

The Evolution of Information Obligations

Information Provision as a Consumer Protection Instrument

Introduction

Freedom of contract is a fundamental principle in civil law. Generally, it allows individual parties to make their own agreements. In the area of consumer protection, however, structural power imbalances, among other things, can lead to information asymmetries between businesses and consumers. This disparity is often detrimental to consumers. For this reason, legislators have introduced information obligations as a consumer protection instrument. Compared to other regulatory interventions, these obligations interfere minimally with the freedom of contract proposition, by obliging companies to provide transparent and comprehensive information.

Since they were first introduced, information obligations have increased in number and expanded in scope in order to meet the needs and challenges of modern markets. The following sections will describe this evolution in more detail. The exposition does not claim to be exhaustive. It compiles key legal frameworks (as well as their amendments) issued in the past 50+ years in various consumer protection domains. In particular, we focus on European Union (EU) legislation because the bulk of consumer protection instructions builds on European rules.

The Evolution of Information Obligations

From a politico-legal perspective, normative and regulatory measures should help ensure that a comprehensive level of information enables consumers to make autonomous decisions on an equal footing with businesses. This intervention seeks to compensate for the knowledge advantage of companies and aims to counteract market failure. At the same time, the obligation to provide information on contract-relevant aspects interferes only minimally with the parties' contractual freedom, at least in contrast to regulatory or law enforcement measures. Businesses themselves can benefit from information obligations if the latter contribute to market transparency. Transparent markets facilitate competition and enable firms to make informed decisions about investments, pricing, and business strategies.

In 1971, a report by the German federal government first established that 'up-to-date information must facilitate as high a degree of comprehensive, situation-dependent market knowledge as possible, so that consumers are able, in a concrete case, to act as autonomous agents in the market'.¹ In its own actions, the federal government seeks to adhere to this information paradigm: information on government action ought to be transparent, accessible and comprehensible to citizens.

In 1975, the *Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy* established that 'consumers should be informed in an appropriate manner of any risk liable to result from a foreseeable use of goods and services, taking account of the nature of the goods and services and of the persons for whom they are intended'.² Accordingly, consumers shall be informed about

any relevant features of goods and services to make an educated choice. Information ought to enable consumers to use goods and services, or to claim their consumer rights in case of damage.

After consumer protection had assumed a distinct role in European policymaking in the 1980s, a series of consumer protection directives containing information obligations in various life domains were enacted in the 1990s. Today's variety of information obligations derives almost exclusively from requirements set out in EU law.³

Since 2010, old regulations have increasingly been adapted and supplemented with more extensive information obligations, to adapt to the evolution of the single market as well as digitisation.

Current and upcoming legislative projects also foreshadow a further increase in information obligations. In particular, the EU's impending legislation on the digital and green transitions may entail additional information provision rules.

Over the last 50 years, the number of information obligations has become ever larger and more extensive – an overview:

Key Legal Frameworks

The following section shows how the amount of information that must be provided has evolved over the decades. To this end, we list key European legal texts in chronological order (see notes for complete references). Due to the large number of legal acts, the list is not exhaustive.

1970 to 1979

- In 1971, the Act on the Reorganisation and Consolidation of the Law on the Marketing of Foodstuffs, Tobacco Products, Cosmetics and Other Consumer Goods⁴ introduced special information obligations to protect consumer health.
- Since the introduction of the Price Indication Ordinance in 1973, prices, including VAT and other price components, shall be indicated to consumers.
- The Cosmetic Products Directive⁵ issued in 1976 stipulates that cosmetic products may be placed on the market only if the packaging or labelling includes information about the company and its address, the expiry date, special precautions for use, and a manufacturer's name/style.

The following legal acts (among others) issued in the 1970s contain additional information obligations:

1974 Second law amending the law on instalment payments⁶ (Germany)

1979 Travel Contracts Act⁷ (Germany)

1979 General Terms and Conditions Act⁸ (Germany)

1980 to 1989

- The Doorstep Selling Directive⁹ of 20 December 1985 establishes that consumers shall be informed of their right of cancellation.

- According to the Consumer Credit Directive^{10, 11} of 22 December 1986, consumers shall be informed, among other things, of the annual rate of interest, the credit limit (if any), and the procedure for terminating the agreement.

The following legal acts (among others) issued in the 1980s contain additional information obligations:

1984 Law on the regulation of price indications¹² (Germany)

1988 Safety of Toys Directive¹³

1990 to 1999

- In line with the Directive on Package Travel, Package Holidays and Package Tours¹⁴ of 13 June 1990, brochures made available to consumers must contain detailed information on the destination, the mode of transport, passport and visa requirements, the itinerary as well as the price, among other things.
- According to the Directive on the Protection of Consumers in Respect of Distance Contracts^{15, 16} of 20 May 1997, consumers shall be provided, in good time prior to the conclusion of any contracts, with information on the supplier's identity, the main characteristics of the goods or services, the price of the goods or services, delivery costs (if applicable), the right of withdrawal, and the arrangements for payment. Information shall be provided in writing or in another durable medium in good time during the performance of the contract.
- Owing to the Directive on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees¹⁷ of 25 May 1999, any guarantee shall state that consumers are entitled to rights under applicable national legislation governing the sale of consumer goods, irrespective of the guarantee. Further, the guarantee statement shall provide information on all relevant aspects, for example the scope and duration of the guarantee.

