Good faith and contents of contracts in European private law

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In this contribution, I would like to draw first some conclusions from comparative research and legal theory before dealing with good faith in the Principles of European Contract law. I will not give you a comparative overview as such, as there are excellent recent publications, such as "Good faith in European contract law" edited by Reinhard Zimmermann and Simon Whittaker[1]. At the end of the second part, I will try to indicate the specific role good faith can play in a multi-level legal system such as the actual or future European contract law.

I. Good faith in our legal systems in general

1.Three dimensions and three paradoxes.

1. In a recent article in the European Review of Private law[2], Marietta Auer shows that the debate on the notion of good faith in contract law has typically three dimensions : "first, a substantive dimension of justification of good faith duties in terms of, for instance, contractual ethics; second, a formal dimension concerned with its structure as a vague standard; and finally, an institutional competence dimension raising the question of judicial freedom and constraint in adjudication based on open standards such as good faith". The discussion thus consists, according to that essay, of "controversies between an individualist ethics of freedom of contract and the opposing altruist value of interpersonal responsibility, between the danger of judicial arbitrariness and the demand for equitable flexibility, and, finally, between the legitimacy of judicial law making and the insistence on judicial restraint".

Indeed, each of these three dimensions gives only a partial view of the role of good faith in European contract law. Moreover, these three dimensions are not necessarily congruent; in fact, they are often not. Even if most applications of the principle of good faith can be seen as inspired rather by a communitarian then by an individualist ethic, others seem to protect individual positions in order to promote certainty in legal relationships, without imposing an altruist logic (eg *Verwirkung*). Further, the fact that one party has to take into account the interests of the other party in a given respect often discharges the other party from a similar duty. Thus many duties to inform imposed on one party discharge the other party from informing itself on the same point, and thus shift the burden of examination from one party to the other. This raises doubts about the possibility of giving the notion of good faith a substantive meaning.

2. Different views have been developed as to how we should understand good faith, given the different controversies in which it is used as an argument, and the lack of congruency between them. At first sight, it seems tempting to separate these three dimensions and even give them different names in order to promote clarity in doctrine and debate. One could thus eliminate

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1 R. ZIMMERMANN & S. WHITTAKER, *Good faith in European contract law*, Cambridge studies in international and comparative law 14, Cambridge university press 2000. See also F. RANIERI, *Europäisches Obligationenrecht*, Springer, Wien - new York 1999, Ch. 9 (p. 225 ff.).

2 M. AUER, "Good faith: a semiotic approach", *ERPL* 2002, 279 ff.

good faith from the first (substantive) dimension and replace it by a duty to co-operate, eliminate it from the second (formal) dimension and replace it by a notion of reasonableness or reasonable expectations, and finally eliminate it from the third (institutional) dimension and replace it by a mechanism of equity granting large powers to the judges. A number of theories have been developed where the function of good faith has been restricted to one of these dimensions (or to the 2 last ones).

Thus, in the tradition of Latin countries, there is often a tendency to restrict the function of good faith to the first dimension, and the notion to an ethical concept : good faith expresses a moral rule, more specifically an altruist morality, to the extent that the formal rules of law permit it. The contents of good faith may be coloured more subjectively, as in a traditional French view reducing good faith to the absence of bad faith in a subjective sense; they may be coloured more objectively, as in Demogue's theory of the contract as a microcosmos, or in art. 1175 of the Italian Civil Code on the *regole della correttezza*. What seems to be closing up good faith in the first dimension in reality does not say much about the first dimension, but is rather a statement in favour of a restrictive use of good faith by the judges, and thus rather a position in the formal and/or institutional dimension.

On the other side, some authors have developed the theory that good faith has no substantive meaning at all, that there is no inner coherence between so-called good faith rules, and that any rule could be based on it. Good faith is in this view merely the sum of all additions and corrections to the old tradition brought about by judges, whatever their content may be, just like "equity" in English law consists of the addenda and corrigenda to the old common law, and the *ius honorarium* in classical roman law consisted of the addenda and corrigenda created by the *praetor*[3]. The only role of a good faith clause in a contract code would therefore consist of reminding us that judges are creating law. But in a systematic overview of the law, it should not be a separate subject[4].

Paradoxically enough, those who only see a formal and/or institutional dimension in good faith do not say much about precisely this dimension: how is the judge going to use its power granted under the name of good faith, reasonableness, equity or any similar principle: by incremental change from precedent to precedent or by trying to give substance to very general principles ?

