

Commercial agency and the duty to act in good faith

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Abstract– Under Directive 86/653/EEC on the co-ordination of the laws of the Member States relating to self-employed commercial agents (the ‘Directive’), commercial agents have an obligation to act ‘dutifully and in good faith’ (the ‘Obligation’). This article considers the impact that this general good faith clause has had upon the UK legal order. It first analyses the Obligation, assessing its scope, function and content. It then reviews the choices made by the UK legislature in implementing this duty and scrutinises the manner in which it has been construed and applied by UK courts, as well as commentators. Finally, it charts the areas of the pre-existing body of rules governing principals and agents at common law that are affected by this imported notion and appraises the resulting alterations to the positive law.

Keywords: agency, good faith, commercial agents, EU private law, common law, contract law

1. Introduction

Over the past thirty years, good faith¹ has progressively permeated the private law sphere of the EU legal order, appearing with increasing frequency in legislation, jurisprudence and soft law.²

This development did not give rise to theoretical difficulties in civil law Member States, as good faith was already an integral part of their legal frameworks.³ By contrast, pre-existing legal paradigms were challenged more acutely in common law jurisdictions, due to their traditional diffidence towards “general clauses”⁴ and historical aversion to good faith as a core concept of private law.⁵

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¹ Traditionally, legal scholarship distinguishes between subjective and objective good faith. Subjective good faith typically designates a state of mind and serves as a condition for the acquisition of definite rights. Objective good faith identifies a specific standard of conduct to be applied in relation to the behaviour of contracting parties or for the interpretation of the law or the construction of legally relevant acts (eg. contracts, deeds, wills). In some legal cultures, this distinction is clearly demarcated in the language: for example, in German “*Treu und Glauben*” and “*Guter Glaube*” are used to designate objective and subjective good faith respectively.

This paper is only concerned with objective good faith. Accordingly, the expression “good faith” exclusively refers to “objective good faith”, unless otherwise specified.

² For a recent overview see Norbert Reich, *General principles of EU civil law* (Intersentia 2013) 189-213.

³ See Reinhard Zimmermann and Simon Whittaker, ‘Good faith in European contract law surveying the legal landscape’ in Reinhard Zimmermann and Simon Whittaker (eds), *Good faith in European contract law* (CUP 2000) 1.

⁴ For an exhaustive analysis see Stefan Grundmann and Denis Mazeaud, *General Clauses and Standards in European Contract Law* (Kluwer 2005).

⁵ Classically, Roger Brownsword, ‘Good Faith in Contracts Revisited’ (1996) 49 CLP 111. In Scots law, Hector MacQueen, ‘Good faith in the Scots law of contract: an undisclosed principle?’ in ADM Forte (ed), *Good Faith in Contract and Property Law* (Hart 1999) 5. Cf *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB); Simon Whittaker, ‘Good faith, implied terms and commercial contracts’ (2013) 129 LQR 463.

Against this backdrop, legal scholars have devoted great attention to the implementation of EU good faith into the UK legal framework, expressing a veritable constellation of views, ranging from cautious enthusiasm to unapologetic scepticism.⁶ The significance of this notion in the consumer *acquis* directives and its impact on pre-existing English contract law have been the subject of lively scholarly debate.⁷ In like vein, the role of good faith in the Common European Sales Law (CESL)⁸ and its potential reverberations on the common law were subject to meticulous scrutiny,⁹ despite the fact that the CESL was merely a legislative proposal, ultimately withdrawn.¹⁰

By contrast, the duty to act in good faith in Directive 86/653/EEC on the co-ordination of the laws of the Member States relating to self-employed commercial agents¹¹ (the Directive) and its impact on agency at common law through the Commercial Agents (Council Directive) Regulations 1993¹² (the Regulations) have not been studied in comparable depth.¹³ This is surprising, as the Directive was the first EU private law legislative instrument to introduce such a duty, and it did so in the ambit of commercial transactions rather than in the more intensely regulated consumer *acquis*.

This paper endeavours to explore this scantily-charted area of the law. It will first analyse the obligation to act dutifully and in good faith in the Directive (the Obligation), assessing its scope, function and content. Subsequently, it will review the choices made by the UK legislature in implementing the Obligation and consider the manner in which this imported notion has been construed and applied by English, Scottish and Northern Irish courts, as well as commentators. Finally, it will appraise the impact that this duty to act in good faith has had on the pre-existing legal framework for agency at common law.

2. Good faith in the Directive

⁶ See Roger Brownsword, 'Positive, Negative, Neutral: The Reception of Good Faith in English Contract law' in Roger Brownsword, Norma Hird and Geraint Howells, *Good Faith in Contract: concept and context* (Ashgate 1999) 13-41.

⁷ For a comprehensive bibliography, see Stephen Weatherill, *EU Consumer Law and Policy* (Elgar 2013).

⁸ Proposal for a Regulation of the European Parliament and of the Council on Common European Sales Law (CESL) COM(2011) 635 final.

⁹ See Simon Whittaker and Karl Riesenhuber, 'Conception of Contract' in Gerhard Dannemann and Stefan Vogenauer, *The Common European Sales Law in Context: Interactions with English and German Law* (OUP 2013) 120.

¹⁰ For the withdrawal, see Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015, COM(2014)910 final, Annex 2, 12.

¹¹ [1986] OJ L382/17.

¹² SI 1993/3053.

¹³ The notable exceptions are Séverine Saintier and Jeremy Scholes, *Commercial agents and the law* (LLP 2005); Fergus Randolph and Jonathan Davey, *The European law of commercial agency* (2nd edn, Hart 2010); Peter Watts and Francis Reynolds, *Bowstead & Reynolds on agency*, (19th edn, Sweet & Maxwell 2010); Susan Singleton, *Commercial agency law and practice* (3rd edn, Bloomsbury 2010); Howard Bennett, *Principles of the law of agency* (Hart 2013); Roderick Munday, *The law of Agency* (2nd edn, OUP 2013).

The duty to act dutifully and in good faith established in the Regulations (the Duty)¹⁴ cannot be fully understood without an in-depth investigation of its counterpart in the Directive, for two reasons. Firstly, the former implements the latter into UK law; accordingly, it cannot venture beneath the harmonisation threshold set out in the EU legislation. Secondly, UK courts are under an obligation to construe the Regulations “as far as possible, in the light of the wording and purpose of the [Directive]”,¹⁵ pursuant to the principle of consistent interpretation.¹⁶ Thus, the Directive is the source towards which they must turn when construing the Duty.

The following analysis will commence by considering the provisions that establish the Obligation, then proceed to determine its scope, function, content and conclude by appraising the consequences arising in the event of a breach. The construction method adopted for this inquiry will combine a systematic analysis of the EU private law framework together with an investigation of the purpose, subject matter and wording of the Directive. This structured approach is consonant with the interpretation canons typically applied by the CJEU¹⁷ and carries notable advantages. It yields a more sophisticated construction of the Obligation, as it is informed by an understanding of good faith in EU private law. Moreover, this method overcomes the textual lacunae of the Directive and avoids the distortions caused by a strictly literal approach to the law.

A. The provisions of the Directive

The Directive only mentions “good faith” in Chapter II, “Rights and obligations”. Art¹⁸ 3(1) states that a commercial agent must act “dutifully and in good faith” in “performing his activities”.¹⁹ This norm is followed by a few examples of the types of conduct that are required of commercial agents: “(a) make proper efforts to negotiate and [...] conclude the transactions he is instructed to take care of; (b) communicate to his principal all the necessary information available to him; (c) comply with reasonable instructions given by his principal”.

Similarly, Art 4(1) requires principals to act “dutifully and in good faith” in their “relations” with their commercial agents. In Arts 4(2)-(3), this is exemplified as providing the commercial agent with “the necessary documentation relating to the goods concerned”, sharing the “information necessary for the performance of the agency contract”, giving notice “within a reasonable period” when it is anticipated that the volume of future commercial transactions will be “significantly lower than that which the commercial agent could normally have

¹⁴ The expressions “the Obligation” and “the Duty” are used to refer to the requirement to act “dutifully and in good faith” in the Directive and Regulations respectively; this is purely a linguistic choice that serves to highlight that these norms exist on different legislative planes.

¹⁵ Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135, para 8. Seminally see *Von Colson and Kamann v Land Nordrhein-Westfalen (Case C-14/82)* [1984] ECR I-1891, para 26; in relation to the Directive see *Centrosteeel Srl v Adipol GmbH (Case C-456/98)* [2000] ECR I-6007, paras 16-17.

¹⁶ Extensively, see Sasha Prechal, *Directives in EC law* (2nd edn, OUP 2005) 180-210.

¹⁷ On the interpretation of directives see Richard Brent, *Directives: Rights and Remedies in English and Community Law* (LLP 2001) 110; Prechal (n 16) 32, 76.

¹⁸ Unless otherwise specified, the abbreviations “Art” and “Arts” refer to provisions of the Directive.

¹⁹ Art 3(1) also requires a commercial agent to “look after his principal’s interests”; this is a distinct obligation ulterior and complementary to the Obligation, falling outside the scope of this paper.

expected”, and apprising the commercial agent “within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured”.

Art 5 concludes Chapter II, declaring that “the parties may not derogate from the provisions of Articles 3 and 4”.

The text of Arts 3-4 raises the issue of whether the composite expression “to act dutifully and in good faith” gives rise to a single obligation, or rather two distinct obligations: one to act “dutifully” and another to act “in good faith”. It is submitted that the phrasing “dutifully and in good faith” is a hendiadys that generates a single obligation. This wording was chosen by the European legislature to indicate that the relevant concept is objective rather than subjective good faith. This construction is supported, firstly, by a comparative analysis of the various language versions of the Directive. The German text uses the wording “*Treu und Glauben*”, which famously identifies objective good faith. The French version reads “*loyalment et de bonne foi*”, echoing the locution “*loyauté et bonne foi*”, which traditionally connotes objective good faith. Similarly, the other Romance languages mirror the French version. Secondly, the CJEU has referred to a single “obligation”²⁰ to act “dutifully and in good faith” in several decisions, as has the Commission in its Communication to the Council and the European Parliament on European Contract Law.²¹

B. The scope of the Obligation

Commercial agency relationships typically come into existence by way of agreement.²² Therefore, a practical approach to charting the scope of the Obligation is to ascertain whether it extends to all phases of a contract.

(i). Pre-contractual negotiations

Arts 3-4 do not mention negotiations, and the CJEU has not yet been called upon to determine whether the Obligation extends to this contractual phase. Following the methodological approach outlined above, the first step to address this interpretation issue is to consider systematically *culpa in contrahendo*²³ in EU private law.

EU Treaties do not contain provisions that explicitly or implicitly mandate specific standards of conduct during pre-contractual negotiations. Equally, the CJEU has not yet recognised *culpa in contrahendo* as an EU general principle of law.²⁴

²⁰ Case C-3/04 *Poseidon Chartering NV v Marianne Zeeship et al* [2006] ECR I-2505, para 24; Case C-19/07 *Heirs of Paul Chevassus-Marche v Groupe Danone et al* [2008] ECR I-161, para 22.

²¹ COM(2001)398 final, 28.

