Is artificial intelligence *bona fide*?

Reflections on the development and trends of disclosure obligations in insurance contracts

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Abstract

The scope and direction of technological changes raise questions about their impact on the nature of insurance and its principles. This paper aims to assess the impact of new technologies on one of the leading principles of an insurance contract, i.e. the principle of good faith and to determine whether these developments necessitate a change in the approach thereto. It seeks to decide whether the traditional principle of good faith, shaped as an obligation to disclose the risk, should remain only on the insured, or whether it should be adapted to current technological developments as a reciprocal duty of both parties. In this context, the author refers to the differing and often contradictory views of doctrine and case law, proposing a solution consistent with the purpose of the insurance contract, the current tendencies of legislators, the state of technology and the prospect of its development.

Key words: transparency, good faith, AI, insurance, best interest of the customer

1. **Introduction**

The technological evolution taking place before our eyes is affecting almost every aspect of social and economic life. This also applies to insurance. Indeed, it is clear that insurance, as a response to the risks present in the modern world, cannot function in isolation from social and technological phenomena. For this reason, it is necessary to address the impact of new technologies on the fundamental principles of insurance contract law. For the purposes of this paper, by 'new technologies' the author means such new phenomena as artificial intelligence, new sources and methods of data collection, and the internet of things (IoT). For the objectives of this paper, they will be considered jointly as 'new technologies', as the author bases the analysis on their common features concerning the ability of gathering and processing information, explained in more detail in Section 3 of the paper. The question that can be asked at this stage is twofold: (1) whether and how are new technologies affecting insurance, but also (2) how can insurance cover the risk of new technologies? This study aims to examine the first issue. The notion of new technologies is too broad to satisfactorily examine their overall impact on the insurance contract within the scope of this paper. For this reason, the paper considers the impact of new technologies on the principle of good faith in an insurance contract.

This topic is important and interesting for the following reasons: (1) the principle of good faith is closely related to the transparency of information concerning the risk covered by insurance, which is why it has been recognised for centuries as one of the leading pillars of the insurance contract, (2) there are many discrepancies as regards the

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meaning of good faith in the context of the contractual obligations of the parties to an insurance contract, and (3) the development of new technologies in the context of new sources and methods of processing the insurance data has the potential to lead to even greater dissent as to the meaning and of good faith and the purpose of applying it. Thus, good faith in insurance will be analysed in the specific context of transferring information concerning the subject of the contract between the parties. For that reason, the author also uses the notions of information and data, especially when the aggregated information is discussed.

Given the above, the ultimate objective of the paper is to analyse the reciprocity, as well as the current and future meaning of the principle of good faith. In particular, the analysis will focus on whether the traditional principle of good faith, shaped as an obligation to reveal the risk, should remain only on the insured, or whether it should be adapted to current technological developments as a reciprocal duty of both parties. At the outset, the author would like to put forward a thesis resolving the dissent that has arisen so far in such a way that the content of the principle of good faith should address the changes resulting from applying new technologies, especially at the pre-contractual stage in insurance, by not only imposing an obligation of transparency on both parties to the contract, but also by adapting the actual burden of duties to the technological possibilities available to each party to the insurance contract.

In this context, the author will refer to the differing and often contradictory views of doctrine and case law. The focus will be primarily on the European private laws, including in particular English law with respect to the origin of the principle of good faith, referring where relevant to views expressed under various jurisdictions in Europe or elsewhere in the world. In addition, the analysis will be conducted by taking into account the development of (insurance) contract law in the European Union, also as a result of the regulatory measures introduced in the financial services by the EU directives and regulations. Within the above, the trend of blurring the borders between private and public law in the financial markets will be considered.[1] This issue is especially important for the author in the context of the influence that the regulatory measures such as Markets in Financial Instruments Directive II (MiFID II),[2] Insurance Distribution Directive (IDD)[3] and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[4] may have on contracts between private parties. In this regard, as an introductory note it is worth mentioning that contract law in the European Union presents a primarily functional approach[5] and proclaims a departure from a formalistic approach and an abstract understanding of legal principles. This is relevant when considering their current status and recent evolution, which remains worthwhile despite the fragmentary nature of the integration of private law, including contract law. This is the reason why the author mentions European Union

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[1] *See* more generally Olga Cherednyhenko, 'Rediscovering the public/private divide in EU private law' (2020) Eur Law J 26:27-47 <doi.org/10.1111/eulj.12351> last accessed 3 September 2020.

[2] Directive 2014/65/Eu of The European Parliament And of The Council of 15 May 2014 On Markets in Financial Instruments And Amending Directive 2002/92/Ec And Directive 2011/61/EU, L 173/349 (further referred to as MiFID II).

[3] Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ L 26 (further referred to as IDD).

[4] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance, OJ L 335 (further referred to as Solvency II).

[5] Lurger , The "Social" Side of Contract Law and the New Principle of Regard and Fairness, in Arthur Hathkamp, Martijn Hessenlink et al (eds) *Towards European Civil Code* (Kluwer 2004), 384.

law separately from the legal systems of the Member States of the EU, where the long-lasting tradition of insurance contract regulations may be observed.

In order to fulfil the stated research objectives of this paper, the author proposes the following structure for the analysis. In the first part of the text (Section 2), the author sets out the meaning and content of the principle of good faith in insurance, in particular in the context of the obligations of the parties as regards the disclosure of insurance risk. This part will also present the dissent that has been present for many years in the case law and doctrine of various countries. The second part (Section 3) will focus on regulatory issues that the author believes affect the principles of private contract law and constitute a kind of a bridge between the traditional meaning of good faith and the contemporary one. The considerations will concern the notion of transparency. The third part of the paper (Section 4) looks at the presentation of new technologies having a real impact on the risk data and its assessment for the purpose of concluding an insurance contract (Section 5). In particular, this part considers the question of how access to these technologies affects the obligations of the parties to an insurance contract with respect to the declaration of risk, and how the dissent as to the reciprocity of the principle of good faith should be resolved. The final sections of the paper (Sections 6 and 7) conclude on the impact of new technologies on the principle of good faith and propose a solution.

2. The disputed nature of the principle of good faith in insurance

Traditionally, the concept of utmost good faith in insurance has been attributed a value of the fundamental principle of the insurance contract, without which it cannot fulfil its functions. It has been argued in both ancient and modern legal literature, particularly of Anglo-Saxon origin, that the essence of an insurance contract requires that the nature of the risk, knowledge of which remains with the policyholder, must be fully understood by the party assuming the risk, i.e. the insurer. In this respect, it has been argued that an insurance contract is a special type of contract governed by a duty of utmost trust and loyalty between the parties (known as 'utmost good faith'). A persistent concern of XVII century insurers was the potential withholding of adverse information by the insured about the subject matter of the insurance, which would increase the risk beyond the insurer's awareness. Accordingly, the principle of the utmost good faith, which originated in marine insurance, essentially guarded the interests of the insurer as a duty to declare the risk by the policyholder and allowed the insurer to avoid liability in the event of a breach thereof. This was the case despite its good foundations, formulated by Lord Mansfield, as a reciprocal duty of both parties in the famous case *Carter v Boehm.*[6] It emphasised that an insurer entered into a contract acting in reliance on the information provided by the policyholder, basing its intention to contract, its assessment of the risks involved, and the amount of potential liabilities on that information. He then uttered the oft-quoted words:

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back [of] such circumstance is a fraud, and therefore the policy is void."

