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Information Requirements in the Digital Environment

Briefing Note

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“Information Requirements in the Digital Environment”

Briefing Paper for the European Parliament’s Committee on Internal Market and Consumer Protection

Questions to be addressed in this briefing paper are the following:

Current EU legislation (e.g. Distance Selling Directive, E-commerce Directive etc.) prescribes mandatory information requirements that sellers need to provide to buyers. Are these information requirements appropriate in the context of the digital environment? What, concretely, should be added or removed from the information requirements to be provided by the producers and service providers to e-consumers (taking into account, in particular, the needs of non- technical users)? How well is consumer information on conditions of sale being communicated to online shoppers?

How can the transparency of the supply chain be ensured on the digital market? How can one ensure that consumers are aware of the real identity of the contractor (e.g. when they are transferred from one seller’s homepage to another without their knowledge)?

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Executive Summary

1. The European consumer law legislation follows the information obligations approach, aiming to enable the consumer to make an informed choice.
2. Information provision becomes more and more important since products and services are getting more and more complicated and direct contact between supplier and consumer exists less and less.
3. Information is key to enable a free choice for the consumer. The amount of information to be provided to the consumer is increasing, making it difficult for the consumer to process the information properly. It seems hardly possible to reduce the amount of information to be provided significantly, the emphasis has to be on the way the information is communicated.
4. The information obligations can be distinguished in product-related information and communication / distribution related information. The latter applies to all products and services. These are generally distinguished between pre-contractual information and written confirmation.
5. The European Directives regarding communication / distribution related information are all self-standing and (due to their drafting process) not or only very little linked although a number of different directives will apply to any economic transactions. This makes it difficult for consumers to understand the different layers of information.
6. Common definitions in different directives would help consumers as well as providers and achieve a more coherent legislative approach.
7. Harmonisation of cancellation / withdrawal periods would enhance clarity and consumer confidence. The minimum harmonisation approach creates barriers to cross-border transactions.
8. Consumers seem to hesitate to use their rights. Forms for cancellation (as introduced in some of the UK implementation) may help to avoid mistakes as well as overcoming the hesitation.
9. Other problems, such as the transparency of the supply chain in the digital market and the real identity of the contractor cannot be solved by legislative measures. Technical solutions can provide some help but will also require consumer awareness of possible problems.
10. Rogue traders cannot be completely eliminated by legislative measures but consumer awareness about requirements as well as his rights can limit the effects of rogue traders. A legal regulation that is clear and easy to understand, both for consumers as well as businesses will make the market less attractive for rogue traders and make it easier for every user, including the non-technical user, to understand the existing rules and to distinguish between honest and rogue traders.

Consumer Information

To reach a high level of consumer protection is the main aim of all consumer legislation. In overview, two different ways to reach this aim are possible, regulation and information obligations.

For contractual relationships, European consumer law legislation follows the information obligation approach. The aim is to ensure that the consumer is provided with sufficient information to enable him to make an informed choice on whether to conclude a contract or not. It is particularly important for the consumer to be provided with information whenever there is no direct contact between provider and consumer. If consumer and provider know each other and negotiate directly, the Roman Law¹ principles which are known in all European jurisdictions², ensure fair results. According to those principles, potential contracting parties have the responsibility to acquire all relevant information before concluding the contract, and contracting parties are seen as capable and curious enough to ensure that they have all necessary information before concluding a contract. With modern markets, however, these principles reveal their limitations. In global markets, most consumer contracts are not individually negotiated; nor are provider and consumer in direct contact with each other. It becomes at least very difficult, if not impossible, to ensure the effectiveness of these principles in consumer contracts. With technical development, products and services get more and more complicated. It accordingly becomes more and more difficult to understand products and services, and the consumer is not able to ask for the relevant and necessary information. The possibility of distance and electronic marketing create situations in which contracts are concluded without any direct contact between provider (or any intermediary, like an agent) and consumer.