²² On whether a contract is a necessary requirement for a commercial agency relationship, see Andrea Tosato, ‘The European dimension of the Commercial Agents Regulations’ [2014] LMCLQ 544, 562.

²³ This locution is used here as a synonym for “obligation to negotiate in good faith”.

²⁴ See Takis Tridimas, *The general principles of EU law* (2nd edn, OUP 2006) 1-56; specifically on *culpa in contrahendo*, see Peter Rott, ‘Information obligations and withdrawal rights’ in Christian Twigg-Flesner (ed), *The Cambridge companion to European Union Private law* (CUP 2010) 187.

With regard to EU secondary sources of law, a small but significant number of private law legislative acts instruct parties to negotiate in good faith. In all of these cases, this requirement is enshrined in legislation that expressly sets out to govern the pre-contractual phase of the regulated transactions and is couched in unambiguous language.²⁵ Notably, there are no secondary sources of law in which a general reference to good faith engenders pre-contractual obligations,²⁶ and the CJEU has never advanced such an interpretation.

EU soft law instruments yield further indications concerning the issue at hand. In the Draft Common Frame of Reference (DCFR),²⁷ art II.–3:301 establishes that “a person is free to negotiate and not liable for failure to reach an agreement”; nevertheless, this rule is subject to the following qualification: “a person who is involved in negotiations has a duty to negotiate in accordance with good faith and fair dealing”.²⁸ Notably, art IV.E.–2:101 reduces the intensity of this obligation for “commercial agency, franchise and distributorship”, stating that parties need only provide each other with information “sufficient to allow them to decide on a reasonably informed basis whether to enter into a contract of the type on the terms under consideration” pursuant to “good commercial practice”.

This brief overview reveals that *culpa in contrahendo* is not foreign to EU private law. Nevertheless, it equally highlights that this doctrine is only found in legislation that

²⁵ See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15 (Satellite Broadcasting Directive), art 12(1); Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC [2002] L271/16 (Financial Services Marketing Directive), Art 3(2); Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (Gas Market Directive), art 33(3); Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] L084/72 (Copyright Multi-Territorial Licencing Directive), art 16(1). See also the repealed Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Distance Consumer Contracts Directive), art 4(2); repealed Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity [1992] OJ L27/20, art 20(2). Notably, in the CESL, the pre-contractual disclosures regime established in art 23 fell short of a duty to negotiate in good faith; see Paula Giliker, ‘Precontractual Good Faith and the Common European Sales Law: A compromise too far?’ [2013] ERPL 79.

²⁶ See Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Terms Directive), Art 3(1); Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Directives 84/450/EEC, 97/7/EC, 98/27/EC and 2002/65/EC and Regulation (EC) No 2006/2004 (Unfair Practices Directive) [2005] OJ L149/22, Art 2(h); Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (Late Payment Directive) [2011] OJ L48/1, art 7(1)(a); Commission Regulation (EU) No 1205/2011 of 22 November 2011 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard (IFRS) 7 [2011] OJ L306/16, Annex A.

²⁷ Christian von Bar and Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (OUP 2010).

²⁸ The DCFR designates objective good faith with the hendiadys “good faith and fair dealing”, while subjective good faith is simply referred to as “good faith”, adopting the terminology of the Principles of European Contract Law (PECL).

unequivocally aims to regulate pre-contractual interactions and, when it does appear, it is clearly expressed in *ad hoc* provisions.

Proceeding to the second part of the methodological approach previously described, focus turns to the purpose, subject matter and text of the Directive.

The purpose of the Directive is twofold: to institute a harmonised core of rules regulating determinate elements of a particular type of agency relationship across Member States, and to introduce definite protections for commercial agents *vis-à-vis* their principals.²⁹ Neither the recitals nor the enacting terms of the Directive indicate an intention to harmonise the rules governing negotiations for commercial agency contracts; furthermore, there is no suggestion that these pre-contractual interactions suffer from ontological or structural issues.

Regarding subject matter, the Directive regulates critical aspects of the relationship between commercial agents and principals, and the legal consequences following its cessation. There are no rules that govern the parties' conduct prior to the creation of the commercial agency. Furthermore, none of the examples of the duty to act in good faith in Arts 3-4 concern the pre-contractual phase.

The text of the Directive never mentions negotiations or interactions between the parties prior to the inception of the agency relationship. The recitals do mention "the conclusion" of commercial representation contracts; however, this fleeting reference cannot be construed as expressing an intention to regulate negotiations.

It is thus submitted that the scope of the Obligation does not extend to pre-contractual interactions, for two reasons.³⁰ First, the mere presence of one ambiguous textual element in Art 4(1) does not eclipse the absence of norms regulating negotiations in the Directive. Secondly, this legislative act lacks all the traits shared by those EU legislative instruments that require parties to negotiate in good faith.

(ii). *Contract performance*

The text of Arts 3(1)-4(1) leaves little doubt that the scope of the Obligation covers the performance of the agency. This is further supported by their collocation in the "rights and obligations" chapter of the Directive, and by the fact that all the examples in Arts 3(2)-4(2) concern performance.

Nevertheless, these provisions are not entirely free of uncertainty. Art 3 requires a commercial agent to act pursuant to the Obligation "in performing his activities", whereas Art 4 states that a principal must do the same "in his relations with the commercial agent". This subtly-differing

²⁹ See Case C-215/97 *Bellone v Yokohama* [1998] ECR-I 2191, para 13; Case C-381/98 *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [2000] ECR I-9305, paras 20-21.

³⁰ This view is shared by Bettina Wendlandt, 'EC Directive for Self Employed Commercial Agents and on Time-Sharing – Apples, Oranges, and the Core of the Information Overload Problem' in Geraint Howells, André Janssen and Reiner Schulze (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Ashgate 2005) 72.

wording calls into question whether the Obligation affects performance of the contract equally for both parties.

It is submitted that the unconventional phraseology in Arts 3-4 is an infelicitous functional description of the respective undertakings of commercial agents and principals, rather than a positive differentiation between their rights and obligations. Support for this construction is found in *Poseidon*, in which the reasoning of the CJEU implies that the Obligation is reciprocal and identical for both parties.³¹ EU soft law instruments authored by the Commission have also explicitly affirmed the same view.³²

(iii). Remedies

Arts 3-4 do not address whether the parties to a commercial agency relationship are subject to the Obligation when pursuing or defending remedies.

Considering this issue first from a systematic perspective, the Treaties do not contain provisions that holistically address the role of good faith in relation to remedies. Equally, the CJEU has not explored whether a general principle of EU law exists that requires remedies to be pursued and defended in good faith.

Among secondary sources of law, legislation that regulates procedural and remedial matters has been enacted in areas in which these interventions were deemed instrumental to the achievement of substantive harmonisation such as procurement law, competition law, intellectual property and free movement.³³ Notably, none of these legislative interventions establish a good faith requirement in relation to the pursuit and defence of remedies.³⁴

EU soft law instruments seldom venture into procedures and remedies. Nevertheless, in the DCFR, art III.-1:103 expressly states that “a person has to act in accordance with good faith and fair dealing in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship”.

Thus, notwithstanding the DCFR, the picture that emerges from this analysis illustrates that the EU legislature has not yet felt compelled to introduce the notion of good faith in relation to remedies, in the private law *acquis*.

Having acknowledged this premise, attention can turn to the Directive.

From a teleological perspective, all the objectives pursued by this legislative act are substantive in nature. There is no evidence to suggest that their achievement requires the imposition of an obligation to act in good faith when pursuing or defending remedies; from the perspective of

³¹ *Poseidon* (n 20), para 24.

³² See Communication to the Council and the European Parliament on European Contract Law (n 21) 28.

³³ For a survey see Christian Twigg-Flesner, *The Europeanisation of Contract Law* (Routledge 2013) 107-116.

³⁴ By contrast, CESL part IV-V contained detailed provisions that required parties pursuing and defending remedies to abide to the tenet of “good faith and fair dealing”.

the EU legislature the material issue is exclusively that Member State procedures and remedies ensure effective judicial protection of these aims.³⁵

With regard to subject matter, all provisions and recitals of the Directive concern the relationship between commercial agent and principal. There is nothing to indicate that the norms established in the Directive also extend to remedies, nor that the EU legislature sought to harmonise this aspect of the agency relationship. On the contrary, the only provision that tangentially touches these issues is Art 16, in which it is stated emphatically that the Directive does impinge on national rules governing immediate termination of agency contracts.

In like vein, neither the recitals nor the enacting terms of the Directive contain textual references to remedies.

Thus, it is submitted that there is no evidence to support the view that the scope of the Obligation extends to the remedial sphere.

C. The legal function of the Obligation

The Directive does not expressly articulate the legal function of the Obligation. This omission is problematic, as good faith has assumed markedly different guises over the course of the centuries and across jurisdictions, ranging from a judicial tool to advance natural law and pursue visceral justice to a statement of principle devoid of normative significance.³⁶

In light of this lineage, acquiring a systematic understanding of the functional profile of good faith in EU private law is particularly helpful in the accurate construction of the legal function of the Obligation.

(i). The legal function of good faith in EU private law

EU treaties do not contain express references to good faith that are relevant for a functional analysis in the private law sphere.³⁷

The CJEU has not recognised good faith as an EU general principle of law. Nevertheless, in the recent past, the Luxembourg court has referred to this notion as a “principle of civil law” and relied on it as a criterion for the interpretation of Art 6 of the Financial Services Marketing Directive.³⁸ However, as the exact scope, nature, role, and legitimacy of these “principles of

³⁵ See Anthony Arnall, ‘The principle of Effective Judicial protection in EU law, an unruly horse?’ [2011] ELR 51.

³⁶ Classically Franz Wieacker, *Zur rechtstheoretischen Präzisierung des §§ 242 BGB* (1956) who drew an analogy with Papinianus’ conception of the *ius honorarium* (or *ius praetorium*) as *adiuvandi vel supplendi vel corrigendi iuris civilis*. Recently, see Martijn Hesselink, *The Concept of Good Faith*, in Arthur Hartkamp, Martijn Hesselink, Ewoud Hondius, Chantal Mak and Edgar du Perron (eds), *Towards a European Civil code* (4th edn, Kluwer 2010) 619.

³⁷ By contrast, in the public law sphere, the CJEU has long established that the principle of sincere co-operation established in TEU Art 3(4) (Consolidated Version of the Treaty on European Union [2012] OJ C326/13) imposes a duty to co-operate “in good faith” for the EU and the Member States; for a recent restatement see Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, para 197. The Luxembourg Court has also recognised the duty to construe international instruments “in good faith” as an EU general principle of law; for a recent restatement see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 40.

