European Rules on Pre-contractual Information Duties?

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I. Starting Points

Harmonisation of private law is an interesting exercise. The methods and sources of such work can be and have been much discussed. The work is often dressed in the clothing of 'research' even though the issuing of norms for market and society rather primarily is a task for 'politics' (in a broad meaning). This is not to say that research lacks relevance in this context. On the contrary, good politics of course takes its starting point in knowledge concerning the issue to be regulated.[1]

I will discuss one of the possible sources of knowledge to be used in the harmonisation discourse, namely the *acquis communautaire*. Is there anything of relevance for the processes towards harmonisation of European contract law in the *acquis*? Can it be used, for example, as an indication of what rules can be and indeed have been deemed generally acceptable for all the Member States and for this reason be seen as a highly relevant body of materials in the harmonisation work?

The issue of pre-contractual information duties is a good test case when discussing these questions. First, as well known there is a lot of material on information duties in the *acquis*, in particular in the consumer law directives. Secondly, the issue is sensitive from the point of view of legal policy. There are profound differences between the Member States – with the main contrast being the rather negative stance towards a duty to disclose essential information in common law and a more positive attitude in many continental legal systems[2] and those differences seem to reflect deeper differences in the understandings for the institution of contract.

In the discourse concerning the extent of information duties some have presented the issue as a conflict between a liberalist attitude downplaying the need for information duties and a more social attitude that lays greater emphasis on such duties. A contractual paradigm strongly resting on freedom of contract is contrasted with a paradigm of greater 'solidarity' and the pre-contractual duties of disclosure are said to belong to the latter.[3] However, such a dichotomy is much too simple. Even if one would take a starting point in a vague contrast between liberalist and social (or 'welfarist' or 'solidary') approaches – a dichotomy that for many purposes is much too simplified – duties of disclosure

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1 One might argue, however, that the clothing of research is stretched too far, when the main work on developing a contract law for the European Union is done within a research network of excellence, financed by the 6th Framework Programme.

2 See e.g. the overview by *J.H.M. van Erp*, 'The Pre-contractual Stage', in *Arthur Hartkamp* et al. (eds.), Towards a European Civil Code (3rd ed., Nijmegen 2004), 363-380, at 375-377.

3 So e.g. *Paula Giliker*, 'Regulating Contractual Behaviour: The Duty to Disclose in English and French Law', European Review of Private Law 2005, 621-640.

do not necessarily fall within the latter box. Both among the 'liberal' and the 'social' one can find defenders as well as critics of duties of disclosure:

Various attitudes to information duties

	Positive assessment of information duties	Negative assessment of information duties
'Liberalist view' emphasising freedom of contract	Information improves real consent as a basis for the contract	Everybody should be responsible for his information (*caveat emptor*)
'Social view' focusing on the protection of the weaker party	Information improves the protection of consumers and other weaker parties	Do not function well as a protective device and should not be used as an alternative to substantive regulation

Already this table shows the need for a more analytical approach to the issue of information duties. People can have positive or negative stances to information duties for very different reasons. It is not a question that can be reduced to a simple dichotomy between liberal and social, but requires a more functional approach.

It is also not a question to which one can demand a simple yes or no answer: should we have a pre-contractual duty to disclose or should we not? In fact all European systems – even the most reluctant British one – contain some duties to inform,[4] and it seems rather obvious that there is and has to be at least some information duties in European legislation on contract law.

We have to pose much more refined questions, related to the purpose and functions of information duties and the relevance of such purpose and functions in various contexts.

II. Purpose of Information Duties

Information duties can have different purposes and fulfill a large variety of functions. *Ruth Sefton-Green,* looking at what she calls 'the underlying values' in rules on mistake, fraud and duties to inform, distinguishes eight values of this kind: (i) protecting consent, (ii) upholding the security of transactions, (iii) controlling fairness, (iv) upholding moral duty of truthfulness, (v) protecting reliance, (vi) imposing standards of behaviour expected by the parties, (vii)

[4] This can be read from the interesting report of the project on The Common Core of European Private Law (the Trento Group), *Ruth Sefton-Green* (ed.). Mistake. Fraud and Duties to Inform in European Contract Law. Cambridge 2005.

setting objective standards and (viii) allocating risks.[5] Looking more specifically at information duties it seems sufficient in this context to distinguish five main purposes, roughly corresponding to the four first values in the list of *Sefton-Green*.