[6] (1766), 1 Blackstone W 593.

The reason for the unilateral and not symmetrical evolution of good faith obligations lies in the wide disparity of knowledge on the risk between the parties, as the insurer often had no way of verifying the information provided by the policyholder. Also, for that reason, though Lord Mansfield proclaimed a reciprocity of good faith between the parties to the insurance contract, in subsequent years the obligations of the insurer were significantly reduced and the meaning of the good faith principle became one of the most contentious issues in the doctrine of insurance contract law. This common law principle, well-established in judicial decisions, was expressed in Section 17 of the Marine Insurance Act as follows: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party".

In its now familiar 'utmost good faith' formulation, the concept was first named in *Life Association of Scotland v Foster.*[7] It held that a contract of insurance, despite its other dissimilarities, is so special as to require utmost trust on both sides. Therefore, even without fraudulent intent, and even acting in good faith, a policyholder may breach it, thereby triggering the associated contractual sanctions. Subsequent court decisions have only confirmed the severity of this principle, indicating that sanctions in the form of avoiding the policy ab initio and the dismissal of all policyholder claims can be applied regardless of whether the insured acted intentionally, negligently or without any fault. One example, among others, is the case *Bates v Hewitt*,[8] in which the insurer was allowed to avoid the contract for non-disclosure, even though it had been aware of the undisclosed fact for some time before the insurance had been placed and had the means to identify such facts. It seems as if the rules of performing good faith obligations had stopped being qualified by good faith itself, with the strict rules no longer promoting fairness between the parties.[9]

Such a jurisprudential trend was quite common despite the recognition of the prudent insurer test[10] and its proactive role to play during the disclosure process. This was due to the fact that the duty of the insurer to make its own findings was not recognised. As a result, the duty to disclose the risk covered all circumstances that might in any way affect the insurer's decision as to the risk assumed and, consequently, its decision about coverage and the premium calculated on the basis of that information. A breach of the above, to any extent and for any reason, amounted to a breach of the principle of utmost confidence.

It is important to note that, although this principle was reflected only in the Marine Insurance Act, it applied to all types of insurance. Subsequent court decisions not only confirmed the application, but noticeably moved further and further away from the foundations of the concept of the trust and loyalty laid in *Carter v Boehm*. This resulted in a gross disproportion between the obligations of both parties to the insurance contract, the sanctions for a breach thereof, and ignoring the distinction between deliberate concealment or misrepresentation (bad faith) and innocent mistake (good faith). The content of numerous judgments points to a 'zero-one' assessment of whether or not the principle of utmost good faith has been complied with, independent of any fault or dishonesty of the policyholder.

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[7] SCS 31 Jan 1873.
[8] (1865) 176 E.R. 892.
[9] See such cases as *Container Transport International Inc v Oceanus Mutual Underwriting Association (Bermuda)*: [1984] 1 Lloyd's Rep. 476 ; *Pan Atlantic Insurance Co Ltd and Another v Pine Top Insurance Co Ltd*: (1994) 2 Lloyd's Rep 427 ; More by Yeo Hwee Ying, 'Recent Developments In Materiality Test Of Insurance Contracts' (1995) Singapore Journal of Legal Studies, 56.
[10] John Birds, Norma J. Hird, 'Misrepresentation and Non-disclosure in Insurance Law - Identical Twins or Separate Issues?' (1996) 59 Modern Law Review, 285.

Despite the theoretical assumptions, the principle of utmost good faith in insurance in practice did not become a reciprocal principle, binding also on the insurer.[11] Although it has been argued that the obligations of the insurer should, in principle, reflect the duties of the policyholder in such a way that the insurer should disclose all known material facts about the risk and the possibility of obtaining an indemnity (payment) that a prudent policyholder would consider relevant when deciding whether to take out an insurance contract, it is rare to find rulings that have sought to achieve this result.

This also seems to undermine the value of the utmost good faith as a universal principle of the insurance contract applicable reciprocally to both parties. As its critics argue, it is difficult to imagine obligations on the part of the insurer to give expression to it (and thus the possibility of sanctions for a breach), even if a duty to ask questions in the risk assessment process was imposed on the insurer (which in fact was imposed by the Insurance Act in 2015, as explained below). Indeed, while subsequent rulings after *Carter v Boehm* confirmed the obligations of the policyholder, there are only isolated cases relating the similar duties of the insurer, at any stage of the insurance contract, i.e. mostly in the claims settlement process. In addition, the sanctions for a breach of good faith on both sides appeared disproportionate, for while the insurer was entitled to be relieved of its obligation to avoid the contract in its entirety, for the policyholder the prospect of recovering only the premiums paid to the insurer was not even partly as attractive. As Lord Mansfield had already warned, the indiscriminate use of the sanction of a breach of supreme trust could even lead to fraud to the detriment of the insured. In so doing, it should be noted that the absence of good faith as a generally accepted principle of contract made it impossible in English law to claim damages for a breach of good faith by an insurer.

It follows from the above that too much reliance was placed on the principle of utmost good faith, leading to the question of whether it still has a place at all in modern contractual relations and in the face of expanding consumerism. Doubts arise especially against the background of the statements of the Anglo-Saxon doctrine itself, which has long advocated its abandonment as too draconian and inflexible, raising many doubts and proving unsuited to the current realities of the functioning of insurers as specialised businesses. This applies not only to consumer insurance but also to all others, regardless of the status of the policyholder and the type of insurance. Given the way in which the principle of utmost good faith has been applied by UK case law, it is possible to accept the view that the principle of utmost good faith, despite the assumptions expressed in *Carter v Boehm*, is not a simple variant of good faith, but that there are fundamental differences between these concepts. Rather, the classic English perception of the *uberrimea fidei* seems to approximate the policyholder's obligations to a warranty of the type and level of risk, having nothing to do with the commonly understood good faith as an expression of honesty and loyalty. For this reason, there are only a few countries that have implemented the principle of utmost trust in the form developed in the United Kingdom into their legal systems, both for axiological and practical reasons.

[11] The duty of disclosure is understood in a narrow way, as in case *La Banque Financière de la Cité SA v Westgate Insurance* [1987] 2 All E.R. 923. Lord Jauncey stated then that any duty of care could not go beyond what was required by the insurer's duty of disclosure. The duty of care can arise if "the usual requirements for the imposition of that duty are satisfied," i.e. the insurers undertake additional responsibility towards the assured. See also Christianne Dubreuil, L'assurance: un contrat de bonne foi à l'étape de la formation et de l'exécution (1992) Revue de droit de McGill, 1087, 37-4, 1992 CanLIIDocs 61, https://canlii.ca/t/2pqp, last accessed 4 September 2022.

