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Information and Notification Duties

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INFORMATION AND NOTIFICATION DUTIES – AN INTRODUCTION

Technological and economical developments require contracting parties to be informed and advised: informed about the characteristics of the services or the goods they order; well advised about their choices and options; informed about the remedies that may be used against them; and well protected from the consequences of a lack of information or notification. It is only through the gathering and the supply of information that one can obtain knowledge. In sum, information and notification duties are designed to facilitate a well-informed behaviour.

Information and notification duties can be found in different varieties. Traditionally they have been associated with doctrines such as mistake and misrepresentation and have been brought in relation with conformity issues. These duties to warn play an important role in various domains and especially in construction law, financial services and tort law. An important question in this regard is: *who is responsible to supply or to acquire the information?* This problem is indissolubly intertwined with the tension between autonomy (getting informed is each person's own responsibility) and solidarity (informing another person in order to protect that person from harm that the informing person is aware of, but the other person is likely not to be aware of). More recently, this question has been linked with the upcoming concept of the "duty of care". This seems to mark an era where there is a shift from autonomy towards solidarity and protection of the weaker party. These considerations are in line with legislative action, for example information obligations have been introduced through (European) consumer law legislation. In particular, the introduction of information obligations in consumer legislation aims at restoring the balance of negotiating power between traders (that have information) and consumers (that lack information) and thus creating a level playing field for participants on the internal market.¹ In the above, the emphasis lies on the duty to inform and to notify the other party. This does not, however, completely wipe out the

¹ See for instance recital (5) to the Consumer Rights Directive (Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ* 2011, L 304/64). On the effectiveness thereof, see *infra*, nos. 8 and 9 and the contributions to this book referred to in those numbers,.

responsibility of any party to gather information herself:² a failure to gather information may, for instance, lead to the loss of a claim for damages on the basis of contributory negligence.

In the first contribution of this book, **Sanne Jansen** focuses on the notification duties with regard to contractual parties. She discerns three different types of duties, namely: (1) the duty to put someone in delay in case of a breach of contract; (2) the notification of (partial) non-performance or breach of contract; (3) the notification of remedies. Indissolubly intertwined with this matter are the consequences of a lack of such a notification. It is clear that the notification of a (partial) non-performance and the notification of the consequential remedies are classical examples of “information and notification duties” and are indispensable. First of all, it is important that the debtor is notified of the shortcoming, so that he is offered a second chance and enabled to remedy his shortcoming. Secondly, these notifications also secure the possibility for the creditor to invoke the shortcoming and, in principle, the consequential remedies. When the creditor refrains from these actions this could have an impact on the interests and on the transfer of risk. The author conducts a profound study of the different notification obligations and searches for a balance between the rights and duties of the debtor on the one hand and those of the creditor on the other hand by studying the Belgian law of obligations and consumer law, European soft-law instruments and EU consumer law legislation (Principles of European Contract Law (PECL), Draft Common Frame of Reference (DCFR), the former proposal for a Common European Sales Law (CESL), Consumer Sales Directive).³ Through this comparison some divergences are revealed between Belgian law *vis-à-vis* European law and suggestions are made to how the balance can be achieved.

As has been pointed out legislation concerning information and notification duties tends to put more emphasis on the protection of the weaker party and shifts away from the basic principle of autonomy and contracting freedom. This protection is mainly offered to consumers, but it is arguable that also small and medium enterprises (SME’s) should benefit from these rules.⁴ Most recently the information obligations have been

² K.J.O. Jansen, “Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht”, Dissertation Leiden University, 2012, 1–3.

³ In the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 December 2014, Commission Work Programme 2015: A New Start, COM(2014) 910 final, the new European Commission announced the withdrawal of a number of legislative proposals. CESL was listed as one of these, but a (m)odified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market’ was announced together with the withdrawal of CESL (see Annex II, no. 60). The proposal for this instrument is expected to be published by the end of 2015. At the time when this book is being finalised for printing, it was thought that the provisions of the modified proposal would to a large extent resemble the provisions of CESL, but be restricted to contracts concluded online.

⁴ This matter is not dealt with in this book, see M.B.M. Loos and I. Samoy (eds.), *The position of small and medium-sized enterprises in European contract law*, Ius Commune Europaeum 121, Cambridge/Antwerp, Intersentia, 2014.

introduced on the basis of the implemented Consumer Rights Directive.⁵ These information obligations have also been included in the proposal for a Common European Sales Law (CESL).⁶ Amongst other things, two important interests have to be balanced against one and another when such consumer law legislation is adopted. On the one hand the functioning of the internal market must be further stimulated and distortions must be avoided as much as possible. On the other hand weaker contracting parties must be protected against a shortage of information or against a lack of knowledge about the exact content of the agreement.