¹ Wendlandt, B (2005) "EC Directives for Self-Employed Commercial Agents and on Time-Sharing – Apples, Oranges and the Core of the Information Overload Problem", in: Howells, G, Janssen, A, Schulze, R: Information Rights and Obligations, pp 67, 74; Möllers, T M J (2002) JZ, 121, 129; Fleischer, H (2000) "Vertragsschlussbezogene Informationspflichten im Gemeinschaftsprivatrecht" ZEuP, 772, 791

² Riesenhuber, K (2003), Europäisches Vertragsrecht, no. 299

Modern European legislation therefore no longer relies on these principles alone¹ and they become less and less important for consumer law, whilst consumer information becomes more and more important. The amount of information which has to be provided is constantly increasing, leaving service providers with a demanding task. Moreover, it is questionable whether this information does in fact enable the consumer to make informed decisions. It may be that, rather, the consumer cannot process the vast amount of information properly.

Information Requirements in European Consumer Legislation

Information requirements have got a long-standing tradition in European consumer legislation. The directives on Doorstep selling², Product liability³, Product safety⁴, Misleading / comparative advertising⁵, Price indications⁶, Package travel⁷, Timesharing⁸, Unfair contract terms⁹, Sale of Goods¹⁰, Distance selling¹¹, Distance selling of financial services¹², Consumer credit¹³, E-Commerce¹⁴, and Injunctions¹⁵ all require information to be provided to consumers to enhance consumer protection.

¹ Fleischer, H "Vertragsschlussbezogene Informationspflichten im Gemeinschaftsprivatrecht" (2000) ZEuP, 772; Grundmann, S "Privatautonomie" im "Binnenmarkt" (2000) JZ, 1133; Howells, G and Wilhelmsson, T "EC Consumer law: has it come of age?" (2003) 28 E.L.Rev., 370, 380; generally on information duties in EU law: Kind, S *Die Grenzen des Verbraucherschutzes durch Information – aufgezeigt am Teilzeitwohnrechtgesetz* (Berlin, 1997); Reich, N "Verbraucherpolitik und Verbraucherschutz" im "Vertrag von Amsterdam" (1999) VuR, 3, 5ff; Rott, P "Informationspflichten in Fernabsatzverträgen als Paradigma für die Sprachenproblematik" im "Vertragsrecht", ZvglRWiss 98 (1999), 382; Mankowski, P "Fernabsatzrecht: Information über das Widerrufsrecht und Widerrufsbelehrung bei Internetauftritten" (2001) CR, 767; Rees, P and Hargreaves, M "E.U. and U.S. Regulation of Electronic Commerce: Converging Approaches in a Changing World" (1999) I.C.C.L.R., 176; Howells, G and Wilhelmsson, T *EC Consumer Law* (Aldershot, Brookfield USA, Singapore, Sydney, 1997) 9ff