This concerns legal traditions based on Roman law and what is known as 'Alpine culture'[12] developed there in insurance, which naturally uses the concept of good faith in different contexts, including France, Germany and neighbouring countries. Some other countries totally rejected this concept. As an example of the argumentation for rejecting *uberrimea des* as a contract principle, the statement of the Supreme Court of South Africa can be quoted: "the utmost good faith is a foreign, vague and useless expression without any meaning in law (...) and our insurance law does not need the utmost trust and it is time to discard it".[13]

For several reasons, the concept of utmost good faith, as promoted by English case law, could not continue indefinitely even in the UK. First of all, insurers in the 18th century were often not yet entrepreneurs specialising in insurance. Any entity with sufficient capital could be an insurer. Secondly, the process of obtaining information on what was insured was often very time-consuming or even impossible, and there was a very large disparity in knowledge of the risk between the parties, as the insurer often had no way of verifying the information provided by the policyholder. Thirdly, despite the assumed reciprocity of good faith between the parties to the insurance contract (as was directly apparent from the reasoning provided by Lord Mansfield), the obligations of the insurer in this respect were significantly reduced in subsequent years.[14] For this reason, it may have been surprising that the principle of utmost good faith in its original formulation was ever applied to consumer insurance.

Thus, changes in this regard have long seemed inevitable, though it took until 2012 for consumer insurance and until 2015 for all other insurance. The first fundamental change to the applicability of the utmost good faith as developed by English case law was introduced by the Consumer Insurance (Disclosure and Representations) Act 2012, which overturned the duty to disclose risks as it had hitherto applied, consequently changing the sanctions associated with a defective risk declaration. Above all, instead of an obligation to disclose information relevant to the insurer from the point of view of the insured risk, an obligation was introduced to take reasonable care not to make an incorrect risk declaration, shifting to the insurer the obligation to ask precise questions about the circumstances that the insurer should reasonably want to know when entering into the contract. This undoubtedly represents a significant step in the direction of the Alpine tradition, where a questionnaire system had been in place

[12] The concept of the Maritime and Alpine tradition in insurance was developed by the French practitioner M. Albert and spread by H. Cousy of the University of Leuven. These authors, in analysing the insurance tradition on the European continent, distinguished two opposing currents. These concern not only the insurance contract, but also the organisation of the entire insurance market and its impact on the rights and obligations of the various actors in that market. The features distinguished within the Maritime and Alpine traditions will thus concern the rights and obligations of the policyholder under the insurance contract, the organisation and rules of risk acceptance by insurers, as well as the role, duties and modus operandi of insurance intermediaries. A closer examination of the principles of the insurance contract shows that both the Maritime and the Alpine tradition accept the same features of the insurance contract, the differences being only in the way these rules operate Herman Cousy (2002) La fin de l'assurance? Cosiderations sur le Domanie propre de l'assurance privee et ses frontieres, in Jaques Bichot (ed) *Droit et economie de l'assurance et de la sante: mélanges en l'honneur de Yvonne Lambert-Faivre et Denis-Clair Lambert*, (Dalloz 2002).

[13] *Mutual and Federal Insurance Company Ltd v Municipality of Oudtshoorn* (240/82) [1984] ZASCA 129; [1985] 1 All SA 324 (A) (16 November 1984).

[14] There are rare cases where the reciprocity was acknowledged by the courts. One of the examples is case *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1987] 2 All E.R. 923; *La Banque Financière de la Cité SA v Westgate Insurance 242 Co Ltd*. 6 [1989] 2 All E.R. 952; [1990] 2 All E.R. 947. It was held by the court that "the duty falling upon the insurer must at least extend to disclosing all facts known to him which are material either to the nature of the risk or to the recoverability of a claim under the contract, which a prudent insured would take into account in deciding whether to place the risk with the insurer."

for a long time. The next step was the extension of the above rules to other (non-consumer) insurances by the Insurance Bill enacted on 12 February 2015. One of the most significant changes appears to be that, instead of the existing rules, the principle was introduced of an obligation of a "fair presentation of the risk".[15] The fair presentation of the risk refers, among other things, to the manner in which it is communicated to the insurer. In this respect, the legislator uses a formulation obliging the insured to provide information in a manner that would be reasonably clear and accessible to a prudent insurer. Such a precise definition of the disclosure obligations on both parties to the contract represents a significant change from the previous form of utmost good faith. On the other hand, by introducing a measure of the fair presentation of the risk, even in non-consumer insurance, some responsibility for the type and quality of the risk information received from the policyholder has been shifted to the insurer. In addition, approportionate sanctions were introduced for incorrect risk disclosure.

The trend of changing the rules for the disclosure of insurance risks is also clearly present in other European countries. As an example, the German law may be given, where reform was carried out in 2008. As was pointed out by Professor Wandt, the reason was that several rules of the Versicherungsvertragsgesetz (VVG) 1908 were unduly burdensome to the policyholder and, therefore, no longer complied with modern requirements on consumer protection. S.16 VVG 1908 imposed a genuine pre-contractual duty to disclose to the insurer all risk-relevant facts, even though the insurer had filed no inquiries. Nowadays, s. 19 VVG 2008 constitutes a key provision on the policyholder's pre-contractual duty not to misrepresent. Pursuant to s. 19(1) VVG 2008, the policyholder must notify the insurer of all risk factors known to him, material to the insurer's decision to conclude the insurance contract with the agreed content and as requested by the insurer in writing (*Textform*).[16]

The same idea was introduced in French law, where the spontaneous declaration, as provided by Article L-113 of the French Insurance Code, was abandoned even earlier, in 1989, for the benefit of a questionnaire system whereby the insurer should prepare clear questions for which the policyholder should simply answer honestly.[17] The present provisions on risk disclosure oblige the policyholder to accurately answer the questions asked by the insurer, in particular in the risk declaration form, through which the insurer questions him at the time of concluding the contract, on the circumstances that are likely to make the insurer assess the risks it is taking on. An example from CEE countries can be found in changes to the Polish Civil Code, where, in 2010, Article 815 regulating the risk declaration by policyholder was changed in such a way that sanctions for misrepresentation by the policyholder could only be imposed if a direct causal link with the event insured was proved by the insurer.[18] Summing up these all changes, it can be stated that they were led not by technology, but by consumerism present in legal systems worldwide, including the European Union. They were not revolutionary but evolutionary and adaptive, and still

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[15] The duty of fair presentation (Part II, section 3 of the Insurance Act 2015): (1) Before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk; (2) The duty imposed by subsection (1) is referred to in this act as 'the duty of fair presentation'.

[16] Manfred Wandt, Kevin Bork , Disclosure duties in German insurance contract law, (2020), ZVersWiss 109, 81.

[17] www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006791998/1976-07-21/ <last accessed 14 July 2022> According to the previous version binding until 1990, the policyholder was obliged to declare accurately at the time of conclusion of the contract all circumstances known to him which are such as to enable the insurer to assess the risks for which he is responsible.

[18] Earlier on, the misrepresentation was relevant also if it could potentially affect the possibility of the materialisation of the risk without the need to prove its actual relevance.

the reciprocal concept of good faith seemed disputable and was not expressed in the legal provisions at that stage. Still only one party to the insurance contract has been burdened with the disclosure of the risk.

3. Utmost good faith versus transparency

In this section, the author will briefly consider the impact of EU legislation on the private laws of insurance, namely the insurance contract. The reason for analysing this issue is that, in the author's opinion, the EU legislation within the scope of consumer protection in financial services contributed to the current shape of the contractual obligations of the parties and are related, even if indirectly to the good faith principle in the insurance contract.