3. In favour of the latter theory, it can be said that the justification of a given solution to a case by good faith, is indeed in most cases limited to solutions, which are not found in the traditional rules (either the case law tradition or legislation).

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3 See for this view eg M. HESSELINK, *De redelijkheid en billijkheid in het Europese privaatrecht*, Kluwer Deventer 1999, also summarized as "Chapter 18. Good faith" in A. HARTKAMP et al., *Towards a European Civil Code*, second edition 1998, Ars Aequi Libri Nijmegen / Kluwer Law international 's Gravenhage, p. 285 ff.

4 Although not theoretically explicit on this point, a practical application is made by H. KÖTZ, *Europäisches Vertragsrecht*, I, Mohr Tübingen 1996, as good faith is not at all a subject in this treatise, but the solutions based on good faith are widely dealt with. Kötz is not dealing with good faith, but with its practical applications.

On the other hand, it remains so that a series of doctrines are still justified by the good faith principle even after they have been enacted in statutes or incorporated in tradition. Other "new" solutions on the contrary, are not or after a while no longer justified by good faith even if not codified[5].

Although I certainly have sympathy for the latter theory, and have defended in the past such ideas to a certain extent from a normative point of view[6], from a descriptive point of view, it is in my opinion incorrect. In positive law there still is a substantive dimension in good faith[7], albeit a very broad one (good faith as a very open norm, but still a norm), a substantive dimension negatively limited by the other two dimensions. In positive contract law, a solution will be seen as an application of the good faith principle, if (and only if) 1° it positively conforms to the open norm (substantive dimension) and 2° does not follow already from another firmly established norm (formal and/or institutional dimension). Once a more specific norm is firmly established, good faith is no longer necessary to justify that rule, but this does not mean that the content of the open norm of good faith can ever be exhausted into more specific norms ("*herunterkonkretisiert*").

Apart from more restrictive substantive notions of good faith, a classical definition of good faith in contract law refers to the need to take into account the legitimate interests of the other party. Such a definition does indeed cover in my opinion the field of good faith.

4. At first sight, this seems to be contradicted by the fact that good faith acts into opposite directions, and more specifically often creates exceptions to rules, which are – or were – also based on good faith. But this paradox can be explained. Any rule, which translates the vague norm into a more specific norm tends to become abstracted from good faith (and live its own life). Whenever a specific rule is developed on the basis of the good faith principle in order to oblige one party to take into account the legitimate interests of the other party, it becomes a specific role in relation to which that other party must in its turn take into account the legitimate interests of the other party. Thus any rule based on good faith is at a certain moment itself subject to correction based on the good faith principle.

In a historical perspective, many examples can be given of such developments. Thus, good faith has successively served to make people bound by formless contracts (*pacta nuda*) even if there was no equivalence, to give priority to the meaning of contractual terms intended by the parties over their literal meaning, and to give preference to substantive fairness over the intended meaning of the contract. Good faith was thus as well used to justify the loss of rights even before the expiration of the prescription period (*Verwirkung*) as to prevent a debtor to invoke prescription when he induced his creditor to delay the filing of its claim in court.

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5 For examples, S. WHITTAKER & R. ZIMMERMANN, "Coming to terms with good faith", in *Good faith in European contract law*, p. 676.

6 My Ph.D. thesis *De invloed van de goede trouw op kontraktuele schuldvorderingen*, Leuven 1989, published by Story Gent / Kluwer Antwerpen 1990.

7 Comp. the conclusion of S. WHITTAKER & R. ZIMMERMANN, p. 699 : "good faith is not devoid of meaning, a pious hope or simply a super-technique waiting to be put to whatever legal end a legal system wishes (though it may act as a super-technique if required)".

2. Rule of construction v. rule of behaviour; mechanisms of containment.

5. Even if the substantive and the other dimensions are not always congruent, there is a large overlap, and the forms of rule taken by the good faith principle in these dimensions are convertible. There is a traditional opposition between good faith as a rule of behaviour on the one hand, and a rule of construction (or development) of the law on the other hand. But there is no contradiction here:
- good faith as a rule of behaviour requires the parties to behave according to the requirements of good faith and fair dealing, and
- good faith as a rule of construction / interpretation of the law requires the judge to interpret the law in the way it promotes behaviour according to the requirements of good faith and fair dealing.