² 1985/577/EEC, OJ 1985, L 372/31

³ 1985/374/EEC, OJ 1985, L 210/29

⁴ 2001/95/EC, OJ 2002, L 11/4

⁵ 1984/450/EEC, OJ 1984, L 250, 17

⁶ 1998/6/EC, OJ 1998, L 80/27

⁷ 1990/314/EEC, OJ 1990 L 158/59

⁸ 1994/47/EEC, OJ 1994, L 280/83

⁹ 1993/13/EEC, OJ 1993, L 95/29

¹⁰ 1999/44 EC, OJ 1999, L 171/12

¹¹ 1997/7/EC, OJ 1997, L 144/19

¹² 2002/65/EC, OJ 2002, L 271/16

¹³ 1987/102/EEC, OJ 1987, L 42/48

¹⁴ 2000/31/EC, OJ 2000, L 178/1

¹⁵ 1998/27/EC, OJ 1998, L 166/5

The Directive on Unfair Commercial Practices¹ follows and widens this approach. Some of these directives² deal with particular products or services where effective consumer protection requires disclosure of specified information about the product, whilst others deal with the mechanisms used for advertising or conclusion of contracts³. In the first case, the information is product (or service) related and the legislation creates duties to disclose information which interfere with party autonomy and freedom of contract, but which are widely accepted as necessary and suitable means to protect consumers. The product- or service – related information to be provided does not vary according to the distribution channel chosen, and the use of electronic means (or contracts concluded over distance) does not require any more or less information about the product. Any other information required due to the chosen means of communication will be covered by the other directives regulating specific means of entering into transactions (post, e-mail, telephone, fax, etc.). In the latter case, the scope of application of the legislation is much broader and only partly related to the product or service concerned, but mainly concerned with the method of concluding the transaction. This latter affects suppliers and consumers across the board, as all goods and services can be included. It causes more tensions, as different products and services have different problems and risks which are all treated equally. This has a wide harmonising effect on European legal systems and implies for some systems great changes to national laws which may, due to their wide scope of application, have far reaching effects for national legal systems as a whole.

Many of the directives requiring information to be provided to consumers require product – related (or service – related) information. The provision of product – related information is not influenced by the way the products or services are distributed (neither is the means used to conclude the contract). Transactions concluded using means of distance communication or electronic means do not affect the product- or service – related information. Since this paper is concerned with information requirements in the digital environment, only the information requirements in the directives dealing with the transaction process (such as distance selling, distance marketing of financial services and e-commerce) will be further examined in this paper.

¹ 2005/29/EC, OJ 2005, L 149/22

² Doorstep selling, which cannot be performed electronically; product liability and product safety where there are no differences between online and offline transactions; package travel and timeshare where electronic transactions are becoming more and more numerous, but the directives on package travel and timeshare only deal with product/service related information and in case of distance or electronic transactions the directives on distance marketing and e-commerce are applicable alongside the product/service related directives.

³ Misleading / comparative advertising, price indications, unfair contract terms, sale of goods, and unfair commercial practices

Information requirements are particularly important in all contracts concluded over distance. The consumer (or, indeed any contracting party) usually does not have the opportunity to inspect goods or services before concluding the contract. Information requirements can help to ensure an extent of reliability, and are therefore extensively used in legislative measures regulating distance selling. Examining the current European legislation regulating distance selling shows that the information required is still increasing in its amount as well as becoming more and more detailed.

Information requirements have to be fulfilled at different stages of the contractual relationship. The directives distinguish generally between "general information", "pre-contractual information" and "written confirmation".

General and Pre-contractual Information Requirements

Other than the directives on distance selling and distance marketing of financial services which require pre-contractual information and written confirmation, the E-commerce Directive in addition creates general information requirements. General information has to be provided to the consumer (or indeed any user) in any electronic communication, before the process of conclusion of the contract. Usually this means that general information has to be provided on the supplier's homepage and has to be generally accessible, even if the user does not enter into the contractual process (or if the website does not offer online ordering). General information has to be independent from contractual relationships and has to be provided in any case and at an earlier time than pre-contractual information. Pre-contractual information has to be provided before a binding contract is concluded.

Although these distinctions are in principle justified and useful, they cause problems in practice. One risk is that the consumer only takes notice of some of the information (or only the first layer of information) and may therefore miss other important information.

Another problem is the reference to the national laws for the latest possible time the information has to be given. The reference to the national laws is – as a matter of principle – to be welcomed. It helps to maintain legal traditions and plurality and allows implementation into different legal systems. For consumers (as well as businesses) however, it means that in cross-border contracts unusual and unfamiliar situations may occur.

For electronic contracts, the provision in Art. 10 (1) (a) of the E-Commerce Directive ensures that consumers get an explanation of the relevant technical steps to conclude a contract. No such provision exists for non-electronic distance contracts. It is rather unusual and unknown from any legal system in the Member States to require one party of a contract in effect to explain the mechanics of entering into the contract (the contract law) to the other party. For electronic cross-border contracts, however, this regulation allows the application of different systems while consumers are not being surprised by different treatment in different legal systems. This requirement should also ensure that non-technical users are able to follow and understand the procedure. It seems that the implementation in practice could be improved. Businesses are sometimes not much more likely to understand the legal requirements any better than consumers, and this often leads to confusing or at least not very clear information. This is (apart from rogue traders where confusion and lack of clarity may be intentional) often due to the fact that businesses operating electronically are sometimes very small and do not have the relevant knowledge. The use of the web is a great opportunity for small businesses to operate on a world-wide or European market, and they are therefore more likely than other small businesses to be confronted with cross-border contracts. Also, since the provision has undergone significant changes in the drafting of the Directive¹, its position in the system of European legislation is difficult to determine.