Standard terms may also lead to an imbalance to the detriment of the weaker party. This contracting party will often be in the situation where he can't negotiate the conditions of the contract and is therefore confronted with a "take it, or leave it"-situation. In order to remedy this asymmetry, rules have been developed to protect weak contracting parties. Some of these rules were adopted at the European level so that pre-existing distortions of competition between the Member States are tackled. The provision of standard terms used by one party aims to inform the other party of the terms for the proposed contract. On the basis thereof the other party should be able to decide whether it wishes to be bound by the contract. For this reason, the Court of Justice regards the timely supply of standard terms in a consumer contract to be of fundamental importance to a consumer.⁷

In her contribution to this book, **Johanna Waelkens** elaborates on article 5 Unfair Terms Directive⁸ that introduces a transparency and interpretation rule in business-to-consumer contracts (B2C). The author evaluates two systems of implementation of the Directive, namely by means of a separate statute (e.g. in the United Kingdom) or by integration in existing legislation (e.g. in Belgium, France, and the Netherlands). Article 5 stipulates, *i.a.*, that when a seller or supplier fails to draft a consumer contract in transparent, plain and intelligible language an interpretation at his disadvantage could be triggered. So, the interpretation most favourable for the consumer actually functions as one of the possible sanctions for not complying with the transparency and information requirement for terms that have not been individually negotiated.⁹ The author deals with the reference person, in relation to which the judge has to ascertain the clearness of a consumer contract. She deciphers that the "average consumer"-test is differently construed depending on the subject matter (e.g. the "notional, typical

⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, *OJ* 2011, L 304/64.

⁶ On these instruments, see A.L.M. Keirse and M.B.M. Loos (eds.), *Alternative ways to Ius Commune: the Europeanisation of private law*, *Ius Commune Europaeum* 105, Cambridge/Antwerp, Intersentia, 2012.

⁷ See CJEU 21 March 2013, case C-92/11, ECLI:EU:C:2013:180 (RWE Vertrieb), point 44; CJEU 30 April 2014, case C-26/13, ECLI:EU:C:2014:282 (Kásler), point 70.

⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *OJ* 1993, L 95/29.

⁹ Another possible sanction is that the standard term itself is found to be unfair.

consumer” in the European Unfair Commercial Practices Directive as regard to a more flexible variant for the Unfair Terms Directive). She concludes with the possible outcomes of an interpretation by a judge and points out that the transparency and interpretation requirements are important, yet often unrecognised, rules that result in a wide consumer protection.

The question whether or not parties may be under an information obligation, is much more controversial in commercial law. The most debated issue is whether or not standard terms are incorporated into the contract if they have not been provided to the other party before the contract was concluded. In this respect, the jurisprudence of the Austrian *Oberster Gerichtshof* contradicts the jurisprudence of the German *Bundesgerichtshof* with regard to the Vienna Sales Convention (CISG). The highest Austrian court ruled that the CISG does not provide a specific rule, so that the general rules on the formation of contracts apply.¹⁰ In short this means that standard terms are valid and can be relied upon by the party whenever the other party has accepted them. As opposed to this finding, the highest German court deducts an obligation from the CISG. According to the German court the CISG requires that the party wishing to rely on its standard terms has provided its counterpart with the opportunity to take note of these terms in an appropriate way and that this is only guaranteed where the first party provides the other with the standard terms.¹¹ Nevertheless, there is no provision in the CISG that explicitly requires providing the standard terms to the counterpart.¹² The European Commission seems to have followed an ‘in-between’ solution for B2B-contracts in the proposal for the CESL. Article 70(1) CESL provides that standard terms may only be invoked against the other party if the other party was aware of the terms or where the party supplying them has taken reasonable steps to draw the other party’s attention to them before or at the time when the contract was concluded. With respect to consumers, Article 70(2) stipulates that: “*For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer’s attention by a mere reference to them in a contract document, even if the consumer signs the document.*” This paragraph implies that a mere reference to the existence and the applicability of standard terms suffices in commercial contracts (B2B). It will be interesting to see whether the European Commission will continue with this approach in the upcoming modified proposal for contracts concluded online.¹³

¹⁰ OGH 6 February 1996, 10 Ob 518/95, *Recht der Wirtschaft* 1996, 203–205, available at www.unilex.info/case.cfm?id=202 (last visited on 23 September 2015).

¹¹ BGH 31 October 2001, VIII ZR 60/01, *NJW* 2002, 370, *BGHZ* 149, 113, available at www.unilex.info/case.cfm?pid=1&id=736&do=case (last visited on 23 September 2015).

