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The implied duty of a service provider to warn about a risk of construction defects resulting from a contract with a third party, with emphasis on defects resulting from design failures: A case study on the precontractual and contractual duty to warn in English, German and Dutch law and in the Draft Common Frame of Reference

Luzak, J.A.

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9. The DCFR and the three national systems compared. Concluding remarks.

This book contains an analysis of the English, German and Dutch precontractual and contractual duty of a service provider to warn about a risk that might emerge from a contract with a third party in the construction sector, in the situation where the client is either a consumer or a consumer-like party. Moreover, it presents an analysis of the regulation of the precontractual and the contractual duty to warn in the Draft Common Frame of Reference (and its predecessor, the Principles of European Contract Law on Service Contracts). This has been done in order to establish and define the existence and scope of this specific duty to warn.

The preceding chapters 2-7 give answers to the research questions. These chapters explore under what conditions a service provider has a precontractual or a contractual duty to warn about a risk that might emerge from a contract with a third party in the construction process in England, in Germany and in the Netherlands, when such duty has not been explicitly agreed upon in the service provider's contract. Each of these chapters ends with a comparative paragraph where the findings in these three discussed legal systems may be found and where more general conclusions have been drawn.

Chapter 8 presents the regulation of the duty to warn in the DCFR. However, no comparison has been made there between the theoretical regulation of the duty to warn in the DCFR and the practical solutions adopted in England, Germany and in the Netherlands. The commentary to the DCFR shortly sketches the source and the scope of the duty to warn in these Member States, without, however, giving the whole picture. One of the aims of this book is to serve as a comparative basis for the current regulation of the duty to warn in the DCFR. It also hopes to influence the future development of a general framework in European contract law as regards duties to warn. This is why a comparison will be made in this last chapter between the regulation of the duty to warn in the DCFR and in the three analysed national legal systems: England, Germany and the Netherlands. Therefore, the first part of this last chapter presents in what way the provisions of the DCFR are supported by the law of the three legal systems that have been analysed. In the second part of this chapter the reader may find a summary of the answers to the research questions considered and other concluding remarks.

9.1. The DCFR and the three national systems compared.

9.1.1. The builder's duty to warn.

As has been presented in the chapter on the builder's *contractual* duty to warn, the three analysed legal systems do not differ significantly on the regulation of the builder's duty to warn about the designer's default. In all of them it is considered that the builder's duty to warn about the defects in the design plans should not be understood too broadly, due to the fact that the client in most cases employs specialists whose task it is to evaluate the design plans and due to the fact that the builder usually does not possess the knowledge, which is needed for such an evaluation himself. Since the English courts, from the beginning of this century onwards, started accepting the duty to warn in construction cases, all systems recognise the builder's duty to warn the client if there is a default within the design

that the builder should have been aware of. Still, English law does not provide us with an established authority as to the recognition of the builder's duty to warn (taking into account that the case law is recent, concerns mostly the sub-contractor's duty to warn and it is based on the Court of Appeal ruling that has never been challenged at the Supreme Court), which points to a weaker position of English clients in this respect as compared with clients in Germany and the Netherlands. In the DCFR the contractual obligation to warn of the service provider has been specifically established which is supported by the fact that it is recognised in the three legal systems that had been analysed here, even if only the Netherlands has codified this duty. Pursuant to the provision of the Article IV.C.-2:108 para. (1) DCFR the builder has to warn the client about a mistake made by the designer. This has also been explicitly pointed out in the General Comments to Chapter 2 (Construction) of the PELSC. Pursuant to Article IV.C.-2:108 para. (5) DCFR the builder would need to warn the client only about such defaults of the designer that he could have easily noticed (or had actually noticed), which, just as in the three legal systems that have been analysed, does not put on the builder any obligation to actively look for defaults. Still, the clear provision in the DCFR establishing the builder's duty to warn provides legal certainty to the consumers who would chose to have the system of the DCFR applied to their contracts.

As far as the scope of the German and Dutch builder's duty to warn is concerned, the case law gives us plenty of indications when the builder might be expected to be held liable if he does not warn the client about the default in the design. However, even in the Dutch system, where the duty to warn is codified, there is no possibility to give precise specifications as to the scope of the builder's duty to warn, since certain requirements for that can be evaluated only on a case-by-case basis. This suggests that the scope of the builder's duty to warn in England and Germany is even less transparent. However, in all three systems there is no doubt that one of the most important indications as to whether the builder should have a duty to warn, is the level of professional knowledge and expertise that could be expected of him in the area where the default had manifested itself. In the DCFR, Article IV.C.-2:108 para. (1) DCFR defines the scope of the builder's duty to warn a bit more precisely since it establishes that the builder has a contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. Again, the clear text of this provision aims at providing legal certainty to the consumers. The DCFR sets a specific limitation to the scope of the builder's duty to warn, namely, the builder does not have to warn the client if the client already knows of the risks involved or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR. The same rule can be found in German and Dutch law. In English law, this matter has not been clearly decided by courts up to this moment.