6. In order to contain communitarian values and guarantee party autonomy, good faith in its substantive dimension is often restricted to a number of specific criteria. The first and most restrictive one is the purely subjective good faith (bad faith in the sense of dishonesty in mind, *animus nocendi*, etc.). But good faith is usually not restricted to the absence of bad faith and has also given rise to objective standards, first of all a standard of interest (acting without serious or legitimate interest, or with a disproportionately low interest).

7. In order to contain judicial activism, a doctrine of different "functions" of good faith was developed, trying to specify the principle in its institutional and/or formal dimension. The distinction between those functions has indeed only this meaning, and thus no substantive meaning.

The precise distinction between these different functions, may vary, but we commonly find[8]:
1° a role of concretisation of other rules, esp. concretisation of the way in which performance has to be rendered;
2° a supplementing or complementary function, basically creating additional duties, burdens, remedies, etc. for situations, which are understood as not being covered by the existing rules;
3° a corrective function, setting aside rules or contractual terms contrary to good faith.

In eg the French and Belgian tradition, the primary function of good faith is traditionally seen as "interpretative" (interpretation of contracts, not of the law, and more specifically interpretation according to the common intention of the parties). Paradoxically, however, this function is historically a form of correction in relation to an older rule favouring a literal interpretation.

Sometimes, a separate function is seen where a contract is modified on the basis of the good faith principles (esp. in case of changed circumstances): a "modifying function".

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[8] The doctrine of different functions was revived by Siebert and Wieacker, tracing it back essentially to Papinianus comment on the *ius honorarium* (or *ius praetorium*) as "*adiuvandi vel supplendi vel corrigendi iuris civilis*"

However, the distinction between a supplementing and a corrective function is in my opinion highly artificial. Any creation of an additional duty not only supplements the contents of a contract, but at the same time corrects it. Any corrective mechanism based on good faith can inversely be framed in terms of an additional duty[9].

A more relevant question on the other hand, concerns the method or style imposed on the judges applying good faith. In this respect, there is a clear opposition between, eg, Art. 1, II and III of the Swiss ZGB / CC on the one hand, and the traditional French conception of the role of the judge on the other hand. Art. 1, II obliges the judge to do what French ideology forbids him, and forbids him to do what French ideology permits. Indeed, French ideology forbids the judge to create law, but exceptionally permits him to judge according to what equity requires in the specific case; but whenever a judge formulates a rule not recognised by law or tradition as a legal rule, this in order to justify his solution, he is seen as transgressing his authority. The Swiss Civil Code on the other hand obliges the judge to formulate a rule, namely the rule he would formulate if he were a legislator, and to decide according to that rule. In Swiss law, the formal dimension (namely rule-orientation instead of mere equity) thus prevails over arguments from an institutional nature used in France. Maybe the thoroughly democratic character of Swiss institutions compared to the centralistic perspective on the judiciary in eg France explains the difference.

II. Good faith and contents of contracts in the Principles of European Contract Law (PECL).

1. Notion of good faith and fair dealing

8. Let us now turn to the PECL, as published in 1999 – i.e. Part I and II.

They contain the principle of good faith:
(a) as a rule of interpretation of the law in Art. 1:106 (1) "*These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application",* and
(b) as a rule of behaviour in Art. 1:202 (1) "*Each party must act in accordance with good faith and fair dealing"* .
These formulations tend towards congruency between both dimensions.

Can we infer some definition or delimitation of the concept of good faith from the Principles ? The Comments to Art. 1:202 are clearly influenced by a primarily substantive notion of good faith. Although this is only mentioned after a series of more classical specifications, the Comments specifically state that Art. 1:201 "imposes upon each party a duty to observe reasonable standards of fair dealing and to show due regard for the interests of the other party". They further explain that "good faith" is primarily a subjective notion and "fair

[9] A classical example is the conversion of hardship into a duty to renegotiate.

dealing" an objective one, reason for which they are always used together as an hendyadis, just like "*Treu und Glauben*" in German and "*redelijkheid en billijkheid*" in Dutch law.