To begin with, a few words of explanation are needed with respect to the relation between the EU legislation and private law of insurance contracts. There are opinions stressing that the *Acquis Communautaire,* "profoundly challenges the public/private divide along these lines and, in particular, the notion of private law as it had developed in national legal systems" and "is primarily concerned with creating the internal market and is therefore regulatory and functional in nature".[19] It has also been noted that:

> "[T]he distinction between financial regulation and contract law is not straightforward. Contract law constructs a legal framework that allows the parties to shape their legal relationships as self-determining entities and safeguards the balance between their private interests. It is then by nature less concerned with the general interest. By contrast, legislation within the scope of financial markets (which includes insurance) is a set of sector-specific EU and national rules imposed by the government on the financial sector in the public interest, particularly to ensure well-functioning financial markets and proper consumer protection."[20]

While contracting was traditionally the exclusive province of private law, even on financial markets, today it has also increasingly become subject to financial regulation, and as such applies mechanisms rather of a public law nature, such as *ex ante* compliance enforcement, providing no express remedies to the aggrieved parties, etc. With this in mind, the traditional division of private and public law may not bring satisfying results with respect to analysing the development of the insurance contract. It seems more appropriate to accept the concept that EU law:

> "is not public law in the orthodox sense(s) understood at national level, nor it is private law. It is both and it is neither. In fact, the EU operates without any such anchor, which makes it fluid and which makes it at the same time unstable".[21]

Though the EU *acquis* focused on regulatory measures, the consumer protection trend has affected private contracts where consumers were involved. Specifically, it contributed to a change in the paradigm prevailing in the tradition of insurance, whereby honesty and loyalty are on the part of the policyholder. This change has its specific name – transparency – and as the legislative measures taken by the EU lawmakers show, was to become one of the major duties of businesses dealing with consumers. In insurance contracts, the notion of transparency

[19] Olga Cherednychenko, (n 1), 32.
[20] ibid.
[21] Dorota Leczykiewicz, StephenWeather, Private Law Relationships and EU Law, in Dorota Leczykiewicz and StephenWeather (eds.) *The involvement of EU law in private Law Relationships* (Hart Publishing 2013).

gained lots of importance and even claimed to substitute the 'old fashioned' and disproportionately applied utmost good faith.

According to definitions repeated in dictionaries, 'transparency' means clarity, openness (also as 'full disclosure'), lack of concealment, comprehensibility. It also means access to information and a situation where 'much is known by many'; a situation in which business and financial activities are done in an open way without secrets, so that people can trust that they are fair and honest; as well as the access and proper disclosure of financial information.[22] It is considered one of the basic conditions for a free and efficient internal market. This is also the context in which the concept of transparency has been used in legal texts and statements from scholars and appearing in the case law. It mainly refers to the obligations of disclosure between the contracting parties, although regulated by the legal instruments of a public nature and giving rise to regulatory justice rather than corrective justice specific for private law relations. Narrowing the discussion to the objective of this paper, as it seems that 'transparency', comes in two senses, i.e. (1) increasingly as a general principle for the functioning of the financial services market, including insurance market, and (2) the way in which the disclosure obligations should be performed. There is no doubt that the European Union has contributed to the proliferation of this concept, since, out of the more than 100,000 or so directives currently in force, it increasingly appears in consumer protection regulatory texts, especially in the sector of financial services. This trend has been transferred to the national legislation of the EU Member States. It is also readily used by the jurisprudence to describe the contractual obligations of businesses, including insurers.[23]

As can be seen in the texts of European regulations, transparency – as opposed to utmost good faith – usually appears in the context of obligations imposed on businesses in the process of providing services or selling goods and concerns disclosure obligations in line with the general concept of consumer protection, understood as the right to information. The aim of the protection standards implemented by the European legislator is to compensate for the information deficit on the part of the protected, weaker parties, in order to ensure an informed decision as regards concluding a contract. It usually applies to consumers, although in insurance it acquires a more universal aspect by applying transparency obligations to all policyholders. Among a number of directives, particular attention should be drawn to the Distance Marketing of Consumer Financial Services Directive 2002/65/EC,[24] as well as MiFID II,[25] PRIIPs II[26] and IDD.[27] The obligation of transparency does not tackle such moral values as

[22] Cambridge Dictionary; Investopedia; consulted on 14 July 2022.
[23] *See* Katarzyna Malinowska, 'Transparency in an insurance contract - transformation of the principle of highest trust into the right to information in Bogusława Gnela and Monika Szaraniec (eds.), *Information in insurance law*, (Lex Wolters Kluwer 2015).
[24] 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 Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (O J EU L 271).
[25] "The financial crisis has exposed weaknesses in the functioning and in the transparency of financial markets. The evolution of financial markets has exposed the need to strengthen the framework for the regulation of markets in financial instruments, including where trading in such markets takes place over-the-counter (OTC), in order to increase transparency, better protect investors, reinforce confidence, address unregulated areas and ensure that supervisors are granted adequate powers to perform their tasks." In addition, MiFID II provides extensive information duties of the investment firms in relation to clients (Art. 24).
[26] Regulation 1286/2014 of The European Parliament and of the Council of 26 November 2014 on Key Information Documents For Packaged Retail And Insurance-Based Investment Products (PRIIps), O J EU; L 352/1.
[27] The Insurance Distribution Directive provides extensive information duties of the insurance distributor which need to be fulfilled before concluding insurance contract (Art. 18).

loyalty and honesty, operating instead on a more functional approach and led by the same objective, i.e. ensuring that the parties to the contract are able to take a conscious, informed decision on being bound by the contract (e.g. in MiFID II, the notion of transparency appears in the vicinity of the notion of fairness and non-discrimination). They cover the information obligations of the parties in contractual relations[28] and there should be no doubts that it is about ensuring loyal and fair behaviour between the parties, which is possible only when eliminating information asymmetry.[29] The notion of 'transparency' is also readily used by scholars to describe the contractual obligations of a business, including an insurer.[30]

The basic difference between transparency and traditional disclosure in insurance is that it is no longer just the policyholder but also the insurer who is burdened with disclosure requirements. A similar message to that purpose can be found in all the cited directives, where the emphasis has been placed on providing a certain type of information to the customer prior to the conclusion of an insurance contract.[31] The concept of transparency also appears in the regulation on key information documents in relation to retail collective investment products and insurance investment products (PRIIPs). In the preamble to this regulation, it is stated that it is necessary to have uniform transparency rules at European Union level that apply to all market participants in PRIIPs, thereby strengthening their protection. Specifically, PRIIPs introduces an obligation to draw up a key information document constituting pre-contractual information in investment insurance and which must be accurate, fair, clear and not misleading (Art. 6).

A special place when considering transparency should belong to the Insurance Distribution Directive, which not surprisingly applies the notion of transparency in the context of enhancing the customer rights (points 36 and 66 of the preamble and in Article 19), though is not limited to a technical treatment of information to be delivered by the insurance distributor to the policyholder, but have re-emphasised the importance of loyalty between the parties and *de jure* introduced a symmetry of obligations between the parties by introducing the rule of acting in the best interest of the customer. While on the side of the insured there is still an obligation to provide reliable information about the risk resulting from the insurance contract laws, on the side of the insurance distributor there is an obligation to be guided by the interests of the client, to analyse his needs (and thus also the obligation expressed *expressis verbis* to assist in providing information about the risk). The issue of the customer's best interest will be analysed separately in Section 6, as it exceeds the notion of transparency, analysed here.