All three legal systems that have been analysed, recognise also the builder's duty to warn as to the risk coming from parties in the construction process other than the designer. The scope of that duty to warn is also dependent on the knowledge and expertise of the builder acting as a careful average builder. It has explicitly been added to Article IV.C.-2:108 para. (1) DCFR that the service provider's duty to warn is not limited to warning the client about a risk that might come about as a result of following information or directions of the client, or faulty information that the service provider himself had collected, but also as a result of the occurrence of any other risk.

This suggests that the service provider has also a duty to warn about a risk coming from a third party, even though this has not been clearly expressed in the comments to the DCFR. Since a similar provision may be found in the PELSC, it is worthwhile to mention that in the General Comments to Chapter 2 (Construction), the draftsmen of the PELSC list such an example of the duty to warn as falling within the scope of this provision. This part of the provision of the DCFR lacks clarity since it does not specify that the consumer may claim damages for loss caused by breach of a duty to warn of one professional party about a risk coming from a third party. It is likely that this provision would be interpreted in such a way to encompass this obligation, as I had explained above, but the consumers would have more legal certainty if it were clearly stated in the text of the provision.

The scope of the *precontractual* duty to warn is not specified in all three systems in such detail as the scope of the contractual duty to warn. In Germany and the Netherlands the main conclusion coming out of the comparison of the scope of the contractual and precontractual duty to warn is that they are alike. However, despite the similarities it needs to be pointed out that the scope of the precontractual duty to warn does not stretch as far as the contractual one. It may be assumed that if the precontractual duty to warn would be accepted at all in England – so far there is no case law where such a duty has been accepted in the first place – the scope thereof would certainly not stretch further than the scope of the contractual duty to warn. The draftsmen of the DCFR were much more specific than the national legislations (or courts) and set the scope of the precontractual duty to warn close to the scope of the contractual duty to warn, which again provides more legal certainty to the consumers. This means that the builder has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. In general, the builder has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract, pursuant to Article IV.C.-2:102 para. (6) DCFR. However, a certain amount of alertness on the side of the service provider is required to discover such risks, namely he is expected to check whether the construction that the client wants to have performed is feasible under the conditions that the client had specified. Article IV.C.-2:102 para. (2) DCFR specifies that the pre-contractual duty to warn does not apply if the client already knows of the risks or could reasonably be expected to know of them. The regulation of the pre-contractual duty to warn in the DCFR is seen as a preferred solution by the draftsmen of the DCFR, since it is to reflect the development of pre-contractual duties to inform (and therefore, also duties to warn) in Member States. However, the Notes to this Article do not provide a good illustration of this reasoning, since they point out just a few Member States and list lots of uncertainties as to the recognition and scope of the pre-contractual duties to inform therein. For example, while the draftsmen discuss these pre-contractual duties to inform, we can see that, just as this research showed, there is a problem with recognition of such duties in England. German and Dutch law are seen as recognising these pre-contractual duties but with certain controversies still leaving doubts as to the specifics of the scope of such rights. All in all, in this respect, the DCFR seems not only to reflect the law as it stands in the three legal systems dealt with, but also to go beyond it and to design a desired law. This desired law provides more legal certainty and clarity to the consumers and therefore may be seen as a preferable option to the ones presented in the national systems.

9.1.2. The designer's duty to warn.

In all three discussed systems it is clear that the designer is liable for not warning the client about defaults in the construction caused by third parties that the designer had or should have noticed. The same obligation has been placed on the designer in the provisions of the DCFR, since the general duty to warn expressed in Article IV.C.-2:108 DCFR of the service provider also applies to designers. The designer does not have to look for the mistakes the builder or any other professional party has made, but he has to notify the client about any risk that he should have seen as a reasonable and competent designer. Pursuant IV.C.-2:108 para. (5) DCFR the designer will also only have to warn the client about any obvious risks to the construction. The designer is not released from this duty just by the fact the client employs other professional parties who might also discover the risk and convey the warning to the client. The only difference between the three national law systems is as to the liability of the designer for recommending another specialist to the client. In German and English law the designer has a duty to warn if he makes such a recommendation as to the risks involved in employing that specialist. In the Netherlands the designer's liability is less certain if that specialist does not perform his work timely, etc. Since pursuant to Article IV.C.-2:108 para. (1) DCFR the designer needs to warn the client about any risk he is aware of, that would seem to include the knowledge he might have of incompetence or financial problems of the specialist he is recommending to the client. The DCFR chose here a solution that gives more clarity and legal certainty to the consumers than the Dutch legal system.