The following legal acts (among others) issued in the 1990s contain additional information obligations:

1992 Directive on general product safety¹⁸

1994 Directive 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 basis¹⁹

1994 Long-Term Care Insurance Act²⁰ (Germany)

1995 Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (Data Protection Directive)²¹

1997 Directive on cross-border credit transfers²²

1998 Directive on consumer protection in the indication of the prices of products offered to consumers²³

2000 to 2009

- In the early 2000s, the German Civil Code (*Bürgerliches Gesetzbuch* [BGB]) consolidated a number of information obligations established in European directives (for example, on distance contracts, the right to use immovable properties on a timeshare basis, contracts in electronic commerce, travel contracts etc.). These additions complement the BGB's existing consumer law directives.

- The Directive on Electronic Commerce²⁴ was intended to create a general framework for electronic commerce in the EU, in order to gain consumers' trust and to bolster the internal market. Hence, information obligations in the area of commercial communications were introduced. Commercial communications shall contain information on, among other things, the client on whose behalf the commercial communication is made; and promotional offers and their terms and conditions shall be clearly identifiable.
- According to the Air Passengers Rights Regulation²⁵ of 11 February 2004, passengers shall be informed of their rights in the event of denied boarding and of cancellation or long delay of flights.
- The EU's Cosmetic Products Directive²⁶ establishes that consumers shall be informed, in an easily comprehensible manner, of product durability and ingredients.
- The Residential Care Act²⁷ requires consumers to be informed about a variety of aspects as part of contracts for care or support services. These include, for example, the amenities and location of the building in which the living space is located, as well as the services included and the results of quality checks.

The following legal acts (among others) issued in the 2000s contain additional information obligations:

2000 Directive on the labelling, presentation and advertising of foodstuffs²⁸

2001 Directive on general product safety²⁹

2002 Universal Service Directive³⁰

2002 Directive on privacy and electronic communications³¹

2002 Directive on the distance marketing of consumer financial services³²

2002 Directive on insurance mediation³³

2003 Directive concerning common rules for the internal market in electricity³⁴

2006 Directive on services in the internal market³⁵

2006 Regulation on nutrition and health claims made on foods³⁶

2007 Directive on payment services in the internal market³⁷

2008 Directive on credit agreements for consumers³⁸

2009 Directive on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts³⁹

2009 Directive on the safety of toys⁴⁰

2009 Regulation on the EU Ecolabel⁴¹

2009 Amendment of the Directive on privacy and electronics communications⁴²

2010 to 2019

- The Directive on Consumer Rights⁴³ of 25 October 2011 introduced extensions to pre-contractual information obligations. Businesses are required to inform consumers of key contractual aspects, not just in stationary retail but also in relation to distance contracts and off-premises contracts. Information requirements include disclosure of the trader's identity, their address and telephone number as well as the total price of the goods or services, and additional freight or delivery costs.
- Following the EU's General Data Protection Regulation⁴⁴ of 27 April 2016, businesses shall inform affected parties when processing personal data. This includes the purpose and legal basis for data processing.
- The Directive on Better Enforcement and Modernisation of Union Consumer Protection Rules⁴⁵ of 27 November 2019 introduced information obligations relating to the providers of online marketplaces.

For instance, where search results are being displayed as rankings, traders should inform consumers as to how those rankings were generated. In relation to distance contracts, consumers shall be informed if prices were personalised using automated decision-making.

- The Directive on the Sale of Goods⁴⁶ and the Directive on the Supply of Digital Content and Digital Services⁴⁷ of 19 May 2019 require businesses to provide, among other things, information on updates necessary for continuous use of digital products.

The following legal acts (among others) issued between 2010 and 2019 contain additional information obligations:

2010 Regulation concerning the rights of passengers when travelling by sea and inland waterway⁴⁸

2011 Regulation on the provision of food information to consumers⁴⁹

2011 Regulation concerning the rights of passengers in bus and coach transport⁵⁰

2013 Regulation on online dispute resolution for consumer disputes⁵¹

2014 Directive on credit agreements for consumers relating to residential immovable property⁵²

2015 Directive on payment services in the internal market⁵³

2015 Directive on package travel and linked travel arrangements⁵⁴

2016 Directive on insurance distribution⁵⁵

2017 Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws⁵⁶

2018 Regulation on cross-border parcel delivery services⁵⁷

2018 Directive establishing the European Electronic Communications Code⁵⁸

2019 Regulation on promoting fairness and transparency for business users of online intermediation services⁵⁹

2020 until Today*

- The Directive on Representative Actions for the Protection of the Collective Interests of Consumers⁶⁰ of 25 November 2020 requires qualified entities to inform consumers of representative actions and their outcome, claim, status, and if they are recorded in dedicated national electronic databases.
- The Digital Services Act⁶¹ of 19 October 2022 requires providers of intermediary services to disclose, among other things, information on their single point of contact. Furthermore, providers of online platforms shall notify complainants when they have made a decision on their complaint.