(1) *Protection of real consent*. In a traditional contract paradigm the main function of an information duty would be to equip the parties with sufficient information to have the contract based on real consent. The principle that contracts are binding because the parties have consented to them in its deeper layers of justification presupposes the idea of human beings as rational actors. Only an informed party can negotiate with the other party in the rational way that the paradigm presupposes.

(2) *Equipment for rational market behaviour*. A party seeking to contract needs information not only to be well equipped for the negotiations with the other party. More broadly, information can be of assistance also with regard to the party's ability to make use of and choose between various options available on the market. Rules on information that has to be provided to consumers often seem to be based on this idea. Of course purposes (1) and (2) are very closely related. In practical discourse it is not always necessary to distinguish them.

(3) *Upholding informational clarity*. Both pre-contractual and post-contractual duties to inform, in particular if they are combined with provisions on written form, may have as their main purpose to ensure that information concerning the contract is preserved for both parties in an adequate manner.

(4) *Controlling fairness*. Information duties can be understood primarily as a protective device, through which the fair content of the contract can be achieved. Requirements concerning the disclosure of negative information can have as their main aim to function as an incentive for parties (businesses) to improve their standards in order to be able to compete in the marketplace. In a subsequent legal dispute disclosure rules can also be useful as instruments for 'hidden control' of the substance of the contract. A court that dislikes a feature of the contract may set it aside, formally because the other party was not sufficiently informed.

(5) *Upholding a moral duty of honesty*. For the sake of cohesion of society and in the interest of a well-functioning society and market at large, society may want to underline the value of honesty. It may be thought important to sanction behaviour that would be deemed morally not acceptable, such as deliberately taking advantage of another person's lack of knowledge in a serious way. Personally I think this moral component of law and its society-building function have been seriously underestimated when discussing duties to inform.

[5] *Sefton-Green, op.cit.*, 14.

My interest in the moral aspect is obviously related to the fact that moral reasoning has been relevant in Nordic law related to pre-contractual information duties, long before consumer protection became an issue. The good faith (*Treu und Glauben*)[6] provision in the close-to-one-hundred-year old Nordic Contracts Acts,[7] which has been used as a vehicle for introducing pre-contractual information duties, is expressly justified by moral reasoning. In particular the Norwegian committee that took part in the preparation of the Acts emphasised this approach in line with the ideas of one of its members, one of the leading Norwegian legal scholars *Fredrik Stang*.[8] The Norwegian committee considered it necessary to introduce a general clause which indicates to the business community that acts that do not conform to good and honest business practice will not be respected by the courts.[9] According to *Stang* the general clause contains a programme for a legal policy in which one strives to give the requirements of honesty a continuously expanding position in the legal order.

Information duties may and often do fulfil several of the above purposes. The nature and content of the rules on pre-contractual information duties obviously vary depending on what purpose one wants to emphasise in each context. I think most of the actual European and national rules can be grouped in two categories:

(a) In the first category one finds general rules related to the moral duty of honesty as well as to the protection of real consent. These will typically be rules that require the party to a contract to disclose to the other party serious negative facts related to the object of the contract or to his performance. Provisions of this kind are often broad, general, clause-like and may contain various subjective criteria on either or both sides. As they relate to societal visions and the general contract paradigm they are often not restricted for example to consumer relationships, but have a general scope. Pre-contractual information duties of this kind can be very important in business-to-business relationships. In fact in my experience as a commercial arbitrator I have had many cases in which the extent of pre-contractual information obligations and similar loyalty obligations has been one of the central issues. In large complicated contractual arrangements duties of information may be essential.