The substantive (rather than formal/institutional) approach also follows from the fact that a number of specific rules expressly stated in the PECL are still seen as expressions of "good faith and fair dealing", although they are expressly stated in the so-called blackletter rules (i.e. the text of the articles as distinguished from the comments). This is e.g. the case of:
- the duty of a party not to negotiate a contract with no real intention of reaching an agreement with the other party (Article 2:301);
- the duty not to disclose confidential information given by the other party in the course of negotiations (Article 2:302);
- the duty not to take unfair advantage of the other party's dependence, economic distress or other weakness (Article 4:109);
- the right given to a debtor to cure a defective performance before the time for performance (Article 8:104);
- the right to refuse to make specific performance of a contractual obligation if this would cause the debtor unreasonable effort and expense (Article 9:102).
In a number of other provisions, the PECL use "reasonableness" as a criterion. But according to Art. 1:302, "*reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case and the usages and practices of the trades or professions involved should be taken into account*".

9. On the other hand, the formal dimension is certainly not absent in the notion of good faith and fair dealing , as it is expressly seen as a means to let justice prevail where "the law or an otherwise valid contract term may under the circumstances lead to a manifestly unjust result"- whereby "whether in such cases the court should let justice prevail will depend, *inter alia*, upon to what extent certainty and predictability in contractual relationships would suffer by letting justice get the upper hand". Equally, good faith and fair dealing are an important factor when implied terms of a contract are to be determined (Article 6:102).

10. Certainly, the real function of good faith and fair dealing in the PECL can only be understood when one sees the interplay with the other rules. Such an interplay does not only relate to performance and non-performance of contracts, but also to formation of contracts. However, I will limit my analysis, given the title of this lecture, to the contents of contracts, thus leaving the precontractual aspects to other contributors.

This brings me to the following paradox :
- on the one hand, good faith is *prima facie* a superfluous concept for those solutions which are embodied in more specific rules; this follows from the negative delimitation in the formal dimension;
- on the other hand, this is a purely a-historical approach, which by neglecting the past cannot be fruitful for the future : solutions embodied in specific rules and seen – at least historically – as specifications of the good faith principle, give guidance for future interpretation of the same principle, precisely because law develops from precedent to precedent and because

specific rules are to a large extent nothing else than codified, petrified precedents. Thus the solutions formerly based on good faith, but now embodied in specific rules remain relevant to determine the contents of good faith. The formally superfluous often turns out to be the substantively essential.

2. The contents of contracts under the PECL.

11. In order to see which role good faith can play under the PECL, I would like to give a more extensive overview of the different elements determining the contents of contracts. I will take into account not only the PECL, but also the Convention on the international Sale of Goods (Rome Convention – CISG) and the Directive on consumer guarantees (EC Directive 99/44).

a) General contract law and specific contracts.

12. The PECL only constitute a first part of a project for a European Civil code, which should also contain Chapters on specific contracts. In order to see how the PECL deal with contents of contracts, this must be taken into account. In different legal systems, the relationship between both varies. In some jurisdictions, many things are detailed in General contract law, whereas others leave a lot to the rules on specific contracts. The PECL do the latter, although the Civil Code project tries to build an intermediate level with rules for service contracts in general.

We will detail below to what extent the contents of contracts are determined by the general contract rules in the PECL, and see that the PECL remain rather abstract. Anyway, general contract law must evidently create a minimal framework, namely rules permitting to determine:
(a) whether a contract was formed – see Art. 2:101 ff PECL, esp. Art. 2:103: *„(1) There is sufficient agreement if the terms: (a) have been sufficiently defined by the parties so that the contract can be enforced, or (b) can be determined under these Principles. (2) However, if one of the parties refuses to conclude a contract unless the parties have agreed on some specific matter, there is no contract unless agreement on that matter has been reached "* -, and
(b) what the main obligations are – as they will permit the qualification of a contract as one of a specific type.

b) How the contents are determined – sources of content.

13. As in the national legal systems, elements from different sources are "integrated" in the contents of contracts (to use the current expression in Italian, *integrazione del contratto*). I will dwell a bit longer on them, even if this exceeds somewhat the subject of good faith, for the reason mentioned i.e. that the precise role of good faith can only be seen when one also knows the other rules. But I'm dealing here only with rules on the primary contents of contracts, and neither with pre-contractual rules nor with the modification of the primary contents at a later stage (rules in case of non-performance).

1° Express terms

14. A first source of content are its express terms. The PECL contain a set of rules of interpretation in order to determine the effects of express terms (Chapter 5).