Unless a common European contract law or a common European consumer contract law is going to be established, these issues cannot be finally solved, but in the absence of that they can be improved. Help and assistance for businesses as well as consumers could improve the information given to consumers and help consumers to understand the information. Best practice examples can foster harmonisation at a practical level and enhance consumer confidence as well as awareness of possible problems.

The analysis in the annex of the individual directives regulating the means of communication used² shows great similarities but also some significant differences in the information requirements. The directives require a different degree of detail of information, but although there is room for improvement in the way the information is presented, the individual information required is necessary for the consumer and should not be reduced.

¹ early drafts included a complete regulation of the conclusion of an electronic contract

² 97/7/EC – distance selling; 2002/65/EC – distance marketing of financial services;
2000/31/EC – e-commerce

The E-Commerce Directive specifically regulates the use of electronic means, whereas the Distance Selling Directive and the Directive on Distance Marketing of Financial Services regulate all distance communication – paper-based, telecommunications, as well as electronic means. In the case of electronic transactions, the transactions are always distance communications and therefore the E-Commerce Directive has to be applied alongside the Distance Selling Directive or the Directive on Distance Marketing of Financial Services. If products or services are advertised by electronic means, all relevant directives on marketing and advertising are to be applied alongside E-Commerce Directive and Distance Marketing Directives.

This leads to the application of a fair number of directives to one economic transaction, which shows a need for harmonisation of the general approach as well as harmonisation of the terminology used in the different directives.

The definitions of consumer and supplier / provider are all slightly different, and this may lead to differences or at least difficulties in the application. This is in practice not a significant problem however, since the European Court of Justice has developed a consistent practice of definition which has now, with the Directive on Unfair Commercial Practices¹, been implemented into secondary law². Any future revision of the relevant directives could introduce this approach as well and would make the law clearer and more easily accessible.

Scope for harmonisation also exists regarding some individual information requirements. It is not obvious why the requirement to give general information about the supplier / provider contain slight variations in the information to be provided, not leading to and not intending any substantial change (i.e. address / geographical address).

Substantial differences, however, do exist regarding other information. The reference to “working days”, “days” or “calendar days” in different directives (including the here not closely examined product-related directives) for time-limits (especially for cancellation / withdrawal periods) is confusing not only for consumers and providers but also for Member States.

¹ 2005/29/EC

² for details, see report for the Department of Trade and Industry (DTI) (UK), „An Analysis of the Application and Scope of the Unfair Commercial Practices Directive”, Howells, G, Nordhausen, A, Parry, D and Twigg-Flesner, C, http://www4.dti.gov.uk/ccp/consultpdf/final_report180505.pdf

A study of the implementation of the Distance Selling Directive into the Member States' law¹ showed great differences in the time-limits, and also some deficits in the implementation due to differences in the interpretation and meaning of the term "working days". This leads to difficulties for consumers as well as businesses. Later directives seem to use "days" or (more precisely) "calendar days" which is preferably as it is clearer and unambiguous and ensures a greater level of harmonisation leading to enhanced consumer confidence.

Related to this is the commencement of the time-limit where harmonised rules would improve clarity, but other than for the time-limit itself, for the commencement of the time-limit the Member States have different rules and traditions in their legal systems.

The differences in the use of either "withdrawal" or "cancellation" go back to different contract law backgrounds in the drafting process and show the limitation of the harmonisation but they do not lead to differences for the consumer.

Benefiting from some harmonisation would be the regulation of the consequences of non-fulfilment of information obligations. Most effective would be if the cancellation / withdrawal period would not commence at all if the required information is not given properly. This would give the consumer an unlimited right to withdraw / cancel. It would, however, conflict with certainty, and might cause further problems in national contract laws. A prolonged withdrawal / cancellation period can achieve a high level of consumer protection (if the withdrawal / cancellation period is sufficiently long) as well as ensuring certainty, and would not interfere so drastically with the national laws.