As has been mentioned in the chapter on the designer's duty to warn, the *precontractual* duty to warn of the designer is even less regulated and less discussed in case law than the builder's precontractual duty to warn. One explanation that might be given for it is that there are not many cases where there is contract concluded with a third party (from which a risk within the scope of this book may emerge) *before* the contract with the designer is concluded – in most cases, the client first concludes a contract with the designer before engaging other parties. As a consequence, it is difficult to draw any conclusions as to the scope of such a duty to warn in the three analysed legal systems. The DCFR is in this respect more specific since Article IV.C.-2:102 DCFR on the pre-contractual duty to warn applies to designers as well and places a pre-contractual duty to warn on them. Moreover, there is a separate provision on the designer's pre-contractual duty to warn in Article IV.C.-6:102 DCFR obliging the designers to warn their clients if they are not qualified to fully assess the risks involved in the construction process. The draftsmen of the DCFR saw the need to enable clients to make an informed decision prior to the conclusion of the contract as to the specialists they would want to employ. Again, the draftsmen of the DCFR by adopting such a provision granted consumers more protection than the protection they have in the three legal systems studied in this book, aiming for the creation of maximum legal certainty and clarity to consumers.

9.1.3. The sub-contractor's duty to warn.

As far as the sub-contractor's *contractual* duty to warn the builder is concerned, its scope is comparable with the scope of the builder's duty warn the client in England, Germany, and in the Netherlands. The sub-contractor will most likely

have a duty to warn when he knew or should have known about the default in the works of a third party. However, it should be mentioned that the sub-contractor's duty to warn is more rarely recognised (or at least claimed) in practice. The DCFR does not differentiate between the builder's and the sub-contractor's duty to warn. The general provision of Article IV.C.-2:108 DCFR on the contractual duty to warn of the service provider would be applicable also to the sub-contractor. This means that in accordance with Article IV.C.-2:108 para. (5) DCFR the sub-contractor would need to warn the builder only about such defaults of the third party that he (the sub-contractor) could have easily noticed (or he had actually noticed) and that the builder (who in relation to the sub-contractor is the client) does not already know of or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR, which will be less likely here. The DCFR provisions, as well as the discussed national legal systems, establish a sub-contractor's duty to warn in similar circumstances to the builder's duty to warn. The level of protection granted by the DCFR to consumers is only marginally higher than what is established in the three discussed legal systems, since the DCFR clearly considers the sub-contractor to comply with the same requirements for the duty to warn as the builder does. In the discussed national laws this comparison is implied in case law rather than explicitly established.

As far as the sub-contractor's duty to warn the client is concerned, important differences may be seen between the three legal systems in the way the client as a third party in regard of the contract between the builder and the sub-contractor can claim damages for the faulty construction and for non-performance of the sub-contractor's duty to warn. In English and Dutch law, the client can claim compensation from the sub-contractors, who noticed or should have noticed a default in the work of other professional parties working at the construction site, but only in tort, since the client does not have a contractual relationship with the sub-contractor. In German law, there is the special construction of *Vertrag mit Schutzwirkung für Dritte*, which, under certain conditions, allows the client to claim contractual damages from the sub-contractor even though there is no contractual relationship between them. In Dutch law when the sub-contractor warns his contractual counterpart, the builder, of a serious risk to the construction and sees that the builder does not do anything with the warning, a question may be asked whether the sub-contractor should not warn the client under such circumstances. As it will be discussed in the next paragraph, when the risks to the construction are extremely serious (e.g. personal injury) then the service provider might be expected to do something more than just warn his client. It is interesting whether the same reasoning could not require the sub-contractor to relay the warning directly to the client. However, it has not yet been decided on by the Dutch courts.

The DCFR regulates specifically only the contractual duty to warn of the service provider towards his client, which means that it would regulate only the sub-contractor's duty to warn the builder, and not the client directly. The sub-contractor's duty to warn the client falls under the tort provision of the DCFR. The tort provisions in the DCFR are very general as to their scope of their application. The loss that the client might suffer as a result of not being warned directly by the sub-contractor could be recovered under Article VI.-2:201 para. 1(b) or 1(c) DCFR, even if there is no specific duty to warn in tort placed on the sub-contractor by the provisions of the DCFR. In this respect the DCFR seems to offer less legal certainty to the consumers, which may be the effect of the focus in the DCFR on contractual relations rather than on tort actions.

There has not been much case law that could be analysed on the *precontractual* duty to warn of the sub-contractor. The only example presented in the chapter on the sub-contractor's duty to warn concerns a case in the Netherlands. It shows us that its scope would correspond to the scope of the precontractual duty to warn of the builder, which means that only so far as the sub-contractor knew or should have known about an obvious risk from a third party from the study he conducts of, for instance, the design plans, in order to make his offer to the builder, he would have a duty to warn. As mentioned in the part about the builder's duty to warn above, the precontractual regulation of the service provider's duty to warn is similarly regulated to the contractual regulation in the DCFR. This means that if there is a precontractual duty to warn of the sub-contractor, then pursuant to Article IV.C.-2:102 DCFR he has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. In general, the sub-contractor has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract.

