



Groningen, Ghent, Uppsala, Turku
Annual Legal Research Network Conference 2008
30-31 October 2008, hosted by the University of Groningen

**The development of the principle of good faith after the
implementation of the 'European Directive 93/13 on
unfair terms in consumer contracts'**

Maud Piers*

April, 2008

Abstract

The research I wish to present at the conference is part of a larger-scale comparative legal research project regarding the development of the principle of good faith in the European Union member states after the implementation of the 'European Directive 93/13 on unfair terms in consumer contracts'.

* * *

In what follows, I will more elaborately explain what the broader scope of my research is about.

BACKGROUND. In 1993 the Council of the European Union issued the Directive 93/13 on unfair clauses in consumer contracts (*PB L 95/29*). Article 3, 1 of this Directive states that a standard contract term shall be regarded as 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. The European Union herewith introduced the principle of good faith in its legislation. The European Union member states were hence required to implement a general application of the good faith principle into their respective legislations.

There was a lot of scepticism amongst academics over the general adoption of this principle of good faith by the European national systems of law. Their criticism primarily arose from the structural differences in legal cultures within Europe. Good faith typically is considered a Civil Law-concept, while English law rejects a general application of such principle. Moreover, also amongst Civil Law countries there is divergence regarding the scope and application of the good faith-principle. This led some to argue that any attempt towards harmonisation of this concept would be futile and unwelcome. Others voiced the opinion that the general use of the good faith principle does not necessarily have to be a “*legal irritant*” to Common Law, but on the contrary provides an opportunity for a more consistent – rather than a “*piecemeal*” – approach.

It is until today unclear whether these several, divergent views expressed in the past 10 years were justified in light of the following development and current stance of the good faith principle in legal practice. Several recent studies assessed to what extent the countries adapted their legislation to *formally* comply with the Directive’s requirements. It has, however, not been examined how article 3, 1 of the Directive influenced the current understanding and development of the principle of good faith in the *actual legal practice* of these European Union member states.

OBJECTIVES. The essential goal of my larger research project is to answer this question and to derive some useful conclusions this. My research project consists of primarily two stages. There will be a micro-comparative analysis as well as a macro-comparative synthesis.

Firstly, I aim to map out the value and understanding of the good faith principle in the domestic consumer law practice of several European Union member states. The European Union member states were required to implement the Directive, including the general application of the principle of good faith, into their national consumer legislation by 31 December 1994. It was not until April 1998 before all member states achieved this goal. The subject of my research is, therefore, time-wise defined over a ten year period, *i.e.* since 1998. It is clear that the mere ‘official’ implementation of the Directive 93/13 not necessarily entails a uniform application of the good faith-principle. The different European Union member countries have their own divergent views and legal cultures. A more important question is, therefore, how and to what extent the Directive influenced the development of the good faith principle in the actual domestic legal *practice*. This is where my research will be innovative. It will have its merit in a profound study of case-law and jurisprudence regarding the legal practice of a limited number of European Union member states. My selection is limited to a number of European Union member states whose legislations reflect divergent views on the good faith principle. My research of course cannot be without England as the most important representative of the Common Law tradition. In Civil Law traditions as well, there are interesting differences in views on how to apply the principle of good faith. Ten years ago, France and Germany were on opposite sides of the spectrum where the application of the good faith principle is concerned. They influenced Belgian and Dutch law on this matter. The Italian courts were initially quite reluctant to resort to good faith as a guideline to assess the legitimacy of standard terms of contract. I, therefore, add Italy, the Netherlands, Belgium, Germany and France to the list of countries whose legal practice I will examine. The subject of my research is thus clearly circumscribed in both time and space.

Secondly, with the results of this micro-comparative analytical (dogmatic and functional) research I want to contribute to the broader discourse regarding the influence of European Union law on domestic legal traditions and the significance of their (symbiotic) relationship. It is my ambition to provide an explanation for why the notion of good faith evolved in one or other direction. The analytical results will also be employed to (re-)evaluate the macro-comparative classification of legal traditions in the context of European private law.

* * *

At the conference, I would like to share the first results of my research. To that end, I will present a paper that I will have prepared over the summer in cooperation with the Oxford Institute for European and Comparative Law on some aspects of this larger-scale project.

Keywords: comparative law, good faith, unfair contract terms, consumer law

* University of Ghent (Belgium)
Faculty of Law
Comparative Law Department
Universiteitsstraat 4
B-9000 Ghent
Maud.Piers@Ugent.be