The following legal acts (among others) issued between 2020 and 2023 contain additional information obligations:

2022 Digital Markets Act⁶²

2022 Law on the electricity and gas price brake⁶³ (Germany)

2023 Directive on general product safety⁶⁴

Planned legislation that includes information obligations:

Cyber Resilience Act⁶⁵

Data Act⁶⁶

Artificial Intelligence Act⁶⁷

Directive as regards empowering consumers for the green transition⁶⁸

* Last updated: 10 November 2023

Amendment of the Ecodesign Directive (Ecodesign Regulation)⁶⁹
Directive on common rules promoting the repair of goods⁷⁰
Green Claims Directive⁷¹
Regulation on the safety of toys⁷²

Conclusion

The introduction of information obligations was intended to protect consumers against structural disadvantages caused by information asymmetries. Hence, various member states began in the 1970s and 1980s to enact consumer protection laws requiring businesses to provide specific information about products and services. These laws would often target specific sectors, such as foodstuffs, health and finance. Coinciding with burgeoning market liberalisation, the advent of the internet in the 1990s, and technological development, the requirements of information obligations have become ever more complex and expanded on a regular basis. New rules applying to a broader palette of products and services have been introduced. Nowadays, all life domains are affected, ranging from everyday supermarket shopping to entering into continuing obligations, such as a contract for an internet connection or a loan agreement, through to specific arrangements like a care home contract. Especially in the context of advancing digitisation, information requirements have expanded significantly, to safeguard ecommerce and consumer protection in the virtual world. Data protection and transparency requirements for online platforms illustrate this development.

Over the last 50 years, the number and scope of information obligations have increased considerably. Deploying this instrument, legislators intend to protect consumers against unfair commercial practices and information asymmetries, among other things. Nowadays, the protection afforded by consumer information is considered a panacea. Irrespective of the policy domain, information provision has become a reflex responding to protection requirements.⁷³

Yet, as the list above instructively shows, an unmanageable amount of information has accumulated, and consumers should ideally process the entire range. Usually, all elements are relevant for making an informed consumption decision.

It is evident that consumers can hardly register the sheer amount of informational cues they receive. In its 2021 scoping review of the state-of-the-art of consumer affairs, the German Advisory Council on Consumer Affairs already argued (using numerous references) that too much information tends to inundate consumers.⁷⁴ Even when they try to obtain information deliberately, consumers do not benefit from a barrage of information since key cues remain undetected. Therefore, information obligations paradoxically defeat their purpose: they cause – rather than prevent – disparity between businesses and consumers.

If legislators wish to retain the ‘information model’, they ought to ascertain which scope and nature of information obligations facilitate effective use. In its 2021 report, the Advisory Council underlined that a review of information obligations was urgently needed to develop consumer law in a sensible manner. Central criteria include the timing of information provision, its subject, the method of communication, and enforcement of information rights.⁷⁵ Pieces of information only serve consumer protection if they are perceptible. The status quo – characterised by information mostly contained in long texts – falls short of this goal. Consequently, it has become necessary to make two important preliminary considerations: In which domains are information obligations a suitable means of ensuring consumer protection? In many cases, it may be more effective to substitute information obligations with other regulatory instruments. Whenever consumer information proves to be the suitable instrument, the following question arises: how to convey the relevant bit of information? This may entail several different means of communication. For example, the results of a study on personalised information commissioned by the Advisory Council on Consumer Affairs in 2021 endorse careful checks assessing which applications lend themselves to personalised information provision.⁷⁶ Differences may arise between information about products vis-à-vis information about services.

Another opportunity emerges in the domain of consumer informatics and its associated instruments, which utilise information technologies and, where possible, artificial intelligence to aid decision-making in the areas of consumption, data protection and digital technologies.⁷⁷ In addition, design requirements may help render relevant information more perceptible. ‘Where sensible and necessary, design obligations ought to be implemented in a standardised form, to enhance consumers’ access to ... information, especially in the digital domain.’⁷⁸

The consumer protection benefits of information obligations ought to be viewed ever more critically as the number of requirements increases. Hence, it is not productive to assess each legal text in isolation, in order to determine the appropriateness of information obligations per se and, as a result, to enact further information requirements in an almost automated manner. Rather, one has to consider all circumstances in their entirety, especially the amount of information and how bits of information are rendered and conveyed.

The use of information obligations should be carefully assessed in light of its effectiveness. Where effectiveness cannot (or no longer) be ensured, one should conceive possible alternatives. This may entail using less yet more effective information obligations. Technical capabilities and design requirements should also inform information provision more strongly. As a result, all market participants – consumers as well as businesses – stand to gain from consumption choices that stem from useful and effective information.

Notes

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