9.1.4. Requirements for an effective warning.

All three analysed systems require the warning to be given in clear and precise terms. Only German law introduces a form requirement: the warning must be given in writing. However, if the service provider could prove that he has given a clear and precise warning but not in writing, the German courts may take that into account while establishing the liability of the service provider. As a result, the court might assess that there was no liability of the service provider or that it should be diminished. The DCFR does not request a specific form for the warning in either of its articles. Article IV.C.-2:108 para. (2) DCFR does require the service provider to ensure the client understands the warning that has been given to him, thus introducing the requirement for clear and comprehensible warning. The DCFR rule in this respect is very general and will not lead to more legal certainty for the European consumers since it is difficult to assess and prove whether the warning was given in a way that led to the consumer's understanding thereof.

It has also been recognised that the service provider could fulfil his duty to warn by warning the representative of the client, and not the client himself. However, in German and English law if the service provider had doubts as to whether the warning was taken seriously by the client's representative and further conveyed to the client, he might need to approach the client directly. In Dutch law such an action would be requested of the service provider only in extreme circumstances, when the service provider would realize that not following the warning given by the representative of the client could have serious negative consequences to the client. Also according to Article IV.C.-2:108 para. (3b) and Article IV.C.-2:108 para. (6) DCFR the knowledge of the representative of the client would be attributed to the client himself, which means that the service provider would fulfil his duty to warn by warning the representative and not the client. However, it does not seem likely that he could assume that the client knew of the risks, if he had a reason to doubt if the representative had conveyed his warning to the client.

In all three systems it has also been mentioned that the service provider sometimes might need to take other measures than just warn the client. However,

none of the legal systems clarifies what such measures are and when the service provider should apply them. The most clear is German law, where when the risk endangering the construction threatens the health and life of people or the interests of third parties, the service provider needs to refuse to perform his services if the client does not change his instruction upon receiving the warning. Pursuant to Article IV.C.-3:103 and Article IV.C.-2:105 para. (5) DCFR the service provider needs to prevent any structural damage to the construction. If such a risk endangers it, then it might be imagined that the service provider could not stop at just giving the warning to the client but should also stop with performance of his services if they could lead to endangerment of the construction's structure. It needs to be mentioned that the provision of the DCFR only aims at preventing the structural damage to the construction. It does not put any specific extra obligations on the service provider, beyond granting a warning, which means that the consumers may not be certain exactly what kind of duties the service provider had towards them. Additionally, if the risk does not involve structural damage but still threatens health and safety of others, German and Dutch law request of the service provider a higher standard of care, but the DCFR does not specify a more extent duty of care.

9.1.5. Liability.

In all three national law systems concurrent liability of the professional party who breached his duty to warn and the service provider who caused the risk to the construction is recognised. This leads, most commonly, to the client being able to choose from which party he wants to claim his loss. In German law these two parties are subject to rules on solidary liability. A similar situation happens in English law, even though there the client often chooses to sue both parties in one proceedings and the court will immediately apportion damages between them. In the Netherlands some authors are in favour of sole liability of the party who breached his duty to warn, while some others argue for concurrent liability and the possibility to apportion damages between all professional parties that contributed to the risk. Since the main rule of Dutch Civil Code on liability is recognition of solidary liability, it is not really clear why in this case an exception could be made of sole liability of e.g. the builder breaching his duty to warn. The arbitral court tends to hold the builder who breached his duty to warn about the designer's mistake fully liable towards the client for his loss. It does not mean that the designer's causal link to the client's loss is seen as being severed. The client could still choose the designer liable for his default. Pursuant to Article IV.C.-2:106 DCFR the service provider will always be seen as having caused the loss to the client, regardless whether he did this directly – i.e. by providing a defective design – or indirectly – i.e. by not giving a warning – since the service provider is obliged to achieve the specific result that was stated by the client at the time of the conclusion of the contract. However, where the service provider would be able to prove a clear lack of causality between the lack of warning and the client's loss, then the comments to the PELSC suggest that the client might not hold the service provider liable at all. Still, no example of such a situation had been given in the comments. In case of the precontractual duty to warn that rule has been deduced from Article IV.C.-2:102 para. (3) DCFR. Since there is no specific provision in the DCFR changing the general rules on liability in case of a breach of the duty to warn, the liability of two professional parties would be solidary pursuant to Article III.-4:103 para. (2) DCFR. Paragraph 3 of this Article specifies that solidary liability may apply even if two debtors are liable on different grounds. This again means that the

client may turn towards any debtor with his claim for damages, which gives him the most legal certainty by allowing him a free choice between professional parties he would like to claim damages from.

The service provider who breached his duty to warn might try to protect himself by claiming the defence of contributory negligence – that is by showing that other parties for whom the client held responsibility had contributed to the risk. This defence is the least likely to lead to succeed in contractual claims in English law. In Germany and in the Netherlands the service provider might not be able to use this defence only exceptionally, that is if it would infringe the ‘good faith’ rule. The DCFR recognises the defence of contributory negligence as well in Article III.-3:704 DCFR. It is disputable whether the provision on ‘good faith’ from Article III.-1:103 DCFR could limit the scope of the application of this defence, since the relation between these two articles has not been explained in the comments to the DCFR. This lowers the level of legal certainty granted to the consumers, since they may not be certain whether they will be able to claim the whole amount of damages from the professional party, based on the fact that e.g. the builder knew clearly of the defect and it was due to his gross negligence that the client was not warned about it, or whether part of the client’s losses will be attributed to them.