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[28] For example, the directive known as the Transparency Directive, which regulates the procedure for providing information on the information society: Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services (O J EU L 204).

[29] This tendency has been transferred to the national laws, eg the Swedish Insurance Contract Act 2005, the Austrian Insurance Contract Act, the Portuguese Insurance Contract Act 2008 and the Versicherungsvertraggesetz 2008.

[30] Daleen Illard and Birgitt Kuschke Transparency, Trust and Security: An Evaluation of the Insurer's Precontractual Duties (2014) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, Vol. 17 No 6 ; AIDA 'Transparency in insurance law' (2012) <www.aida.org.uk/pdf/Transparency%20book.pdf> last accessed 4 September 2022.

[31] The preamble of the Distance Marketing of Financial Services to Consumers Directive (para. 21) emphasises the need for transparency of information provided to the customer prior to the conclusion of an insurance contract. Similarly, the purpose of providing information is for the consumer to be able to assess the proposed financial service and make an informed choice.

It is not difficult to see parallels with the objectives behind transparency and the principle of utmost good faith in terms of the disclosure of information at the pre-contractual stage, and that is why some prominent scholars aptly posed the question some time ago as to whether transparency can or should replace the principle of utmost good faith in an insurance contract.[32] The essence of the issue under discussion is information. Information is required by both parties to an insurance contract in order to make an informed decision regarding the conclusion of a contract on the terms set out therein. This circumstance, but only this one, has not changed since 1766, when Lord Mansfield laid the foundations of utmost good faith. Looking at the definition of transparency, one could say that it is about the same thing in terms of the purpose and function that both the utmost good faith principle and the transparency principle are intended to fulfil. That is why blunt statements abound that currently there is no more justification for differentiating the rules burdening the insurer and policyholder at the pre-contractual stage in such a way that the policyholder is burdened with the requirement to maintain the utmost loyalty, while the insurer is burdened with a clearly and precisely formulated obligation to inform the insured of specific, statutorily stated information. The policyholder, like the insurer, also needs the 'technicisation' of its duties. While it is not possible to make a statutory exhaustive list of these, given the variety of risks covered by insurance, one can at least attempt to regulate it with a relatively precise cross-reference provision, or oblige the insurer to ask the questions covered by the questionnaire in a transparent manner. In such a situation, it will be sufficient for transparent behaviour by the policyholder to answer the insurer's questions – the policyholder will then not have to guess which information the prudent insurer, as an expert in the field, considers relevant. Instead, the insurer satisfies the transparency requirement when it informs the policyholder what is relevant for the assessment of the risk and what conditions must be met to receive the payment.

Provisions introducing the obligations of insurers have been introduced in various legal systems in various ways, though all of them have been inspired by European Union legislation on financial market consumer protection. And thus, English law does not impose upon insurers a duty to provide any specific kinds of information, although the concealment of material facts by the insurer prior to the conclusion of the insurance will entitle the insured to avoid the contract.[33] However, as a regulatory matter, the Insurance Conduct of Business Sourcebook of the Financial Conduct Authority (ICOBS) implements pre-contractual requirements from EU insurance directives – the Distance Marketing of Financial Services Directive and the Ecommerce Directive – which[34] include data concerning at least the service provider and product information. German law provides for an obligation of the insurer to inform the policyholder, in writing, about the terms of contract, including the general terms and conditions of insurance, as well as the information set out in a statutory ordinance to the Act on Insurance Contract.[35] Similarly, in France, the Code des Assurances obliges the insurer to provide information on the price

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[32] This concept has been extensively discussed in the context of insurance by Professor Manfredt Wandt, 'Transparency as a general principle of insurance law' in *Materials for the World Congress of Aida*, *Rome, October 2014*, www.aida-italia.com/aida2014/doc/relazioni/3009Wandt-Transparency.pdf. Defining transparency in the context of an insurance contract, he lists three main conditions, namely: comprehensive, clear, unambiguous, Manfredt Wandt, 'Transparency of Insurance Contract Terms' in Lambros Kotsiris and Kyriaki Noussia (eds.), *Liber Amicorum in Honour of Ioannis K. Rokas* (Nomiki Bibliothiki 2017). *See* also: www.aida.org.uk/pdf/Transparency%20book.pdf.

[33] *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 QB 665.

[34] B2C ICOBS; <www.handbook.fca.org.uk/handbook/ICOBS/2/1.html> last accessed 14 July 2022.

[35] Versicherungsvertragsgesetz 2008; § 7 VVG in connection with the Regulation on Duties of Information Relating to Insurance Contracts of 18/12/2007 (VVG-InfoV); Kevin Bork, Manfred Wandt, *"Utmost" good faith in German contract law* (Springer 2020).

and the warranties before concluding the contract.[36] As a step forward in developing the insurance contract law principles, a new solution was proposed by the Working Group of PEICL. According to Article 2:201 of PEICL, the insurer bears extensive information duties, including concerning the future insurance contract, covering not only data on the insurer, but about the proposed contract terms, the subject matter of the insurance and the risks covered, along with the sum insured and any deductibles, the amount of the premium and the method of calculating it, the deadline for paying the premium and the contract period, including the method of terminating the contract, the liability period and the right to revoke the application or avoid the contract. PEICL goes a step further than the EU rules included in IDD and MiFID II, as it introduces remedies typical for corrective justice, i.e. (a) the insurer must indemnify the policyholder against all losses resulting from the breach of this duty to warn unless the insurer acted without fault, and (b) the policyholder is entitled to terminate the contract by written notice given within two months after the breach becomes known to the policyholder.

With the above in mind, is it possible to say that legislative pragmatism has prevailed and that we can speak of the birth of a new reciprocal insurance contract principle – the principle of transparency? It may be that the use of the phrases "utmost good faith" and "transparency" is just a matter of semantics, as both concepts refer to the disclosure of information necessary to assess the risks involved in entering into the contract and making an informed decision about entering into it by both parties: (1) insurers as to the risk to be covered by insurance, (2) policyholders about the terms of the coverage. Such an approach gives hope for a better balance of rights and obligations of the parties to an insurance contract, which is particularly important in cross-border insurance, where the parties sometimes have to operate in a foreign legal system.

4. Good faith in the era of AI

In the previous section, the author focused on the development of insurance contract law with respect to disclosure and risk declaration, as initiated by the legislation of the European Union. The development in this respect was related to the general consumerism trend affecting those segments of industry where contracts concluded with consumers constituted an important part of the internal market. There can be no doubt that the legal provisions introducing the notion of transparency contributed to a better balance of contractual disclosure duties between the parties to an insurance contract. However, they did not yet reflect the technological revolution we are currently facing, and which is having a major influence on how insurance functions and will function in the foreseeable future. The question analysed in this section concerns the impact of new technologies on the disclosure of risk in insurance contracts and, in effect, on the principle of good faith in insurance. The author will only focus on those aspects of new technologies in insurance that are relevant to the objectives of this paper, i.e. on certain legal consequences, but without considering strictly technical aspects, similarities, differences or their technical essence. In addition, the reservation should be made that, though the use of new technologies appears at every stage of the insurance process: commencing with insurance product manufacturing, marketing and distribution activities, underwriting, risk prevention and at the stage of loss adjustment, including fraud detection, the author intends to focus on the pre-contractual stage of an individual insurance relation. As indicated in the introduction, an essential manifestation of the principle of good faith in insurance comes in the form of the disclosure obligations relating to the risks covered by the insurance contract, taking place at the pre-contractual stage. Thus, the essence of these

[36] Article L112-2 of the French Insurance Code.

obligations is transferring information on risk. This issue, i.e. sharing data about the insured risks, is a point of contact where new technologies can significantly affect the principle of good faith in an insurance contract.

