 1998 L159/4. Note also the draft Food Labelling (Amendment) Regulations 1999.

[56] Committee of Advertising Practice, Briefing, 1993.

[57] On legal transplants and their potential for causing irritancy, see G. Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences" (1998) 61 *Modern Law Review* 11.