Finally, the liability for breach of the precontractual duty to warn has not been discussed as extensively, since most of the time when a breach of a precontractual duty to warn is recognised, the contract had already been concluded and often parties just claim the liability for breach of the contractual obligation. In this respect the regulation of the DCFR, again, does not reflect the current state of law in these three Member States, but rather illustrates the desired state thereof.

9.2. Concluding remarks.

The main purpose of this book is to illustrate the conditions under which a service provider in the construction process has a precontractual or a contractual duty to warn towards his consumer-client about a risk that might emerge from the client’s contract with a third party in England, Germany, the Netherlands and under the DCFR, when such a duty has not been explicitly included in the service provider’s contract. The findings of this research have been presented in the above chapters, each of them finishing with a summary and comparison of these conditions in the analysed legal systems. In these chapters more detailed research questions have been analysed and answered on the basis of a positive methodology, i.e. based on existing legal provisions and case law in England, Germany, the Netherlands, and on the provisions of the DCFR.

Since the outcome of this research may influence the future development of a general framework in European contract law as regards duties to warn, this last part of the book repeats the research questions that were posed at the beginning of this book, and summarizes the answers that may be found in it.

The main research question of this book asked for: *an illustration of the scope of the implied duty to warn of the service providers in the construction sector in respect of a risk coming from a third party.* Article IV.C.-2:108 para. (1) DCFR puts a contractual obligation on the service providers to warn their clients about a risk that might come about as a result of following information or directions of the client or faulty information that the service provider himself had gathered, but also as a result

of the occurrence of any other risk, which would include a risk coming from a third party.

What would trigger the duty to warn? The trigger for this duty to warn to arise under Article IV.C.-2:108 para. (5) DCFR is materialization of a risk that should be obvious to and could be seen by the service provider from all the facts and circumstances of the given case, i.e. without the service provider having to investigate in order to find that risk. This answers also the question *whether the service provider has to specifically look for gaps, ambiguities, inconsistencies, and mistakes.*

Another side of the above-mentioned question is: *how attentive must the service provider be when analysing the information and instruction gathered or received, in order for him to be able to identify a problem?* I see these questions as two different sides of the same coin. On one hand, we need to know how attentive the service provider has to be to answer the question what could trigger his duty to warn. On the other hand, upon knowing what triggers the duty to warn, its scope would depend on how attentive the service provider has to be while performing it. That is why I think it is worth to mention these questions side by side, instead of just asking one of them. The standard for the service provider is that he should be normally attentive to anything that might make him suspect a risk. The same test and standard applies to all service providers included in the analysis of this book: builders, designers, and sub-contractors. This provision has been drafted in a way to reflect the main rule on the builder's and designer's duty to warn the client in England, Germany and in the Netherlands: the builder (or designer, or sub-contractor) needs to warn the client about the defaults that he could have spotted without having to conduct thorough inspections. English courts apply the standard of a careful and competent service provider. A German builder will be held liable for mistakes that should have been obvious to him, as an average builder, 'at a glance'. The scope of the designer's duty to warn in Germany is discussed in detail by German courts and it seems to be less strenuous than that of the builder, since the designer is seen as having fewer chances to notice a mistake in the construction process if he has not been employed specifically to supervise it. A Dutch builder needs to conduct only a marginal check, and the standard of care put on the builder and the designer is that of a reasonably competent and reasonably careful service provider. Based on various specific circumstances of analysed cases the scope of this duty to warn of a builder, a designer and a sub-contractor may be narrowed down more by various national courts and, respectively, chapters 3, 4 and 5 present these various circumstances. The DCFR reflects in Article IV.C.-2:108 para. (5) a general rule limiting the service provider's liability to obvious mistakes that he had not warned about and obliging him to act with 'normal attention'.

The lack of specific definitions and boundaries of the attentiveness of the service provider makes it more difficult to answer the question *whether a mere ambiguity or uncertainty already suffices to give rise to the duty to warn? Or is the duty to warn only brought about in case of an inconsistency or incorrectness?* These questions refer to the previous paragraph since they intend to specify the scope of the service provider's duty to warn. However, as we could see, the provision in the DCFR is of a rather general character. This means that it is left to the judges/arbiters to see whether a normally attentive service provider would have recognised a risk in the construction process just upon being uncertain about certain details of it or whether an actual inconsistency would have to appear before this risk became 'visible' to him. The fact that the service provider is not obliged to investigate and search for the

mistakes and risks suggests that a mere ambiguity might not be a sufficient ground to bind the service provider with a duty to warn.