The tangential point of using new technologies for insurance focuses on the ability to acquire and use data from new sources, as well as new types of data. It concerns aggregated data useful to produce reliable statistics, as well as specific information applied in a particular insurance contract. Initially, the policyholders provided the information they possessed directly to the insurer. This information, depending on the type of insurance, traditionally included medical data, information about the physical features of the object insured (such as car type, contents value, type and features of housing), behavioural, damage and hazard information. The application of new technologies has meant that knowledge of risk, which was traditionally in the sole hands of the policyholder as the 'risk owner', and which was mirrored in the law of insurance contracts (such as Art. 17 MIA cited in Section 2), has now largely passed into the hands of insurers. We can observe the rapidly decreasing role of the insured as the only source of obtaining insurance information by the insurer and strengthening the role of the external sources of information mentioned above.[37] This comes from the fact that, in an increasing number of insurance products, the role of the policyholder is limited to merely granting consent to use these sources of data collection, which are anyway in the hands of the insurer. In some cases, the policyholder is not even aware that the insurer is collecting the information and using external sources in the risk assessment process.[38]

New technologies, however, not only affect the role of the insured, but also that of the insurer. Among the number of issues challenging insurance as a result of new technologies being applied, for the purpose of this paper it is important to note that the insurer's decision-making process is being gradually replaced by algorithms. The use of artificial intelligence may lead to a situation where insurers are finally not able to limit the use of certain sources and categories of data, even if it is the subject of a legal restriction.[39] This concerns such risk factors as gender, race, religion, etc., which, although objectively affecting the level of risk, have been considered socially unacceptable.

If we confront the opportunities offered by the use of new technologies with the parties' risk disclosure obligations contained in the insurance contract legislation of the European countries analysed in Section 2 of the paper (UK,

[37] A distinction can be made in this regard between "new data collection processes", "Automatic collection of data from sensors and readers in a factory, laboratory, medical or scientific environment", and the collection of source data for input into a computer. Acquired data can include both traditional data and new, non-traditional data and imputed data, replacing missing or inconsistent data items (fields) with estimated values.
[38] Insurance Institute of Canada, 'AI and Big Data. Implications for the insurance industry in Canada' (2021), 5; *see* also Marta Ostrowska, 'Does new technology put an end to policyholder risk declaration? The impact of digitalisation on insurance relationships' (2021) Geneva Pap Risk Insur Issues Pract 46, 573; Peter. Kochenburger, Aviva Abramovsky, 'Transparency in the Insurance Contract Law in the United States' in Pierpaolo Marano and Kyriaki Noussia (eds.) *Transparency in Insurance Contract Law* (Springer 2019). Insurance Institute of Canada, 'AI and Big Data. Implications for the insurance industry in Canada' (2021), 7.
[39] The problem of the explainability of AI is subject to major concern especially when it comes to applying AI in financial services. The so-called 'black box' feature is perceived as a serious impediment. The promising XAI (explainable AI) will still need to remain under control. Deutsche BundesBank, 'The use of artificial intelligence and machine learning in the financial sector' (2020); <www.bundesbank.de/resource/blob/598256/d7d26167bceb18ee7c0c296902e42162/mL/2020-11-policy-dp-aiml-data.pdf> last accessed 14 July 2022; Kristina Irion, 'AI Regulation in the European Union and Trade Law: How Can Accountability of AI and a High Level of Consumer Protection Prevail over a Trade Discipline on Source Code?' (2021), <http://dx.doi.org/10.2139/ssrn.3786567> last accessed 14 July 2022.

Germany and France), as well as PEICL, the internal contradiction becomes all too apparent. The 'average' European law on insurance contract still provides for non-symmetrical information duties for both parties at the pre-contractual stage. While the policyholder is burdened with sharing the information on the risk,[40] the insurer's obligations are limited to such formal information as details of the insurer or of the terms of the insurance product. These provisions do not take into account the changing landscape, where the insurer tends to know more about the risk than its actual owner.

This view is not altered by the huge step forward that has been taken at the initiative of the EU in terms of the transparency requirements imposed on insurers, as described in Section 3. The basic concept is still that it is the responsibility of the policyholder to declare the risk, even if it is done with the help of questionnaires produced by the insurers acting prudently. According to the legal provisions regulating insurance contracts in countries like Germany, the UK, France and others, the insurer seems to be still a passive addressee of the information delivered by the policyholder, while in reality it is able on its own, with the help of the new technologies, to gain access to the risk data (such as risk of the traffic accident assessed on the basis of the driving style of the car owner, or the health risks basing on the lifestyle measured by wearables, etc). While in the 18th century the concept of the risk declaration was justified by the difficulty of access to information on risk by the insurer, today it has become irreconcilable with both the degree of specialization and expertise of insurers, the widespread access to risk information, and the general trend of introducing protective norms towards the insured.[41] These considerations may lead further into an area beyond the assessment of risk at the pre-contractual stage, for example, in terms of how risk can be prevented from materialising on the basis of data acquired by the insurer through new technologies, and whether the insurer should have any duties on sharing information in that respect. However, these issues go beyond the topic of this text.

Even if we limit the analysis to risk disclosure, in the opinion of the author, it is no longer possible to perceive it as a one-sided obligation of the policyholder. Recalling that an insurance contract is about managing the risk of the insured, the central point of insurance contract laws should be a clear and transparent picture of the risk, especially as we have to bear in mind its 'non- tangible' nature compared to other types of contracts, where the subject of contract is 'just' a promise of payment in case the risk materialises. Thus, the purpose of insurance contract laws has always been to ensure that the contracting parties are not misled as to the features of the risk covered and terms of its coverage. It is therefore necessary that obligations with respect to the risk disclosure are reciprocal.

The application of new technologies to concluding insurance contracts raises questions about insurers being loyal and transparent, to a greater extent than simply presenting the insurance product and carrying out the needs& demands test.[42] The issue of reciprocal transparency and loyalty should be confronted when analysing the consequences of using artificial intelligence for risk analysis in many contexts. One of them concerns the

[40] *See*, for example, the provisions of the French Insurance Code (Code des Assurances, article L-113); the German Insurance Contract Law (Versicherungsvertragsgesetz, sec. 19) and the Insurance Act 2015, Part II, Section 3.

[41] *Keyser Ullmann SA v Skandia (UK)*, 1987 2 WLR 1300. Katarzyna Malinowska, (n 23).