³⁸ Case C-489/07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315, para 26.

civil law” remains unsettled, little can be drawn from this decision with regard to the general function of good faith in EU private law.³⁹

Among EU secondary sources of law, good faith appears in a limited number of legislative acts.⁴⁰ In the majority of cases,⁴¹ it serves as a behavioural requirement: it mandates that the parties must uphold an objective standard of conduct during specific stages of the regulated interactions. In two directives,⁴² good faith serves as a substantive requirement: it is one of the components of a broader fairness test that contract terms must substantively satisfy in order not to be held unenforceable. Here, good faith encroaches on the content of the stipulations agreed by the parties.⁴³

In the DCFR, good faith and fair dealing has multiple, distinct functions. Firstly, it is one of the criteria to be applied when interpreting the provisions of the DCFR itself.⁴⁴ Secondly, it serves as a standard of conduct that parties must uphold during negotiations, throughout contract performance and when pursuing or defending remedies.⁴⁵ Thirdly, it is one of the interpretation criteria that must be considered when construing contracts⁴⁶ and implying terms.⁴⁷ Fourthly, it is one aspect of the fairness test to which not individually negotiated terms are subject in business-to-consumer contracts.⁴⁸ Crucially, the commentary highlights that “the function of a court is to use the duty of good faith and fair dealing to fill gaps where necessary but not to use the duty to correct or improve the contract by making it more fair than the parties themselves intended”.⁴⁹ Thus, good faith and fair dealing does not override freedom of contract.

Thus, good faith does not serve as an overarching tenet in EU private law; its application is confined to the remit of the instruments in which it appears.⁵⁰ Moreover, leaving aside its nebulous role as a “principle of civil law”, this notion has a relative narrow functional profile in the legislation presently in force. It either imposes a mandatory standard of conduct on the

³⁹ See Stephen Weatherill, ‘The principles of civil law as a basis for interpreting the legislative *acquis*’ [2010] ERCL 75-85; Arthur Hartkamp, ‘The General Principles of EU Law and Private Law’, (2011) 75 *RabelsZ* 241-259; Martijn Hesselink, ‘The General Principles of Civil Law: Their Nature, Roles and Legitimacy’ [2011] Amsterdam Law School Legal Studies Research Paper No 2011-35.

⁴⁰ By contrast, examples of subjective good faith abound: eg Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L335/1, art 72(2); Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L302/2213, 106(2).

⁴¹ eg Unfair Practices Directive, art 2(h); Gas Market Directive, art 33(3).

⁴² Unfair Terms Directive, art 3(1); Late Payment Directive, art 7(1)(a).

⁴³ By contrast, in the CESL, good faith and fair dealing had a broad functional profile (CESL arts 2(1), 59(h), 68(1)(c), 83, 86, 170).

⁴⁴ See DCFR, art I.-1:102.

⁴⁵ DCFR, arts II.-3:301, III.-1:103.

⁴⁶ DCFR, art II.- 8:102.

⁴⁷ DCFR, art II.- 9:101.

⁴⁸ DCFR, art II.- 9:403.

⁴⁹ DCFR, art III.-1:103(2) Commentary D. Cf art II.-1:102(1) of the outline edition of the DCFR; see Horst Eidenmüller et al, ‘The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems’ (2008) 28 *OJLS* 659.

⁵⁰ Expressly acknowledged in the Green Paper on the Review of the Consumer Acquis, COM(2006) 744 final.

parties or serves as an element of a broad fairness test that governs the substance of certain types of contract terms.

(ii). *The functional profile of the Obligation in the Directive*

Returning to the Directive, the preceding overview indicates that a fertile starting point for an inquiry into the legal function of the Obligation would be to determine to whom it is addressed.

Neither a teleological nor a textual analysis of the Directive suggests that the Obligation is directed to courts. There are no provisions establishing that the Directive must be interpreted pursuant to good faith; the canons of interpretation generally relevant for EU secondary legislative acts apply unaltered.⁵¹ Likewise, there are no rules requiring that the terms of commercial agency agreements must be construed in good faith; national canons and conventions will not be supplanted. It follows that the Obligation does not have an interpretative function.

Similarly, courts are not required to assess whether contract terms are consistent with the Obligation, and the Directive does not subject the validity of the stipulations of commercial agency agreements to a broad fairness test. Accordingly, the Obligation does not serve as a substantive requirement.

Arts 3-4 are unequivocally addressed to commercial agents and principals. These provisions postulate that the parties must uphold a specific standard of conduct throughout the performance of the commercial agency and provide examples of the required behaviour. This is fortified by Art 5, which bestows mandatory character to Arts 3-4, by dictating that the parties cannot derogate from these provisions.

Based on the elements adduced from EU private law and the Directive, it is submitted that the Obligation serves as a mandatory behavioural requirement, characterised by a proscriptive and a prescriptive dimension.

The proscriptive dimension prohibits principals and commercial agents from acting in a manner contrary to good faith when performing the agency agreement; consequently, it also debars parties from exercising their rights and performing their obligations in a manner inconsistent with this prescribed standard of conduct. Though it is not expressly enunciated in the form of a prohibition to act in bad faith, this functional trait can be inferred *a contrario* from the positive statement that parties must act in good faith in Arts 3-4.

The prescriptive dimension awards rights and imposes obligations on principals and commercial agents alike, supplementing those stipulated in their agreement; accordingly, the Obligation acts as a source of implied terms. This functional trait can be deduced from Arts

⁵¹ In this respect, the impact of good faith as a “principle of civil law” could be significant; see n 38.

3(2), 4(2)-4(3), as these provisions offer a non-exhaustive list of the types of conduct that commercial agents and principals are required to perform under the Obligation.⁵²

D. The content of the Obligation

Scope and function are essential elements towards a complete understanding of the Obligation. Nevertheless, they do not assist in addressing the fundamental question: what is the standard of conduct demanded by the obligation to act in good faith established in the Directive? To answer this question it is necessary to determine the content of the Obligation.

The Directive does not impart comprehensive guidance on this matter, nor yet has the CJEU.⁵³ Following the methodological approach adopted throughout this paper, it is submitted that this construction issue must be addressed by combining general indications deduced from the EU legal framework with the specific ones extrapolated from the Directive.

(i). The content of good faith in EU private law

EU Treaties do not provide general indications concerning the content of good faith in EU private law. Equally, though the CJEU has referred to good faith in multiple decisions, it has never ventured into an exhaustive discussion of the substance of this concept.

EU secondary sources of law that do mention good faith neglect to provide an intensional definition of this notion. Nevertheless, the following legislative acts offer guidelines and indications for its application in relation to their regulated subject matter.

The recitals of the Unfair Terms Directive note that conformity of contractual provisions with good faith must be assessed with particular regard to the idiosyncrasies of the transaction at hand and “the strength of the bargaining positions of the parties”.⁵⁴ This standard is satisfied when suppliers act “fairly and equitably”, and take into account the other party’s legitimate interests.⁵⁵ In interpreting this directive, the CJEU has held that it is for national courts to decide whether a concrete term satisfies the requirement of good faith,⁵⁶ yet has remarked that this appraisal must be conducted pursuant to the criteria detailed in the recitals.⁵⁷

In like vein, the Late Payment Directive qualifies “any gross deviation from good commercial practice, contrary to good faith and fair dealing” as a relevant “circumstance” in appraising whether a contract term is grossly unfair and thus unenforceable.⁵⁸ In relation to “good faith

⁵² This view is shared by Martin Franzen, *Privatrechtsangleichung durch die Europäische Gemeinschaft* (De Gruyter 1999) 544-548; Oliver Remien, ‘Die Vorlagepflicht bei Auslegung unbestimmter Rechtsbegriffe’ (2002) 66 *RabelsZ* 503, 518, 524.

⁵³ The CJEU briefly considered the Obligation in Case C-203/09 *Volvo* [2010] ECR-I-10721, para 34; *ibid* see Opinion of AG Bot, paras 39-45; see also *Poseidon* (n 20) para 24.

⁵⁴ Unfair Terms Directive, recitals 16-17.

⁵⁵ *ibid*.

⁵⁶ Case C-237/02, *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter et Ulrike Hofstetter* [2004] ECR I-3403.

⁵⁷ C-415/11, *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* [2013] 1 CMLR 5, para 69.

⁵⁸ Late Payment Directive, art 7(1)(a).

and fair dealing”, the recitals expressly refer to the DCFR and provide examples of unfair stipulations.⁵⁹

In the Unfair Practices Directive, good faith is a constituent element of the “professional diligence” standard that professionals must uphold during all regulated interactions with consumers. The definition of “professional diligence” ties the notion of good faith to conduct consistent with the commercial standards of the “trader’s field of activity”.⁶⁰

Other legislative acts do not provide equally explicit guidance, yet tacitly offer indications for the application of good faith in their respective ambits.

In the Financial Services Marketing Directive, information provided to consumers by financial service suppliers must be communicated with due regard for the principle of good faith.⁶¹ Neither the recitals nor provisions elucidate the content of this standard of conduct, but the underlying regulatory aim is to prevent the exploitation of informational asynchronies.

Both the Gas Market Directive and the Copyright Multi-Territorial Licencing Directive require pre-contractual negotiations to be conducted in good faith.⁶² The recitals and enacting terms do not provide details, but the imposition of this standard of conduct appears to stem from policy concerns germane to this sector; the aim is to ensure that unregulated pre-contractual interactions do not eventuate in abusive exploitation of asymmetrical bargaining positions, undermining the pursued market liberalisation.

EU soft law bestows additional elucidations. The Green Paper on the Review of the Consumer Acquis⁶³ expressly remarks that there is no general duty to act in good faith in EU private law or even in the more limited consumer *acquis*. Nevertheless, when hypothesising on the introduction of such a tenet, the Commission suggested that if it were to exist, it ought to include the idea of paying “due regard to the interests of the other party, considering the specific situation of certain consumers”.⁶⁴

In the DCFR, “good faith and fair dealing” is presented as an overarching tenet,⁶⁵ defined as “a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question”.⁶⁶ The commentary states that “honesty” carries its “normal meaning”, to be deduced in contrast to dishonesty, and that “openness” denotes transparency in a person’s conduct.⁶⁷ With regard to “consideration for the interests of the other party”, malicious behaviour is always against good faith, but otherwise “only a basic level of consideration” is required, without having to yield to the interests of the

⁵⁹ Late Payment Directive, recital 28.

⁶⁰ Unfair Practices Directive, art 2(h).

⁶¹ Financial Services Marketing Directive, art 3(2).

⁶² Gas Market Directive, art 33(3); Copyright Multi-Territorial Licencing Directive, Recital 31, art 16(1).

⁶³ See n 50.

⁶⁴ *ibid* 17.

⁶⁵ DCFR, art 0.-301.

⁶⁶ DCFR, art I.-1:103. A similar definition was present in the CESL (RegCESL, art 2(b)).

⁶⁷ DCFR, art I.-1:103, Comment A.

other party peremptorily.⁶⁸ The actual degree of consideration to be exhibited will depend on the circumstances and nature of the agreement, possibly fading into the background in detailed commercial contracts.⁶⁹ The commentary further remarks that “what the parties agreed in the contract” is paramount in determining whether a particular behaviour is in accordance with good faith and fair dealing.⁷⁰ Interestingly, in the “Specific Contracts” Book, under the common provisions for commercial agency, franchise and distributorship contracts, arts IV.E.-2:201 and IV.E.-2:202 articulate the duty of “good faith and fair dealing” by establishing specific obligations of “co-operation” and “information during performance” respectively.⁷¹

It would be an untenable proposition to argue that these sources of law provide sufficient elements to infer systematically a robust and comprehensive construction of good faith in EU private law.⁷² Nevertheless, there are several distinguishing features that emerge consistently.