2° **Rules to determine undetermined terms.**

15. As Art. 2:103 PECL already implies, the Principles also contain a set of rules indicating how the terms of a contract can be determined, when their definition by the parties is insufficient for the contract to be enforced. More generally, the PECL contain rules to determine undetermined terms of a contract. On the one hand, we find rules enabling the parties to refer the further determination of the terms to a third party or even to one of the parties and at the same time restricting this determination by substituting a reasonable term when the term determined by the party or third party is grossly unreasonable (Art. 6:105 and 6:106 PECL). On the other hand, we find rules to determine how an undetermined price should be determined (Art. 6:104 PECL: *"Where the contract does not fix the price or the method of determining it, the parties are to be treated as having agreed on a reasonable price"),* or an indefinite period can be limited by ending the contract (Art. 6:109 PECL: "*A contract for an indefinite period may be ended by either party by giving notice of reasonable length*"). In these articles, good faith is not expressly used, but reasonableness is, and it indicates an application of the "restrictive" function of good faith

3° **Default rules on the modalities of performance.**

16. Further, the Principles contain specific rules on the modalities of performance, such as:
- Art. 7:102 PECL on the time of performance;
- Art. 7:101 PECL on the place of performance;
- Art. 6:108 PECL on the required quality of performance (at least average quality).

There are no explicit rules on transfer of risk. They are to a certain extent implied in the rules on place and time of performance. More specific rules are referred to the Chapters on Specific contracts. In my opinion, it would have been preferable to have explicit rules on transfer of risk in general contract law, too.

As to the quality of performance, the Principles thus remain equally vague. Precise rules can be found in specific contracts, eg in Uniform sales law, esp. Art. 35 para. 2 CISG requiring the goods to (a) "*be fit for the purposes for which goods of the same description would ordinarily be used* ", and Art. 2 Para 2 lit. (c) and (d) EC-Directive 1999/44 (Consumer sales), according to which „*Consumer goods are presumed to be in conformity with the contract if they (...) c) are fit for the purposes for which goods of the same type are normally used, and (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods (...)*"

It is not always clearly understood that quality is often a question of duration[10]. An essential element of quality relates to the period during which goods *remain* fit. Art. 36 CISG appears too restrictive in this respect – the quality is measured at the time of transfer of risk, "*unless*

[10] Eg H. GROSS & F.J. WITTMANN, "Technischer Zuverlässigkeit als Gegenstand kaufvertraglicher Regelung", *BB (Betriebsberater),* 1988, 1126.

a guarantee was given that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics". Such a restriction is absent from the Principles.

4° Statements giving rise to Contractual Obligations

17. A dogmatically very interesting provision is found in Art. 6:101 PECL, which reads:

"*(1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:*

(a) the apparent importance of the statement to the other party;

(b) whether the party was making the statement in the course of business; and

(c) the relative expertise of the parties.

(2) If one of the parties is a professional supplier which gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.

(3) *Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking*".

In sales law, there are more specific provisions along the same lines, especially the provisions requiring the goods:

- to comply with the description given by the seller (Art. 2 Para 2 lit. (a) Directive EG 99/44);
- to possess the qualities of the goods which the seller has held out to the consumer as a sample or model (Art. 35 Para 2 lit. c CISG and Art. 2 Para 2 lit. (a) Directive EG 99/44);
- to be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, (Art. 35 Para 2 lit. b CISG; comp. Art. 2 Para 2 lit. b Directive EG 99/44). In CISG, this only applies unless "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement".
- show the quality and performance (...) which the consumer can reasonably expect, (...) taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. (Art. 2 Para 2 lit. (d) Directive EG 99/44). Art. 2 Para 4 of the Directive makes an exception by providing that „The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he (a) shows that he was not, and could not reasonably have been, aware of the statement in question, (b) shows that by the time of conclusion of the contract the statement had been corrected, or (c) shows that the decision to buy the consumer goods could not have been influenced by the statement."

On the other hand, these requirements are limited by Art. 2 Para 3 EC Directive 99/44 and Art. 35 Para 3 CISG, according to which there shall be deemed not to be a lack of conformity

c.q. the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

18. Such provisions imply duties or burdens (i.e. *Obliegenheiten*) to inform and examine for both parties : the seller should enquire the purposes of the buyer and the qualities of the goods and in form the buyer about them; the buyer should examine the quality of the goods and inform the seller about his (specific) purposes. In principle, knowledge about specific purposes of the buyer is a responsibility of the buyer and knowledge about the qualities of the goods a responsibility of the seller. But the intensity of these duties or burdens depends on the position and capacity of the parties, especially their professional status.