Another research question that concerns the scope of the service provider's liability is *whether the existence and the scope of the duty to warn is influenced by the competence of the client or other professional parties employed by him*. The service provider does not have to warn the client, pursuant to Article IV.C.-2:108 para. (3) and para. (6) DCFR, if the client already knows of the risk. However, the service provider cannot deduce that the client is aware of the risk from the fact that the client is assisted by another professional party or because of the client is competent himself. The competence and experience of the client, or the fact that he employs other specialists in the construction process, do not release the service provider from his duty to warn the client. The same rule can be found in German and Dutch law. In English law, this matter has not been clearly decided by courts up to this moment. Some English cases seem to suggest that the fact that the client had the possibility to get an advice from another professional party could diminish the scope of the liability of the service provider encumbered with a duty to warn and it should not be relevant that the client had not used this possibility. However, there are also opinions expressed that even if the client could have employed another professional party and get their advice, but in fact he had not done that, the scope of the duty to warn of the service provider should not be changed. It seems we need to await more case law on this matter for a clearer rule in English law. In this respect, German and Dutch case law created an additional rule: in case the other specialist employed by the client has a professional knowledge that is higher than the service provider's professional knowledge, then the service provider should not be expected to have a duty to warn the client. This last rule narrows down the service provider's scope of liability. It has not been taken over by the draftsmen of the DCFR. It is, of course, more consumer-friendly not to exclude in such a situation the service provider's liability in the DCFR. However, one might wonder whether, under such circumstances, there are not enough reasons to protect the interests of the service provider, and not only those of the client. If there are two professional parties that could have warned the client about the risk to the construction process and one of them is more experienced and more likely to notice that risk, it seems, to me, abundant to let the client claim damages for breach of the duty to warn from both these parties. However, the reason for not implementing such an exclusion of liability is obvious: since both service providers should have been able to recognise the default, why should one of them be allowed to restrict his liability by claiming that he could have kept quiet when the other, more experienced and knowledgeable party did not mention the risk either, in particular when this should have been apparent to the first service provider. While, in general, it is understandable that there are certain limits to the service provider's duty to warn and that he should not be expected to warn the client when there are more knowledgeable professional parties involved in the construction process, it seems reasonable to still expect the service provider to give a warning when he is aware of the problems and risks. Why? Well, if the service provider has any doubts as to the method of construction chosen, it does not hurt him to share these doubts with the client, whereas it may save the client serious inconvenience. Moreover, in many cases it is hard to assess up front whether the duty to warn would be binding the service provider. Providing the client with a warning might, therefore, allow the service provider to avoid potential liability for the breach of his duty to warn, in case the court would decide in a given case that other professional parties employed by the client did

not have more professional knowledge than the service provider and therefore he should not have relied on their advice.

The same research questions have been raised with respect to the scope of the *pre-contractual duty to warn* of the service provider. In the DCFR the provision on the service provider's pre-contractual duty to warn is similar to the one on his contractual duty to warn. This means that again the service provider will not have a duty to investigate and actively search for any risks to the construction process. The service provider would have a duty to warn about any risk that he should have noticed as a 'normally attentive' service provider, taking into account all information that was available to him in the pre-contractual phase of construction. The explicit regulation of the pre-contractual duty to warn in the DCFR places consumers in a better position in comparison with the three national systems that have been analysed. England, Germany and the Netherlands often lack clear rules on what the scope of the pre-contractual duty to warn is. As it has been pointed out in the specific chapters of this book, it is especially hard to determine the scope of the designer's pre-contractual duty to warn due to a lack of case law on the subject. The scope of the builder's and the sub-contractor's precontractual duty to warn does not seem to differ much from the scope of their contractual duty to warn, based on the German and Dutch law that have considered it. This means that, just as in the DCFR, in these two law systems the builder or sub-contractor does not have to search for the defect or risk to the construction. Article IV.C.-2:102 DCFR makes the murkier regulations of the pre-contractual duty to warn in the mentioned Member States more precise. Certain German cases that have been analysed seem to suggest that the liability would be created only if the defect had been even more easily noticeable than by the test for the establishment of the contractual duty to warn of the service provider. The provisions of the DCFR require the service provider to warn about risks that should be obvious from all facts and circumstances known to the service provider, considering the information, which the service provider must collect. E.g. the builder is required to carefully examine design plans in the pre-contractual phase in order to estimate the price of the offer he wants to make to the client. During such an examination the service provider should be able to assess the feasibility of the project and discover certain defects that should have been clearly noticeable at a glance. Under the provisions of the DCFR the defect, therefore, should also be more easily noticeable to the service provider in order for him to be held liable for breach of the duty to warn.

Besides providing an insight into the scope of the service provider's duty to warn, this book demonstrates also various problems that might arise while performing the duty to warn. For example, it is discussed *what the form of the warning should be like*. The DCFR does not create a formal requirement for giving a warning. This means that the service provider does not need to warn the client in writing, although, of course, he then takes a risk upon himself that he will not be able to prove that the warning have been given. The provision of the DCFR seems to suggest that the service provider will need to use plain language and to clearly present the risks to the client. In the three national law systems that have been analysed it is clear that the warning conveyed by the service provider has to be clear and explicit. Only Germany has a formal requirement of writing added to the regulation of the performance of the duty to warn. However, in case this requirement is not observed in practice, German courts tend to remain flexible and still recognise that there was no breach of the duty to warn if the warning had been given clearly by use of other means than writing. The

solution of the DCFR seems to be more practical, since it may depend on the circumstances of the case whether the service provider should have warned the client in writing or not (e.g. in case the warning must reach the client as fast as possible, e.g. because of immediate danger).