¹² M.B.M. Loos en H.N. Schelhaas, “Commercial Sales: The Common European Sales Law Compared to the Vienna Sales Convention”, *European Review of Private Law*, 2013, 111–114. See also M.B.M. Loos, ‘Art. 70–71: Incorporation and making available of standard contract terms’, in: A.L.B. Colombi Ciacchi (ed.), *Contents and effects of contracts. Lessons to Learn from the CESL*, Cham/Heidelberg/Dordrecht/London, Springer, 2015 (forthcoming).

¹³ See *supra*, footnote 3.

As mentioned before, European legislation to protect consumers mainly focuses on the adequate and obligatory supply of information by the professional to the weaker party. This line of action has become the object of more and more criticism. Therefore, in this book not only the information and notification obligations as such are dealt with, but also their (in)effectiveness. Information obligations may remedy market failures according to law & economics theories, but consumer behavioural studies frequently criticise information obligations for being ineffective. **Johan Vannerom** critically scrutinises the shortcomings of the present European Consumer (Credit) Regulation by studying the behavioural abnormalities of consumers and the double consumer image that has surfaced in the case law of the European Court of Justice. It is however clear that the market systems themselves are insufficient to remedy the information asymmetry. Therefore, the author analyses, in a second step, alternative consumer policy methods. In this respect he develops the innovative notion of the “Multi-Layered Consumer”, as consumers cannot be confined to a homogeneous group of people. Three different categories of consumers are distinguished, each requiring another level of protection. Subsequently the author applies this new criterion to the consumer credit legislation. He concludes by encouraging economists and European (and national) legislators to further explore the alternative policy choices and to come to a legal framework that achieves a high standard of consumer protection at minimal cost to businesses.

Carien de Jager approaches this gap between theory (i.e. information disclosure leads to optimal decision-making by the consumer) and reality (i.e. there are behavioural abnormalities that corrupt this link) in the light of investment products. The European Union stresses the importance of information disclosure by financial institutions. Recently a mandatory Key Information Document (KID) for investment products was proposed. The main purposes of this document are to improve the comprehensibility of financial products and to improve the comparability of financial products. The author evaluates the KID in light of insights from behavioural finance by comparing the behaviour of the rational investor with the conduct of an actual person. Psychological factors such as framing, heuristics, biases, emotions, self-deception, limited self-control and social influences make the rational investor a utopian image. However, little attention has been paid to these factors while drafting the KID. In the last part of her contribution, the author suggests some improvements to fine-tune and to improve the effectiveness of the KID by taking into account the actual behaviour of investors.

Finally, **Joasia Luzak** discusses the question *how* online traders must inform consumers under the disclosure rules of the Consumer Rights Directive. She starts from the assumption that – as is demonstrated in behavioural sciences – most information that is provided before the contract is concluded is probably not read by consumers at that stage. However, she argues that information obligations could be effective in another sense, that is: they could ensure that consumers possess the relevant information contained in the disclosures when they need that information at a later stage, e.g. when a lack of conformity in the goods delivered manifests. If consumers would then be able to find the information who to contact, than in this sense the duty to inform actually is

relevant for consumers. With that starting point in mind, she searches what efforts traders must undertake to ascertain that the disclosure reaches consumers and whether they could rely on an, at least partially, active behaviour of consumers in obtaining this information, e.g. by requiring the consumer to click on hyperlinks leading to the relevant information. In this respect, the case-law of the Court of Justice on the information obligations of the former Distance Selling Directive¹⁴ becomes relevant. In the Content Services case¹⁵ the Court of Justice made clear that under that Directive, traders had to ensure that the information actually *reaches* the consumer. Merely providing evidence that information was *made available* to the consumer (so the consumer herself could then obtain the information via the hyperlink provided) does not suffice for the obligation to be met. She concludes that although the new Article 8 Consumer Rights Directive uses different wording than the Distance Selling Directive did, the implementation of the Consumer Rights Directive in the Netherlands and the United Kingdom may very well signal that the new legislation will not lead to a different decision by the Court of Justice. The author therefore concludes that although theoretical arguments could support a somewhat more lenient approach for complying with information obligations in the online environment through hyperlinks, traders would be wise not to hide mandatory disclosures behind hyperlinks.