Firstly, good faith has an autonomous meaning that must be applied consistently across Member States, pursuant to the principle of uniform application of EU law.⁷³ This can be deduced from the fact that none of the legislative acts featuring this notion refer to Member State laws for its definition.

Secondly, good faith is a general clause. It is characterised by a broad and highly abstract nucleus that must be “concretised”⁷⁴ in relation to the apposite context of application. There are not multiple, distinct conceptions of good faith, each with different content depending on the ambit in which it appears.⁷⁵

Thirdly, as good faith is a general clause it cannot easily be reduced to an exhaustive, positive definition. Nevertheless, over the past decade, honesty, openness and regard for the interest of the other party have progressively emerged as its primary ingredients in EU soft law instruments⁷⁶ and this conceptualisation has spilled over to legislative acts.⁷⁷

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ DCFR, art III.-1:103(2) Comment D.

⁷¹ DCFR, art IV.E.-2:201, Comment A; art IV.E.-2:202, Comment B.

⁷² *cf* Reich (n 2) 189-213.

⁷³ *Seminally*, Case C-327/82 *Ekro* [1984] ECR 107, para 11; in EU private law, see Whittaker and Riesenhuber (n 9) 111-112.

⁷⁴ Throughout this paper, the word “concretisation” is used to signify the process by virtue of which the abstract nucleus of good faith is reduced to guidelines and precepts that are then applied by courts to the specific facts of the case at hand. The function of concretisation is to rationalise and objectivise good faith, yet without depriving it of its open norm character. In some jurisdictions, concretisation has been carried out by way of legislation. In others, it has been the fruit of legal scholarship, either by way of inductive reasoning based on court decisions or through deductive theoretical abstractions. Extensively on “concretisation” see Hesselink (n 36) 623-624; Peter Schlechtriem, ‘The Functions of General Clauses, Exemplified by regarding Germanic Laws and Dutch Law’, in Grundmann and Mazeaud (n 4).

⁷⁵ This view is shared by Stefan Grundmann, ‘The General Clause or Standard in EC contract law’ in Grundmann and Mazeaud (n 4) 141; see also Case C-453/10, *Pereničová v SOS financ spol sro* [2012] 2 CMLR 28 opinion of AG Trstenjak; C-435/11, *CHS Tour Services GmbH v Team4 Travel GmbH* [2001] ECR, opinion of AG Wahl, para 29.

⁷⁶ *eg* DCFR and previously PECL.

⁷⁷ *eg* the express references to the DCFR in the Late Payment Directive and in the CESL.

Fourthly, the legislation in which good faith is included expressly or impliedly provides guidelines for its concretisation.⁷⁸ Though these criteria are diverse, there are several recurring, underlying themes⁷⁹ such as avoidance of market failures,⁸⁰ prevention of the abuse of asymmetries,⁸¹ consideration for the intentions of the parties as objectively attested in their agreement,⁸² and attention to the relevant commercial context.⁸³

It is submitted that the Obligation bears all these features and thus requires parties to act with honesty, openness and regard for the interests of the other party to the transaction. Crucially, the next step is to identify the criteria for the concretisation of this standard of conduct, in the context of the commercial agency.

(ii). *The concretisation of good faith in commercial agency*

The Directive does not offer explicit textual indications conducive to the concretisation of the Obligation. Nevertheless, Arts 3(2), 4(2) provide examples of what is expected of the parties to satisfy the mandated standard of conduct. Though these behaviours concern diverse aspects of the agency relationship, the underlying theme is positive collaboration between commercial agents and principals towards the full realisation of their agreement.

Looking beyond the text of the provisions, further indications can be deduced from the aims and subject matter of the Directive.

With regard to the former, as previously observed, one stated aim of the Directive is to introduce specific protections for commercial agents at certain junctures of the agency relationship. This objective reflects the attention of the EU legislature to market failures engendered by imbalanced contractual relationships, even outside the consumer *acquis*.⁸⁴

With regard to subject matter, the Directive sets out a broad definition of commercial agency. The specificities of the parties involved may vary significantly. The commercial agent may be an individual trader and the principal a large corporation; conversely, the principal may be an entrepreneur entirely dependent on its commercial agent for market penetration; still differently, the parties may be evenly matched. Equally, the nature of the agency stipulated by the parties is subject to a wide margin of variation; it can range from intensely relational and open-ended, to an arm's length agreement of limited duration and finite objectives.

Based on the express and implied elements extrapolated from the Directive, it is submitted that it is possible to delineate two normative precepts that assist in concretising the standard of

⁷⁸ eg Unfair Terms Directive, Unfair Practices Directive, Late Payment Directive.

⁷⁹ cf David Campbell and Hugh Collins, *Discovering the implicit dimensions of the contract*, in David Campbell, Hugh Collins, John Wightman, *Implicit dimensions of contract* (Hart 2003) 25-51.

⁸⁰ eg Gas Market Directive, Copyright Multi-Territorial Licencing Directive.

⁸¹ eg Unfair Terms Directive, Unfair Practices Directive and Late Payment Directive.

⁸² eg Unfair Terms Directive, the CESL and the DCFR.

⁸³ eg Unfair Practices Directive, Late Payment Directive.

⁸⁴ See Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' [2009] ERCL 301.

conduct of honesty, openness and regard for the interests of the other party mandated by the Obligation.

Firstly, expressing honesty and openness, commercial agents and principals must mutually co-operate in the performance of their agreement. Conduct in good faith requires that each party proactively take action to assist the other in the realisation of their bargain, as opposed to mere abstention from obstructive behaviour. However, whether a party has acted in good faith must not be determined by reference to a moral or metaphysical notion of co-operation; this assessment must be based on an objective appraisal of the actual commercial agency relationship. Accordingly, the intensity of the required co-operation will vary, depending on the terms of the contract and the pertinent commercial practices.

Secondly, commercial agents and principals must not exploit asymmetries in their agency relationship in such a manner that frustrates the legitimate expectations of the other party. In this respect, whether a conduct is in breach of the Obligation must be appraised holistically, considering all aspects of the relationship; material facts will include the contractual and commercial leverage of each party, their objective intentions as enshrined in the contract, and the business practices of the sector in question. Nevertheless, the starting axiom of this investigation must be that these are commercial relationships⁸⁵ in which professionals are expected to be self-reliant and must be free to pursue their self-interest. Critically, this will not be an estimation aimed at achieving ontological fairness, a just bargain or equilibrium between the giving and receiving of commercial agents and principals.⁸⁶

E. The consequences of breach of the Obligation

The Directive does not contain provisions that address the consequences flowing from a breach of the Obligation. This is not an oversight on the part of the EU legislature, but rather a choice inspired by the EU law tenets of proportionality and subsidiarity.⁸⁷ Thus, pursuant to the principle of procedural autonomy,⁸⁸ Member States can apply their domestic procedural and remedial norms, provided that they satisfy the requirements of equivalence and effectiveness demanded by the CJEU.⁸⁹

3. Good faith in the Regulations

The preceding exploration of the Obligation in the Directive provides the necessary frame of reference to analyse and construe the Duty in the Regulations.

⁸⁵ For relationships involving consumers, see Chris Willet ‘General clauses and the competing ethics of European consumer law in the UK’ (2012) 71 CLJ 412.

⁸⁶ Steven Burton’s “foregone opportunities” approach theory offers here an appealing model. Steven Burton, ‘Breach of Contract and the Common Law Duty to Perform in Good Faith’, (1980) 93 Harvard LR 372.

⁸⁷ *Ex multis* Tridimas (n 24) 136-193.

⁸⁸ Seminally, Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989, 1997. *Ex multis*, Walter Van Gerven ‘Of Rights, Remedies and Procedures’ 37 CMLRev 501.

⁸⁹ *Ex multis*, Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart 2004).

The implementation of the Directive into UK law will be assessed first, to acquire an understanding of how the surrounding legal environment influenced this process and its outcomes. Thereafter, mirroring the structure of the first part of this paper, the text of the relevant sections of the Regulations will be reviewed, followed by the scope, function and content of the Duty.

A. *The implementation of the Directive in UK law*

The EU Commission proposal to harmonise the law of commercial agents across Member States was not well received in the UK.⁹⁰

Once the Directive was enacted, its implementation proved to be a lengthy and tortuous process in Westminster. Ultimately, the UK legislature⁹¹ elected to transpose the words of the Directive almost verbatim into the Commercial Agents (Council Directive) Regulations 1993 (SI 1993/3053), adopting the “copy-out” technique.⁹²

This drafting choice embodied a strong desire not to alter the pre-existing common law agency rules beyond what was strictly required by EU law, while avoiding *Francovich* liability due to an imperfect implementation.⁹³ Nevertheless, the “copy-out” technique fettered the Regulations with two notable flaws. Firstly, as EU legal terminology is both autonomous and distinct from that of Member States, the verbatim transposition of the Directive yielded a statutory instrument bearing terms that are either unknown or have a different meaning at common law. Secondly, the Regulations lack co-ordination with the pre-existing UK legal framework, as they merely reproduce the norms of the Directive, which detail only the specific harmonisation objectives to be realised.⁹⁴

B. *The provisions of the Regulations*

Reflecting the “copy-out” method of implementation, Regs⁹⁵ 3, 4 and 5(1) reproduce the Directive almost verbatim.

⁹⁰ See the Law Commission, Law of Contract Report on the Proposed EEC Directive on The Law Relating to Commercial Agents (Law COM No 84), 48 suggesting that the proposed directive “offended against basic principles of the English law of agency”. See also the House of Lords Select Committee Fifty-First Report, Wednesday 27 July 1977, paras 2, 11 questioning the desirability of EU intervention in this area of private law and the quality of the drafting.

⁹¹ The Regulations were prepared by the Secretary of State for Trade and Industry under statutory powers conferred in the European Communities Act 1972 s 2(2), and were presented by the Secretary of State to Parliament for approval. On the different drafts of the Regulations, see Randolph and Davey (n 13) 13-24.

⁹² For a critical analysis see Prechal (n 16) 32, 76; Lynn Ramsey, ‘The Copy Out Technique: More of a ‘Cop out’ than a solution?’ [1996] SLR 218, 219-221.

⁹³ See Randolph and Davey (n 13) 22-24; The Department of Trade and Industry, *Review of the Implementation and Enforcement of EC Law in the UK*, (1993) 42-3.

⁹⁴ See Saintier and Scholes (n 13) 17.

⁹⁵ Unless otherwise specified, the abbreviations “Reg” and “Regs” refer to provisions of the Regulations.