Another question concerned is *to whom the warning should be given*. More specifically, does the service provider need to warn the client directly or is it sufficient for him to fulfill his duty to warn if he gives a warning to a representative of the client? Pursuant to Article IV.C.-2:108 para. (3b) DCFR the service provider is released from his duty to warn in case the client could reasonably be expected to know of the risk. Article IV.C.-2:108 para. (6) DCFR specifies then that the client could not reasonably be expected to know of a risk merely because other professional parties advised the client, unless such a party acted as the agent of the client. In such a situation Article II.-1:105 DCFR applies, pursuant to which the knowledge of the representative of the client is imputed to be the client's own knowledge. This means that if the service provider gives a warning to the representative of the client, the client himself can be seen as having been warned. This is also the solution that has been adopted in England, Germany and in the Netherlands. Only in circumstances when the service provider would have realized that the warning was not further conveyed to the client (or additionally, as in Dutch law, if serious negative consequences would be the result of not following the warning), would the service provider have a duty to warn the client directly. The same might be the case under provisions of the DCFR, since the service provider could not reasonably expect the client to know about the risk, if he had only warned the representative of the client and he had reason to believe that the warning was not further conveyed.

Finally, one might wonder *whether the duty to warn is fulfilled by the service provider when he gives a mere warning or whether his warning needs to be effective*. The only provisions in the DCFR that might apply to this question - Article IV.C.-2:105 para. (5) DCFR, further specified in Article IV.C.-3:103 DCFR – say that the service provider should take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service. This suggests that in case the risk that the service provider warns the client about will significantly endanger the construction, the service provider might need to do more than to just warn the client. This is especially relevant in cases when the client does not heed the warning that has been given and when he does not change his instructions to the service provider and does not even try to avoid the risk. However, it is not always easy for the service provider to estimate up front what kind of and how serious negative consequences will follow if the client does not act upon the warning given to him. This means that the service provider will not easily have the certainty that he has fully and satisfactorily performed his duty to warn and that he will not have to compensate any damages of the client, if such would arise. Unfortunately, the lack of clarity in the DCFR provisions does not come as a surprise since there is a gap in the regulation of this issue on national level, as well. In England, Germany, and the Netherlands the courts sometimes adjudicated that the service provider had to do 'something more' than just convey a warning. These other measures that the service provider should have taken are barely ever specified, which leaves a gap as to what procedure should the service provider follow in order not to be held liable for the breach of his duty to warn. Because of a lack of clear regulation the service provider might not be allowed to suspend or even terminate his works in case the client instructs him to perform a faulty construction disregarding the warning that had been issued. Only in cases in which continuation of the construction process would have

endangered safety and health of others, it was clear to the courts that the service provider had a duty not to proceed with such works. As it had been mentioned, however, it might be difficult to assess in advance whether the damage that is threatening the construction process is of such significance.

The last subject matter that had been discussed in this book concerns the liability of the service provider for the breach of his duty to warn. Firstly, matters of causality were raised in order to see *whether the service provider who did not warn the client about a risk coming from a third party, can be seen as having caused the damage or whether it should be attributed to that third party*. Article IV.C.-2:106 DCFR places upon the service provider an obligation to achieve the specific result that was envisaged by the client at the moment of conclusion of the contract. This means, in theory, that regardless the origins of the default that made the final product faulty, the service provider who delivers it would not perform his contractual obligations. However, the non-performance of the service provider does not have to equal his liability. One possible way to escape this liability is for the service provider to warn the client about the risks involved in the construction. As far as causality for the breach of the duty to warn is concerned the service provider who breached his duty to warn will be liable to the client under the general rules on liability of Book III, Chapter 3 DCFR. However, in the comments to the PELSC on a similar provision on the contractual duty to warn the remark has been made that in case the service provider could prove the absence of causality between the lack of warning and the client's loss, the client could not hold him liable. As far as the liability for breach of the precontractual duty to warn is concerned the same may be deduced from Article IV.C.-2:102 para. (3) DCFR. German and Dutch law leave no doubt that the breach of the duty to warn can be seen as a cause of the client's damage and that the service provider might be held liable for that in full. English law is a bit more reluctant to recognise the duty to warn, as had been mentioned many times in this book, which means also that matters of causality are not thoroughly discussed. However, in recent years there is more and more case law on service providers being held liable for breach of their duty to warn which leads to the conclusion that also in English law the causal link is assumed when a duty to warn is breached. The national laws that have been discussed in this book do not relate the service provider's liability to the breach of his own obligation to deliver a perfect end result, what the DCFR seems to be doing, but rather to the fact that another duty, i.e. duty to warn or duty of care, has been breached.