Next to the problem of effectiveness, this book touches upon the question of compatibility of the European legislation with national and pre-existing EU-law. In his contribution, **Gerard de Vries** addresses the question whether the pre-contractual information duties for traders in the Draft Common Frame of Reference, the Consumer Rights Directive and the proposal for a Common European Sales Law are in line with the systems of national law of the Member States of the European Union and with the existing EU-law (the *acquis communautaire*). Firstly, the author examines the different European information duties of traders to provide the other party with information with respect to the main characteristics of the goods or services to be supplied. Secondly, he investigates how the systems of private law in France, Germany, the Netherlands, and the United Kingdom regulate these pre-contractual information requirements (e.g. the right to invoke vices of consent like mistake and fraud). He then concludes that, with the exception of French law, these systems of law reject a general pre-contractual information duty as put forward in the European instruments (DCFR, CRD, CESL). Moreover, the author puts question marks next to the compatibility of such a general duty with other existing EU-law.

In the last contribution of the book, **Mark Kawakami** and **Catalina Goanta** come with an innovative approach to discover which level of consumer protection is actually offered in internet contracts. Most literature – also in this book – is based on the interpretation of applicable rules and of available case-law, or consists of doctrinal critique on the basis of, for instance, the insights law & economics or behavioural

¹⁴ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, *OJ* 1997, L 144/19.

¹⁵ CJEU 5 July 2012, case C-49/11, ECLI:EU:C:2012:419 (Content Services Ltd).

sciences offer. Instead, the authors of this final contribution have put theory into practice by conducting a personal experiment based on five jurisdictions (the Netherlands, Romania, the United Kingdom, Japan and the United States). They have determined the e-store with the largest market share for each jurisdiction and have ordered the same product in each e-store. They have then exercised their withdrawal right. In their contribution the authors link their findings with the discussions and method of implementation of the Consumer Rights Directive in the different jurisdictions and with the case law of the Court of Justice on the Distance Selling Directive. With their paper, the authors argue that the existing literature may mislead readers to believe that the interests of consumers have thoroughly been discussed, considered, and incorporated into the existing conversation. They conclude that in fact the existence of mandatory withdrawal rights in the EU does not offer much additional protection to what at least most major companies would offer their customers anyway, and that awarding such mandatory protection is not the only way to ensure consumer protection, and nor is it ‘the best way’ of doing. We remark, however, that whereas it may be true that major companies offer comparable or even better protection to consumers than mandatory consumer law does, this does not mean that the same is true for smaller companies. In this respect, we note that major companies have a reputation to lose. The fear for reputational damage may bring companies to offer more rights to consumers than they would otherwise be entitled to on the basis of the law. However, it seems doubtful whether the same is true, or to the same extent, with regard to smaller companies: we would think that for some it is, but for others it is not. The implied suggestion to ‘just leave it all to the market’, therefore, is not one we would recommend to be introduced in the European Union.

CONTENTS

Information and Notification Duties – An Introduction

Ilse Samoy and Marco B.M. Loos v

Notification, Shortcomings, Remedies, and Defences: A Complex Relationship – A Comparison between Belgian Law and European Legal Instruments

Sanne Jansen. 1

I.	Introduction	1
II.	Notifying a shortcoming.	3
	2.1. Notifying an unexcused shortcoming.	3
	2.1.1. The formal requisition of putting the debtor in delay under Belgian contract law.	3
	2.1.1.1. General principle and exceptions.	3
	2.1.1.2. Timing of the default notice	10
	2.1.1.3. Form and content of the default notice	10
	2.1.1.4. Effects of the default notice	13
	2.1.1.5. Consequences of a lack of default notice.	14
	2.1.2. Other notification duties under Belgian contract law	15
	2.1.2.1. Examination and acceptance in sales contracts.	15
	2.1.2.2. Notification in tenancy contracts.	17
	2.1.3. Duty to notify under European contract law.	20
	2.1.3.1. General	20
	2.1.3.2. Consequences of a lack of notification.	21
	2.2. Notifying an excused shortcoming.	22
	2.2.1. No requisition of putting the debtor in delay	22
	2.2.2. Other notification duties?	24
	2.3. Conclusion of part 2.	25
III.	Notification of the intention to invoke remedies.	27
	3.1. General rule: the difference between judicial and extrajudicial remedies.	27
	3.1.1. Notifying judicial remedies	27
	3.1.2. Notifying extrajudicial remedies.	27

3.1.2.1.	Belgian law	29
3.1.2.2.	European contract law	39
3.1.3.	Notification to invoke extrajudicial defences	41
3.2.	Conclusion of part 3	43
IV.	The interplay between the notification of shortcomings and of remedies.	44
V.	Conclusion.	45

Article 5 Unfair Terms Directive 93/13/EEC: Transparency and Interpretation in Consumer Contracts

