

# “Good Faith”: A Legal Tool for Environmental Sustainability?

Dario Hug :

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How does the concept of “good faith” relate to environmental sustainability? And could it be expanded through interpretation to establish an enforceable duty for each individual today to act for future generations in the same way as a trustee would (see [Mattei/Quarta 2019](#) or [here](#))? This post offers some general and humble thoughts around these highly complex issues (see further [Gillaerts’, 2022](#)).

## The potential of “good faith”

“Good faith” (“*bonne foi*”) is fundamental not only in private, law but it has also shaped many other areas of the law including public law (for an in-depth analysis which this post is indebted to see [Schmidt, 2018](#) and [Merz, 1962](#)). A key factor for its potential (and evolution) is the fact that, like other indeterminate and often relative legal notions such as “immorality” or “reasonableness” it constitutes an open norm (see [Gillaerts’, 2022](#)). Its traditional meaning is at least twofold. On the one hand, it refers to a person’s state of mind by holding that she is acting in good faith when she legitimately but erroneously believes in the existence or non-existence of a certain legal fact (“*guter Glaube*” / “*goede trouw*”). But it may also refer to

a person's honesty or sincerity, or to a standard of conduct by which certain requirements of decency and fairness are met ("*Treu und Glauben*" / "*redelijkheid en billijkheid*"). The latter understanding, also relating to legitimate expectations, can in turn be determined subjectively (i.e. what did the person regarded as a decent behaviour?) or objectively (i.e. what was the opinion of an average and reasonable person?).

"Good faith" is rooted in the Roman law principle of *bona fides*. One of the principle's significant functions had been to enable the adaptation of the Roman law of contracts to new economic and social necessities and to promote more equitable solutions. From the 20<sup>th</sup> century on, especially in [Germany](#) and [Switzerland](#), the concept has been used to promote more equitable solutions in contract law and thus allowed for the law to evolve, sometimes even in a manner unexpected by its drafters. Considering these developments, it then does not seem *prima facie* far-fetched to recognize an evolutionary and adaptive potential to the concept of "good faith".

### **Relevant interests and environmental sustainability**

What interests are relevant for "good faith"? Traditionally, "*Treu und Glauben*" is not to be applied to an exercise of rights which might have a questionable impact on overriding general interests (only). The application of "good faith" rather implies a special legal precontractual or contractual connection ("*rechtliche Sonderverbindung*") between the concerned protagonists (see [art. I. – I:103 \(1\) DCFR](#)). The concept thus risks being a false friend for environmental sustainability when understood in this way; it is simply not tailored (yet) to address considerations that are as such external to the directly concerned parties' interests. Of course, one could argue that environmental sustainability is always an internal interest for each of the contractual parties. However, that does not adequately solve the issue of how to integrate the current interest for an ecological transition of future generations – non-existent parties.

Notoriously, there is a (rather recent) tendency to widen the scope of "good faith", mostly through its understanding as a requirement for fairness, especially in B2C relations. The provisions on unfair terms (see [Art. 3, para 1, Unfair Terms Directive](#)) and the "reasonable expectations" in the context of objective conformity requirements in B2C sales law (see [Art. 7, para 1, lit. d, Sale of Goods Directive](#)) can be mentioned here.

In the context of the Unfair Terms Directive firstly, one important aspect of "good faith" is that the business side has to take into account the consumer's legitimate interests (see [recital 16](#)). This aspect actively imposes an obligation to protect the consumer's interests. It cannot be excluded that such an understanding also allows considering environmental sustainability as a "legitimate" interest of the consumer. Moreover, the fact that the business side resorted to an unfair commercial practice within the meaning of the [Unfair Commercial Practices Directive](#) – including the blacklist of its Annexe I – [may be an element to assess the unfairness of a given contractual term](#). As it stands the latter Directive does [not provide for specific rules on environmental claims and the prohibition of greenwashing](#); that [could change, however](#), thus conferring a more precise "eco-literate taste" to the concept. In any case, Article 11 [TFEU](#) as an integration clause could already steer the ECJ towards adopting a more ecological comprehension of what is a "fair" and "equitable market" as well as of the "legitimate interests" of the consumer.

Article 7, [para 1, lit. d Sale of Goods Directive](#) constitutes another interface for an eco-literate understanding of "good faith". Here, the quality of the object of the contract is expressly linked to its

durability as regards the “reasonable expectation” of the consumer-buyer. In other words, based on the assumption that the longer an energy efficient good is used (with a corresponding lesser impact on natural resources by extraction of new raw materials), the seller risks being liable for non-conformity if the object of the sale is not durable. In this sense, “good faith” can deploy a rather direct effect -through the conformity assessment for a type of contract with a high impact potential- on the concretization of environmental sustainability.

## Conclusion

As things stand, “good faith” may already serve as an interpretational tool for implementing environmental sustainability in the specific context of the Unfair Terms Directive and the Sale of Goods Directive, thus also respecting the obligation to apply Article 11 TFEU (see the wording “must be integrated” there) in every area of EU law. This would simultaneously confirm the functional and evolutive potential of both EU law and “good faith” with respect to achieving the ecological transition. In this way, the concept could indeed further – and rather quickly – develop itself to integrate collective interests (so to say in their own rights). It “only” requires a change of perception. Ultimately, however, it remains a rather political question to determine whether national legislators or courts must (also) integrate environmental sustainability considerations through the concept of “good faith” and, if so, how this should be done. This is especially true in the prospect of reluctant contractual partners in situations where more than an “ethical minimum” is expected from them (Merz, 1962).

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