(b) For example in the European consumer law directives one finds formalised, often long lists of informational items that have to be provided. Such information duties are less connected with a moral duty of honesty and rather based on the idea of equipping the consumer for the market. The

[6] In the *travaux préparatoires* the Swedish term '*tro och heder*' is presented as a direct translation of *Treu und Glauben*.

[7] Sec. 33 of the Contracts Act is somewhat differently worded in the different Nordic countries. The Finnish and Swedish version has the following wording: 'An act that would otherwise be binding shall not be enforceable if it was done under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances to invoke the act and the person to whom the act was addressed must be presumed to have known of the circumstances.'

[8] See *Stang*, Avtalelovens § 33, Tidskrift for rettsvitenskap 1930. 51-134.

[9] *Utkast til lov om avtaler og andre retshandler paa formuerettens omraade, Kristiania 1914*, 74 *et seq.*

basic purpose is the second one mentioned above, but the rules may also strive to uphold informational clarity and to control fairness. Typically such rules are restricted to consumer relationships and similar relationships in which there is a perceived need to protect the weaker party.

In a legal policy discourse one should not mix these two categories that have rather different functions. I will now look at the *acquis* separately for each category to see what material it can offer for a principled reasoning.

III. General Obligation to Act Honestly

Looking at the *acquis*, the provisions on conformity of the goods in Article 2 of the Consumer Sales Directive[10] first comes to mind. According to this provision the goods are presumed to be in conformity with the contract if they are fit for the purposes for which goods of the same type are normally used and if they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect. These provisions, as the Directive in general, are mandatory in favour of the consumer and contractual terms cannot, according to Article 7, waive or restrict the rights resulting from the Directive. However, the mandatory character of the rules only prevents the contractual waiver or restriction of the application of the rules; it does not rule out the possibility of affecting the application with the help of specific information given in the contract or otherwise before the conclusion of the contract. It is fairly self-evident that the seller to some extent can avoid responsibility for defects by pointing them out to the consumer. This follows both from the reference to the contract of sale in Article 2(1) and in the wording of the eighth recital as well as from more specific provisions of the same Article. One could mention the reference to the description given by the seller in Article 2(2)(a), the use of the term 'legitimate expectations' in Article 2(2)(d) and above all Article 2(3), according to which there shall be deemed not to be a lack of conformity if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of the lack of conformity. In other words, the quality standards of the Directive can be adjusted by exchange of specific information.

It is possible to express this provision differently and in terms of a disclosure rule: if the goods do not fulfil the requirements of the 'fit for normal purposes test' and the 'normal quality and consumer expectations test', the seller is obliged to inform the consumer thereof. In view of the mandatory character of these tests a general statement that the goods do not conform to the tests and other similar statements containing general information only are not sufficient in this respect. The lack of conformity can be avoided only with the help of specific information concerning the actual problem of quality or performance. Therefore it seems quite natural to speak about an indirect information requirement following from the provisions on conformity in the Consumer Sales Directive. As a positive rule this could be worded, for example, as follows:

[10] Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

Before the conclusion of a contract, a party has a duty to give the other party such information concerning the goods or services to be provided as the other party can reasonably expect, taking into account the standards of quality and performance which would be normal under the circumstances.

Even though the Consumer Sales Directive applies only to consumer relationships nothing prevents the use of this provision for business-to-business contracts as well. As mentioned above, provisions of this kind related to the protection of honesty and consent often have a general scope. In fact, Article 35 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), dealing with international business-to-business contracts, contains very similar provisions in this respect (which in fact were used as a model when the Directive was drafted). The fact that the reasonable expectations test is not expressly included in the CISG does not pose a serious problem. 'Reasonable expectations' just have to be understood differently, and with a much narrower content, in business-to-business relationships than in consumer contracts.

As the Consumer Sales Directive regulates the activities of business sellers and the CISG also focuses on business activities, the *acquis* offers direct support only for contracts with business suppliers. However, as even non-business suppliers may be under some obligation to provide information the rule should not be restricted to businesses alone, but rather be made sufficiently flexible to include the behaviour of private persons as well.