Although such duties and burdens are pre-contractual in nature, their sanction is basically contractual : when a buyer does not inform the seller about a specific purpose, being fit for this purpose is not required for the conformity of the goods; when a seller gives erroneous information on the qualities the goods possess, possession of these qualities is nevertheless an element of the required conformity. The contents of contractual claims is thus in part determined by the pre-contractual behaviour of the parties.

In modern law, this is also true for obligations relating to specific goods and not only for obligations relating to generic goods (at least as to movable things)[11]. Delivery of an individually determined good (*species*), which does not possess the required qualities, is therefore a case of non-performance of the contractual obligation to deliver conforming goods and not merely a violation of a pre-contractual duty (as was originally the case with the aedilitian guarantees (*actio redhibitoria* and *actio aestimatoria*), where the idea was that a seller who has delivered what he has sold, has performed his obligation to deliver the sold goods, even when these goods were defective). A specific, express warranty is not required for this effect. The „initial impossibility" (of delivering conforming goods) is not relevant in this respect (unless it gives the seller a possibility to avoid the contract for mistake etc.). The availability, to the buyer, of specific contractual remedies, depends on the reasonableness of claiming repair or replacement. But the sanctions or remedies are anyway contractual and not pre- or extra-contractual, in the sense that their measure is the expectation interest (positive interest) and not the reliance interest (negative interest), as in tort law.

5° **Specific additional remedies in general contract law.**

19. A number of additional/ancillary contractual obligations, duties or burdens (pre-contractual ones are outside the scope of this lecture) can be deduced indirectly from the rules on modification and non-performance. Thus:
- The rules on *hardship* imply a duty to renegotiate a contract in case of changed circumstances meeting certain requirements (see Art. 6:111 (2) PECL);
- The rules restricting the right to terminate a contract to cases of fundamental non-performance (Art. 9:301 (1) PECL), imply a duty to co-operate of the creditor. The Principles prefer to uphold the contract, except where the creditor can make made a

11 Comp. also P. SCHLECHTRIEM, "10 Jahre CISG - Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts", *IHR* 2001, (12) 14 Nr. 2.

reasonable substitute transaction without significant effort or expense (see Art. 9:101 (2)(a) PECL);
- Art. 1:301 (4) PECL (definition of non-performance) implies a duty to co-operate in order to give full effect to the contract, duty which is also expressly formulated in art. 1:202 PECL. The scope of this duty seems rather limited, give the fact that its violation constitutes non-performance. It covers especially the duty to co-operate in performance in the strict sense by accepting performance and is thus addressed specifically to the problem of *mora creditoris*.
An application of this duty to co-operate could also be seen in the rule entitling the debtor to cure a defective performance before the time for performance (Article 8:104).

Most additional/ancillary contractual obligations, however, are not spelled out in the Principles and thus have to be implied according to the vague rules on good faith and nature and purpose of the contract; the Principles do not express these duties, but they do express how these duties should be implied or determined (see below 6°).

20. Some commentators – and I agree with them - have already indicated that they wish the Principles to contain more rules on additional or ancillary duties in the general part of contract law[12]. It is indeed better to formulate such duties directly, instead of having them inferred indirectly from the rules on non-performance and remedies. On the other hand, we should not forget that most of these duties are not actionable in themselves (specific performance cannot be claimed) and thus become really relevant only when their violation causes a non-performance (in the sense of Art. 1:301 (4) PECL).

In his Ph.D., M. Hesselink has correctly analysed the doctrine of additional duties by distinguishing four main categories :
- duties of care (*obligations de sécurité*), protecting the „negative interest“ (extra-contractual interests)of the other party[13];
- duties of loyalty (*devoirs de loyauté*), protecting the „positive interest“ (advantage of the contract itself) of the other party;
- duties to co-operate
- duties to inform.
According to this author, these four categories could better be summed up in general contract law.

One could also specify some typical categories of burdens, leading to the loss of rights or remedies. Here the most important ones can be deduce indirectly from the rules on remedies for non-performance (eg terminating or claiming specific performance within a reasonable time) or other chapters, such as prescription (interrupting prescription before the claim prescribes, etc.). But the burden not to behave inconsistently, and sanctioned by a loss of rights – *venire contra factum proprium nulli conceditur* – is only mentioned in the comments to the good faith article as a possible application (of the restrictive function of good faith).

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12 Eg M. HESSELINK, *Principles of European Contract Law*, Preadviezen voor de Vereniging voor burgerlijk recht, Kluwer 2001, p. 62.