The dominant view among authorities⁹⁶ and commentators⁹⁷ is that the requirement for commercial agents and principals to act “dutifully and in good faith” in Regs 3-4 gives rise to a single obligation.⁹⁸

Nevertheless, in *Simpson v Grant & Bowman Limited*,⁹⁹ HHJ Alton described the duty to act “in good faith” and that to act “dutifully” as distinct “elements” of Reg 4.¹⁰⁰ Similarly, in *Rossetti Marketing Ltd v Diamond Sofa Co Ltd*,¹⁰¹ Cranston J held that “the concept in regulation 3 of a commercial agent ‘acting dutifully’ has not received the same attention as has that of good faith. In my view it connotes the obligation to act loyally. For present purposes both sides accept that the duty of loyalty reflects the fiduciary duty of an agent at common law ... Strictly speaking, to act dutifully is a concept of European law, with an autonomous meaning, albeit one which may draw on national analogies”.¹⁰²

Respectfully, this alternative view is unconvincing, as it is incompatible with the Directive. It is the product of a textual and compartmentalised construction of the Regulations that disregards their European dimension and the principle of consistent interpretation.¹⁰³

C. The scope of the Duty

Courts have unanimously recognised that commercial agents and principals are subject to the Duty during the performance of the commercial agency.¹⁰⁴ By contrast, there are no authorities that deal with pre-contractual negotiations¹⁰⁵ and remedies. The absence of case law, however, has not deterred commentators from sharing their views on these issues.

Saintier and Scholes submit that the reference to principals’ “relations” with their commercial agents in Reg 4(1) implies that the scope of their duty to act in good faith includes pre-contractual negotiations.¹⁰⁶ Moreover, they suggest that this construction is consonant with the purpose of the Regulations, as it prevents “the principal from taking advantage of the commercial agent rather like the Unfair Terms in Consumer Contracts Directive and ... rather like the duty of disclosure placed on the insured in insurance law in English law”.¹⁰⁷ From this basis, they subsequently conclude that commercial agents are bound by an identical duty to

⁹⁶ See *Page v Combined Shipping and Trading Co Ltd* [1996] CLC. 1952; *Cooper v Pure Fishing Ltd* 22 July 2003 Manchester District Registry Mercantile Court; *Npower Direct Ltd v South of Scotland Power Ltd* [2005] EWHC 2123; *Cureton v Mark Insulations Ltd* [2006] EWHC 2279 (QB), ECL Rep 2006, 6(4), 24; *Vick v Vogles-Gapes Ltd* [2006] EWHC 1665 (QB), (2006) 150 SJLB 917; *Scottish Power Energy Retail Ltd v Taskforce Contracts Ltd* [2008] CSOH 110, 2009 SCLR 137; *Anderson v Crocs Europe BV* [2011] EWHC 3386 (QB);

⁹⁷ See Saintier and Scholes (n 13) 76; Randolph and Davey (n 13) 56; Bennett (n 13) 113.

⁹⁸ See 2.1.

⁹⁹ [2006] EuLR 933.

¹⁰⁰ *ibid* [15].

¹⁰¹ [2011] EWHC 2482 (QB); [2012] Bus LR 571 (QBD).

¹⁰² *ibid* [41]. See Andrew McGee, ‘Relations between a commercial agent and his principal’ [2013] JBL 541.

¹⁰³ See 2A.

¹⁰⁴ *eg Page* (n 96); *Npower* (n 96); *Rossetti* (n 101).

¹⁰⁵ *cf Parks v Esso Petroleum Co Ltd* [1999] 1 CMLR 455 (Ch D) in which it was not discussed whether a misrepresentation at common law was also a breach of Reg 4.

¹⁰⁶ Saintier and Scholes (n 13) 100-101.

¹⁰⁷ *ibid*.

negotiate in good faith, because of the “reciprocity and symmetry”¹⁰⁸ that characterise all parties’ obligations in the Regulations.

Respectfully, this thesis is unconvincing.

Firstly, from a methodological standpoint, Saintier and Scholes’ arguments are primarily textual and largely reliant on analogies with English law; the Directive is only marginally considered. This approach is flawed, as such disregard for the principle of consistent interpretation ultimately undermines the uniform application of EU law.

Secondly, with regard to the proposed duty for principals to negotiate in good faith, Saintier and Scholes do not provide adequate substantiation to support their broad construction of the word “relations” in Reg 4(1), beyond the basic observation that this term possesses a wide semantic connotation.¹⁰⁹

Thirdly, the proffered analogy between the position of principals under the Regulations and that of traders under the Unfair Terms Directive is unsustainable. Consumers are awarded special protections when negotiating with traders to compensate for their intrinsically weaker bargaining position. Though the Regulations introduce specific safeguards for commercial agents *vis-à-vis* their principals, they do not purport that their position is analogous to that of consumers; by definition, commercial agents are self-employed professionals dealing with other professionals and their relative bargaining power will vary depending on the circumstances.

Fourthly, the advocated analogy between the Regulations and English insurance law is problematic. As a preliminary remark, it must be noted that the Insurance Act 2015 has almost entirely effaced the significance of good faith from pre-contractual negotiations of insurance contracts, negating any possible analogy with the Duty for present purposes.¹¹⁰ However, even disregarding this reform, good faith previously required that the insured party disclose all information material to the judgement of the insurer during negotiations. This was a departure from the *caveat emptor* principle otherwise applicable to commercial transactions at common law, traditionally justified by the nature of insurance as an arm’s length relationship, uniquely dependant on information.¹¹¹ The rationale was that the insured has better knowledge of “the risks in respect of which the contract is to be made—whereas the insurer is likely to be unaware of the extent of those risks”.¹¹² Commercial agency differs profoundly from insurance. Most pertinently, there is no congenital informational asymmetry between principals and

¹⁰⁸ *ibid.*

¹⁰⁹ Notably, the English, Portuguese, Spanish and Romanian versions of the Directive uses the term “relations” or equivalent wording. By contrast, the French and Italian versions contain the word “*rappports*” and “*rapporti*” in Art 4(1), as opposed to the broader “*relations*” and “*relazioni*” used in Arts 1, 17(3). Differently, in Art 4(1), the German version simply states that the principal must behave towards the agent pursuant to the commandments of “*Treu und Glauben*”.

¹¹⁰ Insurance Act 2015 ss 3, 14-18. See Guy Blackwood, ‘The pre-contractual duty of (utmost) good faith: the past and the future’ [2014] LMCLQ 311.

¹¹¹ See Howard Bennett, ‘Mapping the doctrine of utmost good faith in insurance contract law’ [1999] LMCLQ 165.

¹¹² Francis Rose, ‘Informational Asymmetry and the Myth of Good Faith: Back to Basis’ [2007] LMCLQ 181.

commercial agents to warrant a departure from the *caveat emptor* orthodox negotiating position.

Fifthly, specifically with regard to commercial agents, Saintier and Scholes' thesis is built on the axiom that principals are subject to the Duty throughout negotiations; if, as argued above, this hypothesis is incorrect, their whole construction crumbles.

It is submitted that the scope of application of the Duty mirrors that of the Obligation and does not extend to pre-contractual negotiations.¹¹³ This is supported by the observation that the UK legislature did not intend to realise an expansive implementation of the Directive. Furthermore, in light of the historical disinclination of the common law towards *culpa in contrahendo*,¹¹⁴ had there been an intention to introduce a duty to negotiate in good faith, it likely would have emerged from the *travaux préparatoires* of the Regulations and the normative text would have been worded in an unambiguous manner.

With regard to remedies, Saintier and Scholes claim that the arguments they submit to theorise a doctrine of *culpa in contrahendo* in the Regulations also support the view that parties are “bound by their duties of good faith when terminating the relationship and also in dealing with the consequences of termination (e.g. as to finalising the financial settlement between them and as to the operation of any post-termination restrictive covenant as referred to in Regulation 20)”.¹¹⁵

Respectfully, this thesis is not compelling.

Firstly, the methodological and substantive criticisms previously levelled at the arguments offered in support of the inclusion of negotiations within the scope of Duty are equally valid in this context.

Secondly, Saintier and Scholes use the word “termination” loosely to indicate the coming to an end of the commercial agency relationship,¹¹⁶ espousing the semantics of the Regulations.¹¹⁷ However, used so broadly,¹¹⁸ the word “termination” covers a panoply of situations, in which the parties are subject to markedly different rules.¹¹⁹ Hence, the proposition that commercial agents and principals are subject to the duty of good faith “when terminating the relationship” is dogmatically deficient, as it indiscriminately commingles a multitude of situations that are not homogenous at law.

¹¹³ This view is shared by Bennett (n 13) 114.

¹¹⁴ See Paula Giliker, *Pre-Contractual Liability in English and French Law* (Kluwer 2002).

¹¹⁵ Saintier and Scholes (n 13) 101.

¹¹⁶ This is evidenced by their reference to Reg 20.

¹¹⁷ See Regs 17-18; the word “termination” is copied-out from the Directive verbatim.

¹¹⁸ As opposed to using the word “termination” strictly to refer to the remedial, prospective dissolution of the contract; on this issue see *Light v Ty Europe Ltd* [2003] EWCA Civ 1238; [2003] EuLR 858; *Pure Fishing* (n 96) [15]-[18].

¹¹⁹ eg discharge by agreement, resolution by effluxion of time, frustration, as well as acceptance of a repudiatory breach.

Thirdly, Saintier and Scholes' thesis is incomplete as it only considers termination, neglecting to discuss whether the scope of the Duty also extends to other remedies.

Thus it is submitted that the scope of the Duty does not extend to remedies. This is supported by the observations that the Directive does not intend to harmonise the remedial framework surrounding commercial agency, and that the Regulations in no way suggest that the UK legislature intended to amend the common law in this area.

D. The function of the Duty

The Regulations do not provide express guidance concerning the legal function of the Duty, mirroring the text of the Directive.

Consequently, it is perhaps unsurprising that English and Scottish judges have dealt cautiously with this issue. Nevertheless, it is possible to construe inductively the functional profile attributed to the Duty by reviewing the case law.

Firstly, authorities have consistently ruled that Regs 3-4 forbid commercial agents and principals from adopting behaviour that falls short of the mandated standard of conduct.

In the High Court case of *Cureton v Mark Insulations Ltd*, Bean J held that a commercial agent who marketed his own goods alongside and in competition with those of the principal was in breach of Reg 3.¹²⁰ In similar vein, in *Anderson v Crocs Europe BV*, Sir Raymond Jack posited that "it is obvious that an agent should not go about disparaging the way his principal runs his business. If he does so, he will be in breach of his regulation 3 duty".¹²¹

Secondly, several English and Scottish decisions have recognised that Regs 3-4 debar principals and commercial agents from exercising their contractual rights in a manner that is irreconcilable with the standard of conduct mandated by the Duty.

This functional trait of the Duty was first implicitly acknowledged in *Page v Combined Shipping and Trading Co Ltd*¹²² In this case, a commercial agent appealed a decision denying him a *Mareva* injunction against his principal. Both Staughton¹²³ and Millett¹²⁴ LJJ accepted that a principal that contractually had "absolute discretion" to vary the number of transactions handled by its commercial agent would be in breach of Reg 4(1) if it exercised this right to reduce business volume to zero.

This position was then explicitly articulated in two subsequent decisions. In *Cooper v Pure Fishing Ltd*, HHJ Kershaw QC held that a principal exercising its contractual rights to "engineer" a situation that would engender a conflict of interests for its commercial agents was

¹²⁰ *Cureton* (n 96) [15]-[27]. In the lower courts, see *Edwards v International Connection (UK) Ltd* Central London County Court Judgment 25 November 2005, in which HHJ Knight interestingly accepted the hypothesis that indolence and lacklustre performance could hypothetically constitute a breach of Reg 3.