It is also not easy to justify why such a rule should only apply to the sale of goods and not to the provision of services. One could even discuss whether it should be made still broader than in the above version and cover foreseeable flaws in the main subject-matter of the contract more generally.

IV. Specific Information Duties Towards Consumers

As mentioned above there are many consumer law directives that contain specific and very detailed information duties towards consumers. Such important areas as, for example, consumer credit regulation have been tied to the information paradigm[11] and the contract-related insurance regulation in the Third Life Assurance Directive[12] and the Third Non-life Insurance Directive[13] is basically limited to a detailed duty to inform. Also some other consumer contract law directives, such as the Distance Contracts Directive,[14] the Financial Services

[11] Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit; amended by Directives 90/88/EEC and 98/7/EC.

[12] Directive 92/96/EEC on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive); see Article 31.

[13] Directive 92/49/EEC on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive); see Article 31.

[14] Directive 97/7/EC on the protection of consumers in respect of distance contracts; see Arts. 4-5.

Distance Marketing Directive[15] and the Timeshare Directive,[16] rely heavily on information as a means of improving the position of the consumer. In addition, the Electronic Commerce Directive,[17] which is not limited to consumer relationships, contains information requirements as well.

It is debatable to what extent one can extract general European principles from this mass of detailed information requirements and to what extent the regulation necessarily has to remain scattered and related to particular situations and contracts. The solutions that have been discussed in this context are not yet ripe to be presented.

What should be mentioned, however, is the fact that the *acquis* today also contains a more general regulation of the pre-contractual information duty of businesses towards consumers. Article 7 of the Unfair Commercial Practices Directive[18] forbids the misleading omission of information and thereby contains an indirect duty to disclose information, even though the Commission has preferred not to describe the provision in such language.[19] The purpose of providing the consumer with relevant information in the pre-contractual stage has indeed been seen as one of the central aspects of the Directive.[20]

The cautious description of the Commission, however, is correct in the sense that it is difficult to construct very detailed and costly duties of disclosure with the help of the provision in Article 7(1), given that it is worded as a fairly vague general clause. The duty of the business according to the Directive 'is not to omit 'material' information ... where this information would not be apparent from the context.'[21]

The basic rule concerning misleading omissions can be found in Article 7(1) of the Directive:

A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional

[15] Directive 2002/65/EC concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC; see Arts. 3-5.

[16] Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; see Article 3.

[17] Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce): see Arts. 5 and 6.

[18] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

[19] As mentioned in the Explanatory Memorandum, the regulation of misleading omissions attempts to 'avoid the need for a positive duty to disclose' that in the earlier stages of preparation met criticism for being unduly onerous and costly for traders, COM(2003) 356 final 8.

[20] *Hans Schulte-Nölke* and *Christoph W. Busch*, 'Der Vorschlag der Kommission für eine Richtlinie über unlautere Geschäftspraktiken KOM(2003) 356 endg.', Zeitschrift für Europäisches Privatrecht 2004, 99-117, at 104-105.

[21] COM(2003) 356 final 14.

decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

In Article 7(4) the Directive contains a list enumerating the information that shall be regarded as material in the specific situation of an invitation to purchase. This provision concretises the general rules of the article for probably the most important situation in which a misleading omission can occur:

In the case of an invitation to purchase, the following information shall be regarded as material, if not already apparent from the context:

(a) the main characteristics of the product, to an extent appropriate to the medium and the product;

(b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;

(c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;

(d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;

(e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.

If one is eager to develop more general principles concerning duties to inform on the basis of the *acquis*, these provisions of the Unfair Commercial Practices Directive offer a natural starting point. Here the European legislator has clearly stated that provision of certain information to consumers is generally demanded of businesses if they do not wish to render themselves guilty of an unfair commercial practice.

There is one obvious counter-argument to such a proposal. It lies in the article on the scope of the Directive. According to Article 3(2) the Directive 'is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract'. However, it is not completely clear what the effect of this delimitation will be in practice.