The time for the latest provision of pre-contractual information differs slightly in different directives. There does not seem any justification for this. It seems to have come about somewhat by accident in the drafting process of the directives. In any revision of the directives, this could easily, and without negative effect on the Member States' legal traditions, be harmonised and clarity being improved.

Similarly, a harmonisation of the requirements for written confirmation of information as well as to its contents would not have negative effect for the Member States' law but would improve clarity of the law.

¹ Nordhausen, A in: Edwards, L (ed.) The New Legal Framework for E-Commerce in Europe, Hart Publishing, Oxford 2005, pp 260

Since some of the relevant directives (i.e. that on distance marketing of financial services) are maximum harmonisation directives – not allowing the Member States to go beyond the directive in its implementation into their national law and to create or maintain any higher standards of consumer protection – this cannot easily be achieved by the Member States.

For other questions, such as the transparency of the supply chain in the digital market and the real identity of the contractor, there are no effective legislative measures. Some help may be provided by technical solutions. Providers can, for example, be made to design their websites in a way that consumers are made aware that they are getting onto a different website or leaving the secure website of one provider. If the consumer is aware of the possible problems, he will be more likely to spot irregularities and try to avoid dangers. Following the existing rules, the provider is obliged to mark advertisements and other commercial communications clearly and to provide the consumer with address, contact details, registration, etc.. If this is not provided or not provided properly, this results in a prolonged cancellation period or, in some Member States where the information is regarded as essential part of the contract, even a contract being invalid or non-existent. Although in contract law terms this might be a very welcome outcome for an individual consumer, it is not very effective as most consumers will not insist on their rights and most consumer cases will be too small to be brought to court. Another possible threat for providers is injunctions. In practice, however, injunctions, although useful and necessary in a number of cases, cannot provide proper enforcement of information obligations. In most cases, it will be very difficult to tackle rogue traders since they can easily escape. The only effective measure against rogue traders is an informed consumer who is aware of the requirements and his rights and a legal regulation that is clear and easy to understand, both for consumers as well as businesses. This will enhance consumer awareness of existing rules and regulation and make it easier for every user (including the non-technical user) to understand the existing rules and also to distinguish between honest and rogue traders.

Main problems

- Different directives with different requirements apply to the same contractual relationship. To contracts on the sale of goods concluded electronically, the E-Commerce as well as the Distance Selling Directive applies. This makes it difficult for providers to fulfil the information requirements correctly, as well as making it difficult for consumers to understand the different layers of information.
- Common definitions in different consumer directives would help consumers as well as providers.
- Different times and ways of communication of the information make it difficult for consumers as well as providers. Although there is some logic in the different treatment of different issues (i.e. financial services contracts) it does not seem necessary to maintain the subtle differences about when information has to be given. Harmonisation would make it easier for consumers as well as providers. It would interfere with the Member States traditions in their respective legal traditions, but this should not have a major effect on the legal systems as a whole.
- The minimum harmonisation approach for cancellation periods is problematic. In practice, the cancellation periods vary quite considerably in different Member States (some Member States are even not fulfilling the minimum requirements). Consumers will in most cases assume that the cancellation period for cross-border contracts will be as long as in their Member State of residence. Providers could theoretically opt for the law of Member States with only the minimum cancellation period, although in practice this does not seem to be of great relevance. For cross-border contracts, the applicable law has to be established before information on any cancellation period can be given correctly. This does complicate the communication of information unnecessary for providers.
- Another very important problem is the flood of information for consumers. As shown, the information requirements are getting more and more and research as well as consumer experience show that consumers cannot take in and process all the information provided before making any decision. It is problematic to reduce significantly the amount of information to be given, since (in the absence of strict regulation) information is the key element to enable a free choice for the consumer.