¹²¹ *Crocs* (n 96) 41.

¹²² [1996] CLC 1952.

¹²³ *ibid* 1954.

¹²⁴ *ibid* 1957.

in breach of the Duty.¹²⁵ Similarly, in *Scottish Power Energy Retail Ltd v Taskforce Contracts Ltd*, Lord Menzies had to adjudicate, *inter alia*,¹²⁶ whether a principal who had caused a 70% contraction in his agent's commission by reducing the scope of his authority has breached Reg 4. Having reviewed the terms of the agency agreement, his Lordship concluded that the principal had exercised his contractual rights in a manner consistent with the Duty.¹²⁷

Nevertheless, the authorities do not speak in unison on this point. In *Vick v Vogles-Gapes Ltd*, HHJ Seymour QC voiced doubts that “it was necessary to have regard to the obligation ... to act dutifully and in good faith” when exercising contractual rights stipulated in the agency agreement.¹²⁸ Citing Lord Wilberforce in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd*,¹²⁹ he argued that a party's reliance on an express contract term, “even mistakenly and wrongly”, could never be treated as a breach of contract under English law, let alone as repudiatory intention to abandon or refuse performance.

Respectfully, HHJ Seymour's QC reasoning is flawed. Setting aside the law in *Woodar*,¹³⁰ his reasoning is entirely based on the assumption that the Duty can be construed and moulded on the basis of English contract law doctrines. On the contrary, recourse to domestic legal doctrines is an avenue precluded to Member State courts when interpreting national legislation that implements EU law; UK courts are under an obligation to construe the Regulation in light of the wording and purpose of the Directive.¹³¹ Accordingly, this would have required a construction of the Duty informed by an inquiry into the legal function of the Obligation; alternatively, a question of interpretation could have been referred to the CJEU.

Thirdly, English courts have held that Regs 3-4 can imply terms into commercial agency agreements.

In *Npower Direct Ltd v South of Scotland Power Limited*, Cresswell J held that the Duty could not broaden the substance of an obligation as contractually stipulated by the parties.¹³² Nevertheless, as a matter of principle, he accepted the submission that the Duty could imply terms into the agreement concluded by the parties.¹³³

¹²⁵ *Pure Fishing* (n 96) [36]-[37]. On Appeal, Tuckey LJ affirmed the reasoning of HHJ Kershaw QC, *Cooper, Ian Watkins, Andrew Bartle v Pure Fishing (UK) Ltd* [2004] EWCA Civ 375 [9].

¹²⁶ The main issue was whether the conduct of the principal had caused a partial termination of the agency, triggering compensation under Reg 17.

¹²⁷ *Scottish Power* (n 96) [28].

¹²⁸ *Vick* (n 96) [84]. He ultimately accepted this proposition, but only because the parties were in agreement on it.

¹²⁹ [1980] 1 All ER 571, 574B-E.

¹³⁰ Interestingly, Lord Wilberforce observed that invocation of a contractual right “abusive, or lacking good faith” constitutes a breach, *ibid* [2]. Though his Lordship was not referring to objective good faith, his reasoning assumes that reliance on an express contract term encounters limitations.

¹³¹ See nn 15-16.

¹³² *Npower* (n 96) [156].

¹³³ *ibid* [147]-[156], [165].

Similarly, in *Simpson v Grant & Bowman Limited*, HHJ Alton expressly accepted that Reg 4 can act as a source of implied obligations in the agreement beyond those expressly agreed by the parties.¹³⁴

It is thus submitted that this body of case law evidences that English and Scottish courts have construed the Duty as establishing a behavioural requirement, mandating a standard of conduct which commercial agents and principals must uphold throughout performance of the agency. Despite the lack of exhaustive judicial reasoning and a principled analysis, this stance is welcome, as it accurately implements the functional profile of the Obligation into the UK legal order.

Nevertheless, some commentators argue that the Duty has a broader functional footprint, also serving as a substantive requirement that contractual stipulations must satisfy to be enforceable.¹³⁵

At present, there are no authorities that squarely address this issue, as no attempt has yet been made to have a contractual term set aside on the grounds that it is irreconcilable with Regs 3-4.

The following decisions, however, appear implicitly to rule out this construction. In *Cureton*, Bean J concluded that the agent's conduct was in breach of the Duty, absent a stipulation that countenanced such behaviour.¹³⁶ Similarly, in both *Simpson* and *Scottish Power*, the content of the terms of the commercial agency agreement was paramount in determining whether the specific conduct of the principal breached Reg 4.¹³⁷ An even clearer statement in this direction is found in *Rossetti*. Here, Cranston J explicitly stated that the obligations in Regs 3-4 "are non derogable, but their content is not invariable and will be moulded by the contractual context".¹³⁸ This reasoning implies that it is the manner in which the parties perform contract terms that must be consonant with the Duty, not the substance of the stipulations.

The sole dissenting voice is that of Cresswell J, in *Npower*. In an *obiter dictum* he posited that "if and to the extent it is to be suggested that the express terms were contrary to the requirements to act dutifully and in good faith, the relevant contract terms must be identified".¹³⁹ Though not perspicuous, this statement could be interpreted as implying that stipulations the content of which is irreconcilable with the Duty are ineffective.

It is submitted that the Duty does not serve as a substantive requirement.¹⁴⁰ It was previously argued that the Obligation only serves as a behavioural requirement in the Directive.

¹³⁴ *Simpson* (n 99) [23].

¹³⁵ Saintier and Scholes (n 13) 55, 104-106. Watts and Reynolds' position is not entirely clear, stating that "terms in which the principal retains the right to act in a manner contrary to [the Duty] will not be valid" (n 13) para 11-023.

¹³⁶ *Cureton* (n 96) [27].

¹³⁷ *Simpson* (n 99) [16]-[20]; *Scottish Power* (n 96) [28].

¹³⁸ *Rossetti* (n 101) [55].

¹³⁹ *Npower* (n 96) [154].

¹⁴⁰ Bennett (n 13) 114 arrives at the same conclusion.

Accordingly, treating the Duty as substantive requirement relies on the tenuous assumption that the UK legislature intended to carry out an expansive implementation of the Directive. Moreover, such a construction would result in a compression of party autonomy that, while not uncommon in business-to-consumer transactions,¹⁴¹ would be atypical for commercial relationships. This would be a particularly surprising development in the UK, given the historical prominence attributed to freedom of contract.

E. The content of the Duty

The Regulations do not provide indications elucidating the content of the Duty beyond those present in the Directive.

Against this legislative backdrop, English and Scottish courts have often eschewed the perilous task of defining the content of the Duty, preferring to simply rule whether a particular conduct breaches Regs 3-4.¹⁴²

This approach is neither incorrect nor does it necessarily lead to flawed decisions; nevertheless, it does result in an inconvenient under-conceptualisation of doctrine and a piecemeal legal framework that are unlikely to yield consistent case law. Furthermore, lack of actionable guidance concerning the content of the Duty deprives the parties of the information necessary to pre-emptively establish whether certain types of behaviours may be in breach.

Nevertheless, there are a limited number of cases in which courts have endeavoured to explore the content of the Duty.

Proceeding in chronological order, the first such decision was *Npower*. Here the commercial agent claimed that the principal had breached Reg 4 by asking for a reduction in sales volume by 70% for a period of time, and increasing the price of the offered goods to levels that made it harder to conclude deals.

Setting out the relevant legal principles, Cresswell J cited the definition of good faith offered by Lord Bingham in *Director General of Fair Trading v First National Bank plc*: “the requirement of good faith in this context is one of fair and open dealing. ... good faith in this context is not an artificial or technical concept ... It looks to good standards of commercial morality and practice”.¹⁴³ Thereafter, focusing specifically on the Duty, he posited that “when considering the impact of Regulation 4, the starting point must be the express written terms of the Agreement”.¹⁴⁴

Applying these principles to the facts before him he ruled that the principal had not breached the Duty. The instruction to reduce sales volume was not unreasonable in the relevant commercial context; similarly, the imposed price increases were a lawful enforcement of the

¹⁴¹ See Elizabeth MacDonald, ‘UCTA Thirty Years On’ in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007) 154.

¹⁴² eg *Scottish Power* (n 96); *Pure Fishing* (n 96); *Cureton* (n 96).

¹⁴³ [2001] UKHL 52, [2002] 1 AC 481 (*DGFT*) [17]; see also *ibid* [250] (Evans Lombe J).

¹⁴⁴ *Npower* (n 96) [153].

contract term granting the principal the right to make such variations, as long as they remained “reasonably competitive”.

A different approach emerged a year later in *Vick*. In this case, the claimant argued, *inter alia*, that the obligation to act dutifully and in good faith was at least “as wide as the obligation implied on the part of both an employer and an employee in a contract of employment to act towards the other with mutual trust and confidence”,¹⁴⁵ as defined by the House of Lords in *Malik v Bank of Credit and Commerce International SA*.¹⁴⁶ HHJ Seymour QC accepted this submission and posited that the criteria established by the House of Lords to determine whether the mutual obligation of trust and confidence between the employer and the employee has been breached should also be applied to the Duty by analogy.¹⁴⁷

In *Simpson*, a commercial agent brought an action against his principal for a repudiatory breach of Reg 4 and sought compensation under Regs 8, 15 and 17. At the outset, HHJ Alton cautiously posited that she did not deem it necessary to define the Duty; nevertheless, she then proceeded to formulate several general and abstract observations concerning the content of the Duty during her appraisal of the specific submissions of the litigants.

Contemplating the type of conduct that would breach the Duty, she noted that “dishonest behaviour or a deliberate intent to damage the other party [would] very likely if not almost certainly ... amount to a failure to act in good faith”,¹⁴⁸ however, she added that “absence of dishonesty or deliberate intent to damage would not necessarily mean that the act in question could not amount to a failure to act in good faith. ... Sharp practice in the context of treatment of the agent ... falling short of dishonesty or intent to harm would also be likely to constitute a failure to act in good faith”.¹⁴⁹

Subsequently, in her analysis of the position of the principal, she held that Reg 4 did not create an overarching obligation “to treat the agent fairly, the assessment of which is to be made from the perspective of the agent and without ... significant regard to the ... entitlement of the principal to make what appear to be proper commercial decisions”.¹⁵⁰ She compounded this, stating that “a decision on business matters, which might well impact on a particular agent or agents, which is within the range of commercial decisions open to a reasonable principal, and which is untainted by improper motive”¹⁵¹ would not amount to a breach of the Duty.

Pivotaly, HHJ Alton explicitly rejected the construction adopted in *Vick*, explaining that “to parallel independent commercial agents with employees for the purpose of determining the

¹⁴⁵ *Vick* (n 96) [85].

¹⁴⁶ [1997] UKHL 23, [1998] AC 20 (HL), 45 “[the relevant party] will not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee” (Lord Steyn); exhaustively, see Matthew Boyle, ‘The Relational Principle of Trust and Confidence’ (2007) 27 OJLS 633.

¹⁴⁷ *Vick* (n 96) [86].

¹⁴⁸ *Simpson* (n 99) [15].

¹⁴⁹ *ibid*.

¹⁵⁰ *ibid* [16].