[42] The needs & demands test was introduced by the Insurance Distribution Directive in Article 20, which provides that: 'Prior to the conclusion of an insurance contract, the insurance distributor shall specify, on the basis of information obtained from the customer, the demands and the needs of that customer and shall provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision'.

assessment of the consequences of inaccurate or erroneous data used by the insurer.[43] When information comes from a human being and is used by a human being in the underwriting process, it is easy to require the insurer to prove a causal link between erroneous data and risk assessment, or any fault made by the insured. In the case of AI, we face a situation in which every piece of information (sometimes not from the policyholders themselves but, for example, from social media) has an effect on the assessment of a particular risk and so the premium, but it may not be possible to trace exactly how a particular piece of information is reflected in the level of risk, and it will be difficult to assess the impact of a particular mistake on the decisions of the insurer as regards the coverage and its terms. Secondly, the issue of protecting the policyholder against an insurer using publicly available but false data should be taken into account in the context of transparency. We can go further in these considerations and ask about the duty of the insurer to inform the insured about some risk details collected from external sources, of which the assured may not be aware, but which may be important for managing these risks and preventing them apart from insurance coverage (especially if some of them remain uninsured). Not surprisingly, the legal provisions of the analysed countries (France, Germany and the UK) regulating the pre-contractual obligations of the parties to insurance contract are silent about such a specific exchange of information, as they traditionally reflect only the flow of information from policyholder to insurer.

Applying new technologies, especially artificial intelligence, raises further concerns. When insurers make decisions based on data not directly provided by policyholders, the risk appears that they will be incomplete or inaccurate. Indeed, not knowing that the data are used for insurance purposes also means not being able to correct inaccuracies.[44] Artificial intelligence can therefore upset the balance created by the regulatory standard for transparency and the purpose of disclosing risk. The need for insurers to have accurate information, though obviously important, should not abstract from due diligence or a policyholder misrepresenting unintentionally, which is reflected in the laws regulating insurance contract.[45] AI analysing the insurance risk on the basis of the data derived both from the policyholder and from external sources without the knowledge of the policyholder, potentially shifts the burden of error to policyholders to a far greater extent than in traditional underwriting.[46] Given the nature of loyalty and diligence dominating in current good faith regulations, the use of AI has the potential to disrupt the developed model of how this principle works. Based on the currently prevailing regulations, sanctions can be applied by the insurer only if it asked the insured for specific information which was then withheld, or where false information was provided intentionally, and furthermore if such a breach of loyalty had a real impact on the occurrence of an event insured. This also implies that no data should be used by the insurer without policyholders being at least aware of it. Questions appear in that respect, including whether false personal

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[43] It is stressed that AI/ML "is generally as effective as the data used to train it and the various scenarios considered while training the system". Assuming that it is not possible to train the AI system on all possible scenarios, the risk of poor data cannot be ignored. Artificial Intelligence Risk & Governance: <https://ai.wharton.upenn.edu/artificial%20intelligence-risk-governance/ > last accessed 14 July 2022.

[44] IAIS, Issues Paper on Increasing Digitalisation in Insurance and Its Potential Impact on Consumer Outcomes, (2018) https://www.iaisweb.org/page/supervisory-material/issues-papers; last accessed 14 July 2022.
IAIS, Issues Paper on the Use of Big Data Analytics in Insurance, (2020) <www.iaisweb.org/page/supervisory-material/issues-papers> last accessed 4 September 2022.

[45] The laws on insurance contract binding in France, Germany, Poland, UK, PECL differentiate the consequences of intentional and unintentional misrepresentation. *See* the respective articles of French Insurance Code: L-113; German Insurance Contract Law, s.19.

[46] Rick Swedloff , 'The new Regulatory Imperative for Insurance' (2020) , 61 B.C. L. Rev. 2031.

information published by the insured on Facebook automatically means a breach of good faith in relations with the insurer in the event that the insurer used it without verification by the insured? And further: can we trust that AI-based tools of risk assessment use only reliable sources of data and thus behave loyally and diligently in this process?

Bearing the above in mind, new technologies may undoubtedly place insurers in a position superior to the policyholder by having better access to information on risk than the risk owner himself/herself.[47] Consequently, the burden of the disclosure and transparency should also shift to the insurer relevant to the extent and manner of using the new technologies in the underwriting process. Specifically, it requires that automated decisions affecting the policyholder are explained with the same degree of detail and clarity that an experienced professional would in a similar case without the use of automated processing.[48] Without adjusting the insurer's behaviour to the changed circumstances of risk assessment, the current legal provisions are doomed to go out of use.

5. Is the doctrine of 'best customer interest' an answer?

Given all the concerns discussed in Section 4, the question arises whether we can accommodate them within the traditional meaning of utmost good faith in insurance, as presented in Section 2, or rather under the notion of transparency as discussed in Section 3. Perhaps a new type of insurance general clause could apply, one that appeared along with the IDD and is gaining popularity not only as a regulatory measure, but also finding a place in private insurance law, i.e. the obligation to act in the 'best interests of the customer' by an insurance distributor. Unknown to the hitherto practice of insurance, it is the subject of continuous discussions among the insurance distributors and though it is meant to serve the level playing field, it is not unanimously accepted, even by the courts in some of the countries involved.[49] Although in the EU its sources are legal provisions regulating the rules of conduct of a distribution business, given the considerations in Section 3 of this paper on the blurring of the boundaries between private and public law, it is worth considering the impact of the general clause 'best interests of the customer' on the insurance contract in terms of supporting the principle of good faith, and perhaps even replacing it.

The concept of the best interests of the customer was introduced by Article 17 in the Insurance Distribution Directive,[50] stating that 'an insurance distributor, in carrying out insurance distribution, shall act honestly, fairly and professionally in accordance with the best interests of customers'. This concept has been used in financial services since MiFID II,[51] where Articles 19 and 24 introduced the obligation to act in accordance with the best

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[47] Optic, 'Artificial intelligence solidarity and insurance in Europe and Canada. Roadmap for international cooperation' (2020) <http://optictechnology.org/images/files/Full-Report-AI-Solidarity-and-Insurance-HTF-ENG-compressed.pdf> last accessed 14 July 2022.

[48] Ibid 40.

[49] The court holds that NYDFS "best interest" rule is unconstitutionally vague, < Independent Insurance Agents and Brokers of New York, Inc. v New York State Department of Financial Services [no 73], https://nycourts.gov/ctapps/summaries/Session/2022/Sep7-14.pdf > last accessed 4 September 2022.

[50] Article 17, which introduces as a general principle the obligation of 'Member States to ensure that insurance distributors, in providing insurance distribution, act honestly, fairly and professionally at all times in accordance with the best interests of their customers'.

[51] About the essence of obligations contained in MiFID, *see* for example Etay Katz, 'MiFID– practical issues for implementation' (2007) Law and Financial Markets Review; Eric J. Pan, A European Solution to the Regulation of Cross-Border Markets, 2 Brook. J. Corp. Fin. & Com. L. (2007); Iris Chiu, 'Securities intermediaries in the

interests of customers. MiFID II states that 'when providing investment services to clients, Member States shall require that, when providing investment services and/or, where appropriate, ancillary services to clients, an investment firm act honestly, fairly and professionally in accordance with the best interests of its clients'. As an extension of this principle, MiFID II lists obligations such as fairness of information including marketing communications (which should be clear and not misleading), information content regarding the details of the investment firm, the financial instruments and investment strategies proposed (this should include appropriate guidance and risk warnings), the entities executing orders, and the costs and associated charges. Guidelines such as enabling clients to understand the nature and risks of the investment service in order to make an informed investment decision with regard to their knowledge and experience also emerged at the time. [52] The client's best interest is visibly at the heart of MiFID II, significantly expanding the scope of obligations that meet the principle of the client's best interest. Though not as developed in the Insurance Distribution Directive, the concept of the customer's best interest undoubtedly has the same roots and serves the same purpose.