Some information obligations could be harmonised, but mainly the manner in which the information is communicated needs to be improved. One possible way of doing this is standardisation of the presentation of information; another option is to make some information more prominent (i.e. like in the Directive on Unfair Commercial Practices).

- Consumers seem to hesitate to use their rights. Forms for cancellation as introduced in some of the UK implementation (with the correct addressee included) may help the consumer in avoiding mistakes as well as overcoming the hesitation.
- Electronic delivery and cancellation is problematic. Electronic delivery (i.e. download of software) is included and would normally allow cancellation. Technically however, it is unavoidable that a copy is saved on the consumer's computer and the delivered goods or services therefore cannot be send back. The only sensible way forward here seems to be a technical solution. Providers can for example allow temporary access which has to be unlocked after the cancellation period. This does not address the problem where a consumer is only interested to access the information once but not in keeping the information but this problem is very similar to physical delivery of goods or services.

ANNEX: Information Requirements in Individual Directives

Distance Selling Directive

The Distance Selling Directive applies to all contracts concluded over distance. The Directive names some means of distance communication explicitly¹, but these are not exclusive. Whenever the Directive is applicable² and the contract is not explicitly exempted³, the supplier has to provide the consumer with certain specified information⁴.

Article 4 of the Distance Selling Directive requires this information to be given "in good time prior to the conclusion of any distance contract". The latest possible point of time for providing this information is just before the last step necessary for the binding conclusion of the contract, depending on national laws.

Information Requirements in the Distance Selling Directive

All information has, according to article 4 (2), to be given in a clear and comprehensible manner, appropriate according to the means of distance communication used. This means that the information can, and must, be given differently on a website than in a telephone conversation⁵.

Telephone contacts are under the Distance Selling Directive generally permitted (but prior consent required for the use of fax and automatic calling systems). Some Member States allowed all other forms whereas others banned some practices, such as spam and cold calling. With the Privacy and Electronic Communications Directive, which bans unsolicited commercial communication without prior consent for (inter alia) phone, e-mail and other electronic texts, some of the problematic issues have been solved. The Privacy and Electronic Communications Directive however, allows some significant exceptions.

¹ Annex 1

² Article 2(1)

³ Article 3(1)

⁴ Lodder, A R and Voulon, M B "Intelligent agents and the information requirements of the Directives on distance selling and e-commerce" (2002) I.R.L.C.T., 277; Rose, A *Distance Selling and the Internet* (Paisner I.P.B. 1997) 12; Lawson, R "E-Commerce and distance selling" (2002) C.S.R., 94; Hornle, J "Germany – distance selling – information requirements and withdrawal right" (2002) E.B.L., 14; Newton, J "Distance selling: keeping the customer in the know" (2001) E.B.L., 16; OLG Frankfurt/M., "Pflichtangaben beim Fernabsatz, judgement of 17 April 2001, 6 W 37/01" (2001) MMR, 529

⁵ Meads, P "E-Consumer Protection – Distance selling" (2002) I.C.C.L.R., 179, 180

The information given to the consumer has to be confirmed in writing¹. The consumer must receive the information either in writing or on a durable medium available and accessible to him. The latest possible time for the confirmation of the information is “in good time during the performance of the contract”. It is commonly understood that inclusion of the confirmation with the physical delivery of the product is sufficient.

Directive on Distance Marketing of Financial Services

Although the Directive is a specialised regulation for financial services, it interplays with the Distance Selling Directive as well as the E-Commerce Directive and it builds on the measures and approach known from these two directives². The similarities can mainly be found in central issues of these directives such as the information requirements, the cooling-off period and the restrictions on inertia selling. Some differences exist in the regulation of these issues, but these are mainly founded on the different nature of the services.