¹⁵¹ *ibid*.

nature of duties owed would be to seek to elide chalk with cheese and is unwarranted under the Regulations”.¹⁵² Conversely, she underlined the importance of determining the content of the Duty with regard to the specific commercial context.

In *Rossetti*, the matter of contention was whether the commercial agent had breached the Duty by acting on behalf of competing principals, absent the principal’s consent. Mirroring the approach in *Npower*, Cranston J referenced Lord Bingham’s definition of “good faith” in *Director General of Fair Trading*,¹⁵³ yet also stated that the content of the Duty had to be “moulded” with regard to the specific contractual context.

Applying these principles to the facts before him, he concluded that a commercial agent acting on behalf of competing principals would be in breach of the Duty unless an express or implied term of the agency agreement granted leave to do so. Furthermore, such a term would have to “delineate what the commercial agent is to do when acting for competing principals so that each party knows what to expect with these duties, attributable by law to the relationship between them”.¹⁵⁴

Lastly, in *Crocs Europe BV v Anderson*,¹⁵⁵ the Court of Appeal had to decide whether a breach of Reg 3 should always be treated as repudiatory. The appellant again submitted that an analogy should be drawn between the content of the Duty and the employer-employee mutual obligation of trust and confidence; on this basis, as a breach of the latter is always repudiatory, the same should be true for the Duty.¹⁵⁶ In the leading judgment, Mummery LJ only examined the specific issue on appeal; by contrast, Bean J also considered the intension of the Duty in an *obiter dictum*.¹⁵⁷ He generally posited that the “formulation of the obligations of a commercial agent [in Reg 3] does not seem to me to be materially different from the obligations owed by an employee (other than a director) to his employer”; applying this construction, he expressed doubts that the obligations owed by the commercial agents in the case before him would have varied in substance had they been employees of the principal.¹⁵⁸

Two alternative views of the content of the Duty emerge from the authorities.

The first, observed in *Vick* and in Bean J’s *obiter* in *Crocs*, is that the content of the Duty should be construed by analogy to the employer-employee implied mutual obligation of trust and confidence under English law.

It is respectfully suggested that this construction is not entirely persuasive on grounds of both method and substance. Confronted with the onus of construing the content of the Duty, both

¹⁵² *ibid* [17].

¹⁵³ *Rossetti* (n 101) [40].

¹⁵⁴ *ibid* [55]. On appeal, Lord Neuberger MR took a different approach, focusing exclusively on the fiduciary duties owed by the agent at common law and not considering the Duty. See *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021, [2013] All ER (Comm) 308.

¹⁵⁵ [2012] EWCA Civ 1400, [2013] 1 Lloyd’s Rep 1.

¹⁵⁶ See 3.F.

¹⁵⁷ Hughes LJ agreed with both judgments, *Crocs* (n 155) [65].

¹⁵⁸ *ibid* [56].

HHJ Seymour QC and Bean J make recourse to an analogy with domestic employment law, rather than interpreting this notion in light of the words and purpose of the Directive, pursuant to the principle of consistent interpretation.¹⁵⁹ Such reasoning negates the harmonisation aim pursued by the Directive and would completely undermine the uniform application of EU law if emulated by other Member State courts.

With regard to substance, this construction is unsatisfactory because it fails to identify that the Duty is a general clause, attempting instead to force it into a straitjacket that fits one particular type of commercial agency relationship yet is ill-suited to many others. The proposed analogy between the Duty and the employer-employee mutual duty of trust and confidence is perhaps conceptually adequate if the commercial agency under consideration is functionally similar to an employment relationship, due to the characteristics of the specific agreement and the idiosyncrasies of the parties. However, this is not always the case. For example, if the principal is a large corporation, the commercial agent is a company with hundreds of employees, and their agency is governed by a sophisticated contract at arm's length, the parallel with the employer-employee relationship falters and with it the aptness of the analogy.

The second construction emerges from *Npower*, *Rossetti* and *Simpson*. Though not perfectly coextensive, these decisions expressly or implicitly state that the Duty requires parties to uphold an objective standard of conduct characterised by openness and fairness, based on commercial morality and practice. Dishonesty and intent to damage always fall foul of the Duty, as can “sharp practice” without malice. Whether a particular behaviour is in breach of Regs 3-4 must be appraised on a case-by-case basis, concretising the aforementioned abstract standard of conduct in light of the terms of the agency agreement and the relevant commercial context.¹⁶⁰

From a methodological standpoint, both *Npower* and *Rossetti* refer to Lord Bingham's definition of good faith, formulated in relation to the Unfair Terms in Consumer Contract Regulations 1999.¹⁶¹ In his judgment, his Lordship had expressly stated that good faith was a notion of EU law with an autonomous meaning.¹⁶² Therefore, this interpretation carries over to *Npower* and *Rossetti*, acknowledging in turn that the notion of good faith must be construed consistently across domestic legislation that implements EU private law legislative acts.

With regard to substance, these authorities construe the Duty as a general clause based on the broad and abstract notions of openness, fairness and commercial practice, which must be concretised in relation to the agency in question. Though they do not expound these concepts in detail, *Npower*, *Rossetti*, and *Simpson* convey the idea that co-operation on the part of commercial agents and principals is required, beyond mere abstention from obstructive behaviour. These decisions also highlight that a balance has to be struck between pursuit of self-interest and realisation of the commercial agency. Crucially, the objective intentions of the

¹⁵⁹ See nn 15-16.

¹⁶⁰ McGee (n 102) 541-542 favours this construction. Similarly, Watts and Reynolds (n 13) para 11-023 suggest that the Duty offers scope “for the development of implied terms of fair treatment, co-operation and disclosure of relevant information”.

¹⁶¹ (SI 1999/2083).

¹⁶² *DGFT* (n 143) [17] (Lord Bingham), [32] (Lord Steyn).

parties and the relevant commercial context are at the forefront of the judicial reasoning in these authorities.

This approach is welcome as it methodologically heeds the European dimension of the Regulations and substantively offers the flexibility necessary to cater to the varied nature of commercial agency.

Alongside these two judicial constructions, a third has been proposed by Saintier and Scholes. They suggest that the standard of conduct mandated by the Duty requires parties to “act so as to best advance the joint interests of both parties. ... it is not permitted for either party to have regard to its own selfish interest and nothing more, but a party is not obliged to put the other side’s interests to the exclusion of his own either. Each party has to achieve a balance and have regard to both”.¹⁶³ They further argue that “in those respects in which the commercial agent is a fiduciary in English law, he is now fiduciary not exclusively for the principal but for the principal and himself jointly, and has to act in the best interests of both of them”.¹⁶⁴

Though interesting, this construction is not persuasive.

Saintier and Scholes’ thesis is inspired by the French doctrine of “mandate of common interest” and built on analogies with the English law of partnerships and the implied employer-employee mutual obligation of trust and confidence. The European dimension of the Regulations is completely neglected. The Duty is recognised as normatively originating from the EU legal order, yet the principle of consistent interpretation is not considered.

Beyond these methodological blemishes, the substance of Saintier and Scholes’ submission is grounded in neither the Directive nor the Regulations. There are no textual elements suggesting that the parties to a commercial agency agreement must prioritise its realisation over their own self-interest. Equally, from a teleological standpoint, there is no support for a conceptualisation of the Duty that would severely restrict the freedom of enterprise¹⁶⁵ of commercial agents and principals and which would be unworkable in commercial agencies structured as arm’s length relationships. Moreover, the suggestion that Reg 3 renders commercial agents concurrently fiduciaries to both their principals and the commercial agency is troubling, as it fails to consider the possibility that the interests of the two might conflict and implies that principals are subject to an equivalent obligation due to the reciprocal nature of the Duty.

Thus, the content of the Duty remains a point of contention. It has been argued that the approach adopted in *Npower*, *Rossetti* and *Simpson* is preferable both in method and substance. It is to be hoped that UK courts will follow this path in the future and perhaps develop it further, by fleshing out criteria for the concretisation of the Duty in line with the Directive.

F. The consequences of breach of the Duty

¹⁶³ Saintier and Scholes (n 13) 106.

¹⁶⁴ *ibid.*

¹⁶⁵ For example, a principal who chose to invest resources elsewhere rather than employing them to advance the commercial agency, would be held in breach of Reg 4.

The Regulations do not contain provisions addressing the consequences of a breach of the Duty, offering but a hollow reflection of the Directive. Reg 5(2) does establish that “the law applicable to the contract shall govern the consequence of breach of the rights and obligations under regulations 3 and 4 above”. However, this is a private international law rule that signals the relevant connecting factor by which to ascertain the applicable law, and as such does not regulate the manner in which breaches should be treated substantively.

Two possible, alternative hypotheses are possible to bridge this legislative chasm. The first assumes that Reg 3-4 incorporate the Duty into all commercial agency contracts as a statutory implied term (henceforth “the implied term hypothesis”). If this is the case, the consequences of a breach depend on whether this implied stipulation is deemed a condition, a warranty or an innominate term. The second supposes that Regs 3-4 articulate the Duty as a statutory right overlaying the contractual position (henceforth “the overlaying right hypothesis”). Under this construction, it must be determined which statutory remedies are available in the event of a breach and the manner in which they operate; for example, if damages are awarded, the relevant measure of assessment.

In the past, UK courts have been reluctant to confront this matter squarely.¹⁶⁶ In its recent *Crocs* decision, by contrast, the Court of Appeal took a discernible stance. The case involved a breach of Reg 3.¹⁶⁷ Though he did not venture into a classificatory exercise, Bean J’s reasoning assumed that the Duty was a statutory implied term of the contract. He concluded that it should be deemed an innominate term and the consequences for breach established accordingly.¹⁶⁸ Mummery LJ classified the breach in question as contractual and emphasised his agreement with Bean J’s reasoning.¹⁶⁹ Hughes LJ concurred.¹⁷⁰

Unsurprisingly, commentators have expressed diverging views on this complex issue.

Saintier and Scholes support the implied term hypothesis and suggest that the Duty should be treated as a condition due to its “fundamental importance” to the commercial agency relationship.¹⁷¹ Bennett has voiced approval for the reasoning of the Court of Appeal in *Crocs*, remarking that the decision to classify the Duty as an innominate term is fitting, “in view of the variable nature, extent and gravity of potential breaches”.¹⁷² By contrast, Randolph and Davey favour the overlaying right hypothesis, drawing an analogy with the Employment Protection (Consolidation) Act 1978. They posit that “the rights set out in Regulation 17 are

¹⁶⁶ See *Simpson* (n 99) [20]; *Bell Electric Ltd v Aweco Appliance Systems GmbH & Co KG* [2002] EWHC 872 (QB); *Crocs* (n 96); in the latter, however, Sir Raymond Jack appears to base his decision on the assumption that the Duty is contractual in nature at [42].

¹⁶⁷ See 3.E.

¹⁶⁸ *Crocs* (n 155) [61]-[64].

¹⁶⁹ *ibid* [53]-[54].

¹⁷⁰ *ibid* [65].

¹⁷¹ Saintier and Scholes (n 13) 107-108.