13 M. HESSELINK, in *Towards a European Civil Code*, p. 295.

6° **Other – sources of - implied terms**

21. Finally, PECL contains a rule indicating the sources for further implied terms, thus stemming from:
- the (tacit) the intention of the parties, (Art. 6:102 PECL);
- the nature and purpose of the contract (Art. 6:102 PECL) – This rule can be seen as a reference to rules on specific contracts.
- good faith and fair dealing (Art. 6:102 PECL). Good faith is not only a rule for the interpretation of the Principles, but equally a norm integrating additional obligations and terms into the contract and restricting the exercise of contractual rights.

In sales law, the most important additional obligations are contained in the notion of (non-)conformity. The notion also covers additional terms, such as the required packaging (Art. 35 Para 2 lit. (d) CISG), the correct installation of the goods or correct installation instructions (Art. 2 Para 5 Directive EG 99/44), etc.

3. Vague norms and multi-level European law.

a) The formal/institutional dimension of vague norms in the PECL

22. Flexibility can be organised in different ways. One way is that of the German BGB: in essence a large number of rather detailed rules, superseded by a super-norm like the good faith clause in BGB § 242. It has been contrasted to the Swiss Code, and the contrast is striking precisely because both legal systems are substantively rather close to each other.

Zweigert/Kötz have argued that the style of the ZGB is because of its wide meshes the best style for a European code[14], even the only one if we want to realise an appropriate unification of law in Europe.

Where do the PECL stand on this point ? The PECL have to a large extent used that style.

Much more can be said about the style of the Principles – in other publications I have explained that the PECL avoid definitions to a large extent, and have a structure which is moderately effect-oriented (neither purely remedial, nor pseudo-naturalistic). Here, I only want to draw your attention to the fact that vagueness is structured not on the basis of one super-norm, but on a network of rather but not absolutely vague norms, such as good faith and fair dealing, reasonableness as to specific elements (eg reasonable time), usages and practices, nature and purpose of the contract, etc.

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14 ZWEIGERT/KÖTZ, *Einführung in die Rechtsvergleichung*, Mohr Tübingen, 3rd edition 1996, p. 175: "einmal deshalb, weil ohne gewisse kalkulierte Spielräume richterlicher Bewegungsfreiheit eine Rechtsvereinheitlichung europäischen Zuschnitts nicht realisierbar erscheint, zum anderen deshalb, weil wir den Vorgang, in dem der Richter die Tragweite einer geräumig gefaßten Gesetzesbestimmung allmählich entfaltet, inzwischen besser verstehen und schätzen gelernt haben und in ihm nicht mehr eine gefährliche Bedrohung der Rechtssicherheit sehen".

The authors clearly did not want to use good faith as a § 242 BGB in order not to scare common lawyers too much. We know the notion is nevertheless a legal irritant to them, as to some continental lawyers[15].

On the other hand, I'm missing a principle formulated along the lines of the famous art. 1 Swiss ZGB, as explained supra.

b) Vague norms as an instrument to organise sustainable diversity.

This brings me to the last question: what degree of uniformity of law do we reach in using such concepts in a European contract law? It is meanwhile a well-known criticism of uniform rules that they are not uniform at all, as lawyers tend to understand and apply these rules differently, each from the perspective and experience of their own national (or regional) background. However, I dare to say that this is partly the wrong discussion. Europe should be harmonised, not homogenized; our identity is multi-layered, and our law should to a certain extent correspond to that. European law may have his head in the sky, but should not be floating there without also keeping its feet on the ground and its manifold diversity. The correct question is in my view: how can we organise a legal system, which combines the necessary uniformity with an equally necessary degree of diversity. This is first of all a question of quantity: how uniform should contract law be ? But is also a question of technique. Diversity should be allowed, but a contained and predictable diversity. It mist be sufficiently predictable to what extent the uniform rules will be uniformly applied and to what extent their application involves different practices. Therefore these rules themselves should organise diversity by indicating the elements of variety, which may and will play a role. Reference to usages and practices is clearly part of this technique. If correctly used, good faith and reasonableness are therefore instruments, which allow us to take into account national and regional differences in an appropriate way.

15 See the article by G. TEUBNER, "Legal Irritants: Good Faith in British law or How Unifying law Ends Up in New Divergences", 61. *Modern Law Review* 1998, 11.