As with the Distance Selling Directive, the Directive on Distance Marketing of Financial Services requires certain information to be provided to the consumer in good time prior to conclusion of the contract. Compared to the general Distance Selling Directive, far more information has to be provided, and all information has to be given in good time before the conclusion of the contract in a way appropriate to the means of distance communication used. All the information has, as Article 5 (1) requires, to be given “in writing or in another durable medium” before the consumer is bound by any contract or offer. This, due to the complexity of the services, is considerably earlier than for the general Distance Selling Directive. The wording “before the consumer is bound by any distance contract or offer” seems to imply that the information has to be communicated before the consumer can make a binding offer and it could be argued that this communication of information is a necessary pre-requisite for the conclusion of a contract. This argument would be very much in favour of the consumer but it would make Article 11 of the Directive more or less redundant, which requires the Member States to provide appropriate sanctions in the event of non-compliance with provisions pursuant to the Directive. One sanction suggested in Article 11 is the right for the consumer to cancel the contract at any time.

¹ Art. 5

² Coffey, J “E-Commerce Directive and financial services” (2002) S.J., 504

As this is only one possible option for sanctions, it does not exclude the possibility for the Member States to include the information duties into the essential requirements for a contract (*essentialia negotii*) but it does not require it either. In certain cases it might also be disadvantageous for the consumer and therefore doubtful of compatibility with the aims of the Directive.

At any time during the contractual relationship the consumer is entitled to receive, on his request, the contractual terms and conditions on paper. Additionally, Article 5 (3) gives the consumer a choice of the means of distance communication used, unless it is incompatible with the contract or the nature of the financial service.

Information Requirements in the Directive on Distance Marketing of Financial Services

Information prior to the Conclusion of the Contract

Article 3 requires the consumer to be provided with information “in a clear and comprehensible manner” in any way appropriate to the means of distance communication used, concerning the supplier, the financial service, the distance contract and redress. The commercial purpose of the contract must always be made clear and all communication must follow the principles of good faith in commercial transactions and the principles governing the protection of persons unable to give consent, such as minors.

The Individual Information Duties

For all means of distance communication other than telephone communication, the full information requirements have to be fulfilled. The consumer has to be provided with detailed information according to the means of distance communication used and which subsequently has to be confirmed on paper or another durable medium. The information required includes information about the supplier, the financial service itself, the distance contract and redress mechanisms. This individual information required is as follows:

Additional Information Requirements

Article 4 (1) requires additional information for those cases in which other EU-law provisions require prior information additional to the information requirements of the Directive. In these cases the supplier has to comply with the full information requirements following the Directive on distance marketing of financial services as well as any other information requirements.

Article 4 (2) allows the Member States to maintain or introduce more stringent provisions on prior information requirements, as long as these requirements are in conformity with Community law¹. Member States have to communicate any provisions requiring additional information to the Commission, and the Commission shall communicate this information to suppliers and consumers to enable them to comply with these requirements². This provision is an exemption from the general maximum harmonisation approach of the Directive, but the exemption is restricted only to more stringent information requirements and pending further harmonisation.

Telephone Communications [Financial Services]

Article 3 (3) regulates the special information duties for voice telephony communications. The information supplied must generally follow the special requirements of the means of distance communication used, but as in the general Distance Selling Directive, use of the telephone is regulated. This is particularly necessary as fulfilment of the information requirements over the telephone is especially difficult, as fulfilling all information requirements by reading the information out to the consumer would, especially with the amount of information required for financial services, be incomprehensible to the consumer and would be likely in practice to exclude telephone communications completely, a result that would be contrary to the aim of the Directive.

Nevertheless the information requirements are independent of the means of distance communication used. Consequently the Directive regulates the information duties separately for telephone communications.

¹ I.e. for German law see the comprehensive analysis: Abegglen, S *Die Aufklärungspflichten in Dienstleistungsbeziehungen, insbesondere im Bankgeschäft* (Bern, 1995); regarding Standard Contract Terms: Derleder, P/Pallas, A "Vertragsschluss und AGB-Einbeziehung im kreditwirtschaftlichen Distanzgeschäft" (1999) ZIP, 1285

² Art. 4(3)

Furthermore, the supplier has to inform the consumer about other information, its nature and that it is available on request. This allows the consumer to access more information if he feels it would be necessary or preferably to do so.