In fact, the delimitation seems rather misleading if it is interpreted literally, as in the Explanatory Memorandum, according to which the Directive 'has no

bearing' on the formation, validity and effects of contracts.[22] Indirectly, through contract law principles, it may very well have a bearing on contractual claims, irrespective of the delimitation in the Directive. Crossover effects from the content of the Directive to contract law are most certainly possible.[23] For example, the use of contractual principles concerning illegal or immoral contracts may be affected by the content of the Directive. If certain behaviour on the part of the business leading to a contract is deemed to be illegal according to the Directive, this may be relevant in a contract law dispute, as it may trigger the use of an applicable national rule concerning the invalidity of illegal contracts. Other possible crossovers between the Directive and contract law relate to contract law concepts such as undue influence. Contract law rules on liability for marketing statements are also relevant in this context. The extent of possible contract law effects of this nature is of course today a matter of national contract law.[24]

In other words, the Directive may very well affect contract law, despite intentions to the contrary. One should read the delimitation of the scope as a statement that the maximum harmonisation nature of the Directive does not require any amendments of national contract laws rather than as a complete obstacle to the use of the Directive as an inspiration for contract law. Therefore the question remains: to what extent can one construct a pre-contractual information duty with contractual remedies on the basis of Article 7 of the Unfair Commercial Practices Directive?

V. A Duty to Advise?

In addition to the issue of information duties proper – concerning what information a party should be obliged to provide to the other party – one can also discuss whether and in what situations a (business) party could have a duty to advise the other party concerning important matters.

According to the Annex of the Unfair Contract Terms Directive[25] a term which has the object or effect of irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract is to be regarded as unfair. This indicative example of unfairness requires the terms to be handed over to the consumer before the conclusion of the contract. However, this may not suffice. As the Annex requires a 'real opportunity', one may argue that even such standard form contracts which are signed by the consumer can be set aside, if the terms were presented to the consumer so late that the consumer did not have the opportunity to get acquainted with them before the conclusion of the contract. Going further, not

[22] COM(2003) 356 final 10.

[23] The difficulties of drawing a strict borderline between contract law and unfair commercial practices law is clearly demonstrated by the *Compilation of national laws* made in preparing the Directive, published on http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm, see question VII B: How does your legal system delimit between contract law and unfair commercial practices generally?

[24] However, as to liability for marketing, see the Consumer Sales Directive, Article 2(4).

[25] Directive 93/13/EEC on unfair terms in consumer contracts; Annex (1)(i).

even the handing over of the terms a reasonable time before the conclusion of the contract may be sufficient. Read in connection with the transparency requirement in Article 5 of the Directive, according to which the terms must always be drafted in plain, intelligible language, the requirement concerning real opportunity to become acquainted with the terms could be used to justify further information duties. If one understands intelligibility as a different criterion than plain language, it could justify a rule according to which the business would have an obligation to explain the content of the terms for example to consumers who do not master the language of the terms well, even if they are written in the language of the country where the contract is made.

Such an obligation to provide assistance would add a further dimension to the basic obligation to use plain, intelligible language in the wording of the contract terms. It could, for example, be worded in the following way:

A business is required to explain to a consumer the content of the terms of a contract to be concluded with that consumer if this is the only opportunity for the consumer to become sufficiently acquainted with these terms.

As an additional support from the *acquis* for a rule on a duty to give advice one could mention Article 19(4) of the Financial Instruments Directive,[26] even though it is not, however, limited to consumer relations alone:

When providing investment advice or portfolio management the investment firm shall obtain the necessary information regarding the client's or potential client's knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives so as to enable the firm to recommend to the client or potential client the investment services and financial instruments that are suitable for him.

The proper content and extent of a duty to advise is difficult to define and its support in the *acquis* can be questioned. It might therefore be easier first to discuss the issue in relation to specific areas and problems. In particular with regard to financial services there seem to be good reasons to contemplate further the need for a European provision concerning a duty to advise.

[26] Directive 2004/39/EC on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.