The second matter that has been raised is that when the default was caused not only by breach of the duty to warn but also by a third party causing the risk, then maybe both these parties could be held liable by the client. *What system of liability is adopted to enable the client to fully claim his damages?* In case both the service provider who breached his duty to warn and the third party who had caused the original default could be held liable, that is if the causal link between the original default and the loss suffered by the client had not been severed, then under Article III.-4:103 para. (2) DCFR the solidary liability of these two parties would occur. Article III.-4:103 para. (3) DCFR specifies that it does not matter for establishing the solidary liability that the debtors are not liable on the same terms or grounds. The system of solidary liability means that the client may require performance of any of the debtors until full performance had been received. The debtors might have then recourse obligations to each other. This is definitely the system that offers sufficient protection to the client, since he is then able to choose the debtor that he wants to

claim full damages from. English law also enables the client to sue both parties that might have caused his loss, both in contract and in tort, recognising that whoever contributed to the client's losses should be held responsible for that. The difference between the DCFR regulation and English law is that in practice in England the client is more likely not to receive the whole sum from one debtor, since the court will apportion the damages to all the parties that have caused his loss. The DCFR-system is more alike to German law, where solidary liability is established on the basis of similar rules. The client may choose the professional party that he will claim damages from and that professional party may then seek recourse on the other service provider that had contributed to the client's loss. Dutch law is a bit less clear, since there seem to be two different approaches adopted in practice: either the service provider who breached his duty to warn would be held solely liable or the liability of the third party who made the original mistake would be recognised as well, which will then lead to the court apportioning the damages between these two parties. As it has been mentioned, the sole liability of the service provider does not find proper justification in Dutch law. The system of the DCFR, just as the German system, seems to be more clear and client friendly. The client does not have to conduct two different court proceedings against each individual debtor to claim damages and he is less endangered by the possibility of insolvency of one of his contractors.

The next question to consider is: if the service provider that breached his duty to warn is held liable by the client instead of or alongside with the third party who had caused the risk to the client, *may that service provider limit or exclude his liability by using the defence of contributory negligence?* The DCFR has a rule on contributory negligence in Article III.-3:704 DCFR pursuant to which the debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to his own damage. This means that if the client is responsible for the original default made by the third party, e.g. that third party acted upon his instructions or was his representative, then the service provider may be able to limit or even exclude his liability for breach of the duty to warn about this default. German and Dutch law accept the use of the defence of contributory negligence in such a situation, as well. In both these systems this possibility might be taken away from the service provider in case it would be contrary to the principle of 'good faith' to limit his liability, e.g. when the service provider actually recognised the default but had waited with conveying the warning to the client, and his delay had caused the damage. The DCFR also contains a provision on the application of the principle of 'good faith' in Article III.-1:103 DCFR, which seems to suggest that a similar limitation of the use of this instrument might happen. How big of a role in interpretation of the provisions of the DCFR the principle of 'good faith' will play is yet to be seen. English law is a bit more reluctant to accept the use of the contributory negligence defence by the service provider since traditionally it was available only in tortious liability cases. However, in practice, there were a few cases in which the English courts managed to find an application for this defence also in contractual liability cases.

In the above-presented paragraphs it has been shown that the draftsmen of the DCFR, indeed, took into account the national trends and tendencies, at least as far as English, German and Dutch law are concerned. There are, of course, slight discrepancies between these regulations but most of them seem to come from the fact that the provisions of the DCFR are of a more general nature and are supposed to regulate the duty to warn in more sectors than just construction law. However, there is a separate chapter in the DCFR devoted to the construction process and another one to

design, which seems to suggest that the draftsmen of the DCFR recognised the need for more specific rules on construction process and design, respectively. This book points out a few inconsistencies and gaps between the regulation of the three analysed legal systems and the provisions of the DCFR on the duty to warn. In future works on the European Contract Law it could be reconsidered whether not to make the duty to warn more specific for all service providers, or whether not to regulate these ambiguities in specific chapters relating to construction or design. The need of and methods of introducing such changes is for the future researchers to establish.

Various chapters of this book illustrate the scope of a specific duty to warn, problems with performing it and consequences of a breach of that duty to warn. This book refers to existing literature and case law discussing and regulating various aspects of that duty to warn, and adds to that debate by presenting the most current developments as well as a comparison with the provisions of the DCFR. Such in depth comparison of the provisions of the DCFR with English, German and Dutch law as far as the regulation of the duty to warn of the service provider in the construction process is concerned is a novelty. This type of research shows us an increased tendency to attempt further harmonization of the European Contract Law. This process seems to call for the broadening of the traditional comparative research of positive legal systems of various Member States by adding a review of the rules that are supposed to be 'European'. This book does not argue for the change of any of the legal systems analysed in it, but mainly describes the rules established in these systems and presents different (or similar) solutions that had been found in English, German, Dutch law and in the DCFR to the legal problems reviewed. Fortunately, work on further harmonization of the European Contract Law is still in progress, which means that the researchers and politicians involved in this endeavour are capable of taking into account the conclusions of research such as the one that has been presented in this book.