In any case the supplier has to provide full information according to Article 5 on paper or another durable medium, either in good time before the consumer is bound by any contract or offer or, if the contract has, on the consumer's request, been concluded before these requirements could possibly be fulfilled, immediately after the conclusion of the contract.

Information Requirements for E-Commerce

The E-commerce Directive requires general information and pre-contractual information. General information has to be available and accessible at all times, but pre-contractual information only has to be provided during the process of concluding the contract. General information has to be provided to every user, business users as well as consumers. Pre-contractual information has to be provided to every user if no other agreement has been made but this is subject to the agreement of the parties. In business-to-business contracts (B2B) the parties can opt-out. Generally exempted is e-mail communication or any other individual communication between provider and consumer.

Written confirmation (including durable medium) of information is required regarding the information required under the Distance Selling Directive (or the Directive on Distance Marketing of Financial Services). The E-Commerce Directive states explicitly that other provisions shall still apply and the E-Commerce Directive shall only provide additional specialised provisions for the use of electronic means. E-Commerce contracts are always distance contracts and the distance selling provisions therefore apply. This means that in electronic contracts, the information required under the distance marketing regime has to be confirmed in writing (or on a durable medium), the general information required under the E-Commerce Directive¹ has to be available and accessible all the time and the pre-contractual information required under the E-Commerce Directive² has to be given to the consumer, but not to be supplied in writing or on a durable medium – nor has to be in a format in which the consumer can easily print or save the information.

¹ Art. 5

² Art. 10

Only contract terms (including standard terms)¹ have to be presented to the consumer in a way that they can be saved and reproduced.

This construction is not very consumer-friendly. The consumer is flooded with a vast amount of information which he cannot possibly process properly and is also confronted with the fact that some but not all of the information will be supplied to him on a durable medium.

General Information

General information to be given in any event (regardless of whether the parties enter into contractual relationships or do not even intend to do so) will usually have to be included in any website. It is not specified whether this information has to be directly on the homepage or if it is sufficient to provide a link from the homepage. Generally, the latter is seen as sufficient, assuming this is provided in a clear and comprehensible manner. General information also has to be provided in all cases, not only on websites aimed at consumers but also websites aimed at businesses. The general information requirements have to include the following:

- Name of service provider
- Geographic address
- Details including e-mail allowing him to be rapidly contacted and communicated in a direct and effective manner
- Details of trade registry entries
- Professional details
- VAT details
- Price (tax, delivery costs)

These are the information which have – according to most national laws – generally to be provided in the offline world as well, with the exemption of an e-mail address, which will usually be provided offline as well, but is an explicit requirement for online presentations. Whilst businesses cannot be required to have and use e-mail and electronic communication, with the use of electronic media they open this communication method and therefore have to be prepared to communicate through this channel.

¹ Art. 10 (4)

Pre-contractual Information

Although the general information requirements are also pre-contractual information requirements, the E-commerce Directive distinguishes general and pre-contractual information requirements. Other than the general information requirements pre-contractual information requirements only have to be fulfilled if online contracting (or contract preparation) is generally offered. In contrast to general information requirements, pre-contractual information requirements also can be given at a later point in time; they only have to be provided in connection with the conclusion of a contract whilst general information requirements have to be fulfilled in any case, including situations where no opportunity is given to conclude a contract online.

Although the pre-contractual information requirements generally have to be provided both in business-to-business (B2B) and business-to-consumer (B2C) transactions, parties can agree otherwise in business-to-business relationships. In the absence of contrary agreement, however, the pre-contractual information has to be given in the same way as in consumer contracts. In consumer contracts, the pre-contractual information is mandatory and cannot be excluded. The only possible exclusion in consumer contracts is individual negotiation, i.e. by exchange of e-mails or any other equivalent individual communication. In this case, the main justification for pre-contractual information requirements, to outweigh the information imbalance, is not relevant.

The pre-contractual information has to include the following:

- Different technical steps to conclude the contract
- Whether the concluded contract is filed and accessible
- Technical means for identifying and correcting input errors
- Languages offered
- Relevant codes and how to access them electronically
- Contract terms and general conditions available and storable

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