¹⁷² Bennett (n 13) 115-116.

statutory non-contractual remedies” and argue that “it would be ... strange ... if other elements of the Regulations were intended to operate on a contractual basis”.¹⁷³

As the Regulations are silent on the consequences of a breach of the Duty and its contractual or statutory nature, it is particularly challenging to decipher the “legislative intention”.¹⁷⁴

As a preliminary observation, it is submitted that both the aforementioned hypotheses are compliant with EU law. Both offer a suitable implementation of the Directive, as the EU legislature did not prescribe a specific manner in which the Obligation should be transposed into national law.¹⁷⁵ Furthermore, with regard to adequate enforcement of the rights established in the Directive, both constructions ensure remedial protection compliant with the effectiveness and equivalence requirements.¹⁷⁶

In the absence of EU law related concerns, the conundrum in question must be resolved pursuant to UK canons of statutory construction.¹⁷⁷ While the interpretative approaches more commonly relied upon by courts provide little guidance,¹⁷⁸ a “consequential construction”¹⁷⁹ decisively favours the implied terms hypothesis.

The overlaying right hypothesis is not untenable *per se*. However, it would require courts to articulate autonomously a statutory remedial framework to regulate the consequences of a breach of the Duty. Effectively, the judiciary would be required to enact a supplementary section to the Regulations. This would be an impractical, if not unworkable result,¹⁸⁰ particularly in light of the traditional reluctance of UK courts to assume the role of legislator.

By contrast, the implied term hypothesis would merely require courts to apply the general doctrines of contract law to determine the consequences of a breach of the Duty. This would be a relatively certain and simple outcome.

Having determined that the implied term hypothesis is preferable, it is still necessary to establish whether the Duty should be treated as a condition, a warranty or an innominate term. It is submitted that Bean J’s reasoning in *Crocs* is entirely convincing on this issue. The flexible nature of innominate terms is best suited for the open texture character of the Duty, in respect

¹⁷³ Randolph and Davey (n 13) 60-61. Reg 17 falls outside of the scope of this article. However, the submission that this provision establishes statutory remedies is at odds with the views of both courts and commentators. See *Ingmar* (n 29) paras 20-21; Watts and Reynolds (n 13) 11-038-11-040.

¹⁷⁴ See Francis Bennion, *Bennion on Statutory Interpretation* (6th edn, Lexis 2013) ss 163-171; John Bell and George Engle, *Cross Statutory Interpretation* (3rd edn, Lexis 2005) 48-63.

¹⁷⁵ See Prechal (n 16) 73-92.

¹⁷⁶ See n 89.

¹⁷⁷ For a comprehensive account of the scholarship on this topic, see Bennion (n 174); Bell and Engle (n 174).

¹⁷⁸ Typically the “literal rule”, “golden rule” and “mischief rule”; *locus classicus* John Willis, ‘Statute Interpretation in a Nutshell’ (1938) 16 Can Bar Rev 1, 3.

¹⁷⁹ In the words of Mustill J “[a statute] cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it” *R v Committee of Lloyd’s ex p Moran* (1983) The Times, 24 June 1983. See also *ICI Ltd v Shatwell* [1965] AC 656, 675 (Lord Radcliffe). For an exhaustive analysis see Bennion (n 174) s 286, according to whom consequential construction derives from the general principle *ut res magis valeat quam pereat*.

¹⁸⁰ On impractical interpretative outcomes see *R v Deputy Governor of Camphill Prison, ex p King* [1985] QB 735, 751 (Lord Griffiths); see also Bennion (n 174) s 313.

of which only some breaches will deprive the innocent party of substantially the whole benefit of the agreement, while others will not.

4. The impact of the Duty on the law of agency

Having charted the confines of the Duty, it is possible to measure the impact of this notion on the pre-existing legal spheres of agents and principals at common law.

A. Commercial agents

At common law, commercial agents are a species of the broader genus of agents; as such, they owe their principals both fiduciary obligations and duties of performance.

As fiduciaries, commercial agents must act with single-minded loyalty, prioritising their principals' interests over their own.¹⁸¹ This equitable requirement translates into two broad duties: "the agent must avoid any conflict that can be avoided between its own interests and those of its principal and must resolve any conflict that does arise in favour of the principal"; and "the agent is prohibited from obtaining any benefit from the agency that has not been authorised by the principal".¹⁸² Fiduciary duties are proscriptive and prophylactic in nature: they tell the fiduciary what he must not do, not what he ought to do.¹⁸³

Commercial agents also owe duties of performance alongside their fiduciary obligations. The exact scope and intensity of these duties depend on the particulars of the agency agreement, and, consequentially, contract construction. Nevertheless, they can be summarised as follows: the duty to perform the undertaking, the duty to comply with the principal's subsequent instructions, and the duty to act with the due skill and care normally exercised by agents in similar circumstances. Duties of performance positively dictate what the agent must do in performance of the agency.¹⁸⁴

The prevailing view among commentators is that the Duty has no meaningful impact on the legal position of commercial agents, as it "largely replicates" the fiduciary and performance duties owed at common law.¹⁸⁵ On one hand, any conduct forbidden by the Duty is also proscribed by fiduciary obligations because the standard of conduct mandated by the latter is more exacting than that imposed by the former. On the other, any behaviour that is positively prescribed by the Duty is also required by the duties of performance at common law.

It is respectfully submitted that, though aspects of this thesis are convincing, it fails to provide a comprehensive assessment of the issues under scrutiny.

As a preliminary observation, it should be noted that fiduciary and performance duties do not extend to pre-contractual negotiations and remedies, and English contract law does not

¹⁸¹ Classically, Watts and Reynolds (n 13) 6-032-6-108.

¹⁸² Bennett (n 13) 90.

¹⁸³ See *Breen v Williams* (1996) 186 CLR 71, 113; Matthew Conaglen, 'The nature and function of fiduciary loyalty' (2005) 121 LQR 452.

¹⁸⁴ See Watts and Reynolds (n 13) 6-002-6-025.

¹⁸⁵ Munday (n 13) 193; Randolph and Davey (n 13) 55.

generally dictate a standard of conduct comparable to that mandated by the Duty.¹⁸⁶ Consequently, if, contrary to what has been argued above, the scope of the Duty were construed to encompass these phases of the agency relationship, this would mark a radical departure from the extant agency law framework.

However, even accepting the submission that the scope of the Duty only covers performance of the commercial agency, the interaction between Reg 3 and the pre-existing common law agency rules is more complex than it would initially appear.

Firstly, parties can modify or waive fiduciary obligations, whereas the Duty is not derogable. Consequently, even if the agreement explicitly allows for actions otherwise proscribed by fiduciary duties, a commercial agent must still perform the contract abiding to the standard of conduct mandated by the Duty.

Secondly, the scope and content of the duties of performance at common law differ from those of the Duty. The duties of performance have been developed at common law to tackle determinate issues; as a result, they are a piecemeal set of rules and their scope is confined to specific occurrences of the agency relationship. By contrast, the Duty permeates the relationship between commercial agent and principal completely, imposing a standard of conduct on the performance of their agreement. With regard to content, an analysis of the relevant authorities suggests that duties of performance demand a standard of conduct that is not analogous to that mandated by the Duty.¹⁸⁷ For example, the former only require that unfettered contractual discretion be exercised in a manner that is not subjectively “capricious, arbitrary or ... perverse”,¹⁸⁸ while the Duty insists on an objective standard of conduct based on honesty, openness and regard for the interests of the other party to the transaction.

It is thus submitted that while performance duties and fiduciary obligations may overlap with the Duty, they never completely obscure it; the amount of light gleaming through will vary but can be significant in circumstances in which the parties have waived fiduciary duties or the commercial agent is awarded ample contractual discretion. Accordingly, English and Scottish courts reviewing the legal sphere of a commercial agent would be best advised to heed carefully both the rights and obligations arising at common law, and the Duty.

B. Principals

At common law, principals owe their agents indemnification for liabilities incurred in carrying out the agency and remuneration pursuant to their agreement. Discharge of these obligations is generally secured by a lien over any property of the principal in the possession of the agent.

¹⁸⁶ Classically, see Raphael Powell, ‘Good faith in contract’ (1956) 9 CLP 16; Johan Steyn, ‘The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy?’ [1991] Denning LJ 131.

¹⁸⁷ See Watts and Reynolds (n 13) 6-015-6-021.

¹⁸⁸ *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd’s Rep IR 221 [35]; *Socimer International Bank Ltd v Standard Bank London Ltd (No2)* [2008] EWCA 116, [2008] 1 Lloyd’s Rep 558 [66]. See Richard Hooley, ‘Controlling contractual discretion’ (2013) 72 CLJ 65.

Save for these exceptions, general doctrines governing contract performance apply unaltered.¹⁸⁹

Conceptually, the impact of the Duty on the pre-existing legal framework for principals is not problematic to chart. The introduction of this mandatory standard of conduct throughout performance of the agency breaks a certain amount of new ground, departing from the generally more adversarial stance of the common law. In practice, the effects of this reform will vary, depending on the terms of the agreement in question and the relevant commercial context. Nevertheless, as principals are required to collaborate pro-actively with their agents, failure to communicate adequately and generally inert behaviour might be held to breach Reg 4; equally, the obligation to consider the legitimate expectations of agents will limit the extent to which a principal can exercise contractual discretion or stand steadfastly on their rights.

5. Conclusion

EU law has introduced good faith to the common law of agency. This paper has endeavoured to analyse this general clause and assess its impact on the pre-existing legal framework.

The first step was to chart precisely the obligation to act “dutifully and in good faith” established in Arts 3-5 of the Directive. The submission was advanced that these provisions engender a general clause that requires principals and commercial agents to perform their agency in adherence to a mandatory standard of conduct, based on honesty, openness and consideration for the interest of the other party. Though this requirement must be concretised in light of the specificities of the relationship at hand, positive co-operation and abstention from the exploitation of asymmetries were suggested as functional normative precepts for this purpose.

Subsequently, attention turned to the manner in which English and Scottish courts have interpreted and applied this imported duty. It was shown that, with few exceptions, the scope and function of this requirement have not given rise to significant difficulties. By contrast, the case law contains profoundly diverging conceptualisations of the content to be attributed to this mandatory standard of conduct. It was submitted that the construction articulated in *Npower*, *Rossetti* and *Simpson* is preferable as it is substantively suited to the broad-ranging nature of relationships covered by commercial agency and consistent with the words and purpose of the Directive.

Finally, it was posited that the pre-existing common law agency rules have been meaningfully modified but not radically overhauled by the introduction of this obligation to act “dutifully and in good faith”. For principals, the standard of conduct imposed by the Regulations marks a conceptually significant departure from the pre-existing common law regime; its practical incidence, however, will vary depending on the idiosyncrasies of the agency agreement in question. With regard to commercial agents, a distinction must be drawn between the proscriptive and prescriptive dimensions of this novel duty. The proscriptive dimension partially coincides with the scope of fiduciary duties, yet still imposes meaningful reform. The

¹⁸⁹ Comprehensively, Watts and Reynolds (n 13) 7-001-7-002.

prescriptive dimension engenders onuses different and ulterior to those previously imposed by performance obligations at common law and thus imports an even more pronounced recast of the legal sphere of agents.