The reason for introducing the clause of the 'best interest of the customer' was that the asymmetry of information occurring in financial services has not been eliminated by the previous regulatory tools (see Section 3 of this paper). The clause of acting in the best interest of the customer seems to apply in a very broad scope, namely to all kinds of actions undertaken by the financial services providers and in relation to all types of clients (consumers and others). Insurance was subject to this regulation last. By introducing this concept, the European legislator seems to have applied all available strategies to manage the problem of information asymmetry in these complex contractual relationships,[53] namely both by regulating: (1) advanced information duties to ensure information equality (information playing field), and (2) the obligation of distributors to act in the interest of the party with less access to information on the subject of the contract and less expertise, thereby prejudging the outcome of any conflicts of interest that may arise during the distributor's provision of services. Additionally, in insurance it has been done by increasingly regulating the content of the insurance product.[54] Thus it seems reasonable to place the clause of the best interest of the customer within the scope of good faith principle in view of the above regulatory context. As the wording of the provisions shows, the essence of the 'best customer interest' clause is loyalty (of the distributor) to the other party, compensating the deficit of knowledge or information concerning the subject matter of the contract. This is also evidenced by the wording used in the IDD and MiFID II, which talk about acting loyally, honestly, fairly and professionally.[55] This obligation is reinforced by the distributor's obligation to

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internet age and the traditional principal-agent model of regulation: some observations from the EU's markets in the financial instruments directive' (2007) 2 Journal of International Commercial Law and Technology, 42.

[52] Niamh Moloney, 'Large-scale reform of investor protection regulation: The European Union experience' (2007) 4 Macquarie J. Bus. L. 147; also Niamh Moloney, 'Regulation of the market and intermediaries: global comparison and contrast – what is best practice? Recent developments in UK and European Union market and intermediary regulation' (2008) 5 Macquarie J. Bus. L. 1.

[53] Dan. Awrey, William Blair, David Kershaw, 'Between Law And Markets: is there a role for culture and ethics in financial regulation?' (2013) 38 Del. J. Corp. L. 191.

[54] A good example of which may be Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for retail collective investment products and insurance investment products (PRIIPs).

[55] This loyalty is nothing more than the insurer's pursuit of the best interests of the customer. Traditionally, it has been associated with an obligation to respect, at least to a minimum extent, the interests that the other party wishes to satisfy by entering into a contract; Daleen Millard, Birgit Kuschke, 'Transparency, trust and security: an evaluation of the insurers precontractual duties' (2014) 17 Potchefstroom Elec. L. J. 2144.

perform an analysis of the customer's needs and limit the possibility of concluding a contract that does not satisfy such needs, or despite the lack of needs.

6. Conclusions: insurance principles versus new technologies

We are currently facing intense legislative activity in the area of financial services, including insurance, at national, and European levels. The direction of these changes must raise questions about their compatibility with the nature of insurance, the evolution of its principles, and the decline of the 'old' and the emergence of new ones. It would be a mistake to produce successive regulations that are merely formal rules without any reflection on what principles they are supposed to implement. This is also important because insurance law, in all its aspects, including private legal relations, is a functional law and needs functional solutions rather than abstract and formalistic notions.[56] All this leads to the conviction that the principles of the insurance contract are not only influenced by legal facts (e.g. a prohibition on usury and the great codifications of the nineteenth century), because they are essentially a reaction of the legislator to social, economic, technology or natural changes. Although the insurance industry is quite conservative, largely due to the long-term nature of the factors that allow the basis for the provision of insurance services to be developed from mathematics and statistics, it is not a lonely island in the ocean and must be subject to appropriate change. This all means that we are currently dealing with the phenomenon of globalisation and consolidation in the economic sphere, an increasing number of natural disasters and the emergence of completely new risks, including those resulting from new technologies that did not exist before.[57] For some time we have also been facing the legislative aftermath of the 2008 financial crisis,[58] which is widely believed to have been a crisis of consumer confidence in the liberal economy and the burdening of consumers with the consequences of corporate financial policy. The reaction of the legislator in such a state of affairs was inevitable. However, as it seems it did not lead to a change in the principles of the insurance contract. There is no doubt, however, that the insurance contract principles, and especially the concept of good faith, need strengthening and further legislative support.

The analyses conducted so far show that at the heart of contract regulation stands the maintenance of contractual balance between the parties, taking into account the specific conditions of contracting (e.g. e-commerce, highly complex contracts such as in the field of financial services) and the essential characteristics of the parties (consumer, professional client, and the concept of large and mass risks). Contractual transparency and the related right to information are in the focus of all the provisions addressed here.[59] Looking past the formalistic perception of the principles of the insurance contract and reaching to their functions allows us to state that recent legislative trends, especially those contained in the provisions on insurance distribution, have not led to the collapse of traditional contractual values, including good faith. The new principles advocated by the doctrine, such as the principle of contractual fairness and the principle of reasonableness, paradoxically reinforce rather than deny the functions of the traditional ones. These days we stand at a dawn of changing disruptively the face of insurance.

[56] Lurger (n 5) 385.
[57] For example, the cyber risks gaining popularity recently did not exist at all before 1995.
[58] Mainly referred to are the provisions of IDD and Solvency II.
[59] Lurger (n 5) 385 'The "Social" Side of Contract Law and the New Principle of Regard and Fairness' in Arthur Hathkamp et al (eds) *Towards European Civil Code* (Kluwer 2004).

This change, however, does not diminish the need for loyalty and fairness, though it does change the way they should work.

Regardless of whether regulatory trends are merely legislators' responses to changing technology and market circumstances, or whether these trends may be pursuing a different model of economics, we must operate on the principles and shape the rules based on them. In addition, it is necessary to take into account at least European trends in reforming contract law, including in particular the insurance contract due to its emphasized cross-border aspects. In the light of the considerations, the author concludes that functional approach to the contractual principles allows us to state that the latest trends do not lead to the collapse of traditional values of the insurance contract, including in particular good faith, though they certainly need re-shaping at the level of rules. The final remark resulting from the examination made in this paper is that, in spite of new technologies taking over insurance processes, the application of good faith does not diminish. Though it seems that a change of regulations in this respect is inevitable with the change of the functions that insurance has a chance to fulfil. Until this moment, the developed doctrine of loyalty of both parties to the insurance contract supported by the clause of 'the customer's best interest' is to play a role.

The law should undoubtedly react and, to some extent, adapt to the development of technology. However, it should not go beyond the limits of the nature of a given relationship, in this case the nature of an insurance contract. In this context, it can and should place limits on the application of certain business and technological models. Another issue is the need to integrate technical models within the principles of the insurance contract, not leaving them as simply meaningless formal rules related to the contractual procedure. The use of AI in an insurance contract is not just a procedural issue, but should be reflected in the law, also in the context of the principle of good faith.