	Johanna Waelkens	47
I.	Introduction	47
II.	Implementation of Article 5 Unfair Terms Directive 93/13/EEC.	49
III.	Content of Article 5 Unfair Terms Directive 93/13/EEC	52
3.1.	Functioning of the rule	52
3.2.	Transparency rule: clarity and intelligibility	54
3.2.1.	Reference person	54
3.2.2.	Plain language.	61
3.2.3.	Intelligible language.	62
3.3.	Interpretation of unclear clauses	64
3.3.1.	Precedence of the rule	64
3.3.2.	Interpretation <i>in favorem consumentis</i>	65
3.3.3.	Exception.	69
3.4.	Nullity of unintelligible clauses	71
IV.	Conclusion.	72

The Consumer’s Right to Information: A ‘Reality Check’, on the Boundaries of a Duty to Inform and a Proposed Regulatory Reform

	Johan Vannerom	73
I.	Introduction	73
II.	Information paradigm.	74
2.1.	Solutions via the free market	75
2.2.	Solutions through legislation	80
2.2.1.	Information requirements	80
2.2.2.	Financial education	83
III.	Multi-layered consumer image.	85
3.1.	Consumer image and the Court of Justice	86
3.1.1.	The consumer in the internal market and the law on commercial practices.	87
3.1.2.	The consumer in case of positive harmonisation	89
3.1.3.	Double consumer image	92
IV.	Proposal for a multi-layered consumer image	93
4.1.	Notion of the ‘Multi-Layered Consumer’	93
4.2.	Applicability in consumer credit legislation	95
V.	Conclusion.	99

‘Who Are You, Investor: Mr. Spock, Captain Kirk or Somewhere in between?’ – A Behavioural Finance Exploration and Suggestions for Better Informing Investors about Complex Investment Products Through Information Disclosure
 C.E. (Carien) de Jager 101

I. Introduction 101

II. A new information document for retail investors: a brief overview. 103

III. The normative model: *homo economicus* 105

IV. The positive model: *homo sapiens* 106

 4.1. Heuristics. 107

 4.2. Biases 108

V. The effectiveness of the Key Information Document and suggestions for improvement 111

 5.1. Comprehension of complex financial products. 112

 5.2. Comparing complex financial products 115

VI. Final remarks. 117

VII. References 118

Online Disclosure Rules of the Consumer Rights Directive: Protecting Passive or Active Consumers?
 Joasia Luzak 123

I. Introduction 123

II. Passive vs. active consumers in substantive European consumer law. 125

III. The Distance Selling Directive & the *Content Services* judgment: protecting passive consumers. 130

IV. CRD: new online disclosure rules 133

V. Internet users’ attitudes to disclosures 136

VI. Conclusion. 139

Is the General Pre-Contractual EU Notification Duty of Traders to Provide Consumers with Information with Respect to the Main Characteristics of the Goods or Services to Be Supplied in Keeping with the Systems of Private Law of the Member States and Consistent with the *acquis communautaire*? 141
 G.J.P. de Vries. 141

I. Introduction 141

II. The EU Notification duty of traders to provide the other party with information with respect to the main characteristics of the goods or services to be supplied 143

III. Why address the questions whether the general EU Notification duty of traders to provide consumers with information with respect to the main characteristics of the goods or services to be supplied is in keeping with the systems of private law of the Member States and consistent with the *acquis communautaire*? 146

IV.	Is the general EU Notification duty of traders to provide consumers with information with respect to the main characteristics of the goods or services to be supplied in keeping with the systems of private law of the Member States?	148
V.	Is the general EU Notification duty of traders to provide consumers with information with respect to the main characteristics of the goods or services to be supplied consistent with the <i>acquis communautaire</i> ?	154
VI.	Conclusion	154

Even Lawyers Are Consumers: Perceiving Business Attitudes in Online Contracts

	Mark T. Kawakami and Catalina Goanta	157
I.	Introduction	157
II.	The Consumer Rights Directive – A brief overview	159
III.	Shopping as lawyers	163
	3.1. Explaining the methodology	163
	3.2. An analysis of consumer experiences	166
	3.3.1. The Netherlands	166
	3.3.2. Romania	168
	3.3.3. The United Kingdom	169
	3.3.4. Japan	171
	3.3.5. United States (New York)	173
IV.	Back to theory: A(nother) classification of withdrawal rights	176
	4.1. Mandatory withdrawal rights	176
	4.2. Default/optional withdrawal rights	177
	4.3. Insurance-like withdrawal rights	178
V.	Reflecting on our own consumer experiences	179
	5.1. Do mandatory withdrawal rights make things easier for consumers? Some comparative remarks	179
	5.2. What about practical matters?	180
VI.	Conclusion	182