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ARTICLE

Breach of information duties in the B2C e-commerce: adequacy of available remedies

Zofia Bednarz
PhD candidate
Area de Derecho Mercantil
Universidad de Málaga

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Abstract

B2C e-commerce is characterised by the information asymmetry between the contracting parties. Various information duties are imposed on traders, both at the European and national level to correct this asymmetry and to ensure proper market functioning. The mandated disclosure is based on the assumption of consumers' rationality. However, developments of behavioural economics challenge this assumption. The utility of mandated disclosure in consumer contracts depends also on the remedies available to consumers in a case of breach of information duties. Those remedies are often heavily influenced by the national general private law applicable to the contractual relationship between the parties. Nevertheless, since the economics of general contract law differ importantly from principles of consumer e-commerce, various problems can be associated with the application of general law remedies to the breach of information duties in B2C contracts. The limited value of the majority of the online B2C transactions is incompatible with costly and lengthy court proceedings. Moreover, breach of information duties will often not produce enough material damage on the side of the consumer to make the remedies available. Different solutions are explored, from ADR, to the duty to advise, to non-legal mechanisms making the information easier to use for consumers through limiting disclosure. Finally, the right of withdrawal is analysed as an example of a specific remedy, adapted to the economics of the B2C electronic transactions, where the aims parties pursue through contracts are different to those in commercial contracts, and their relationship is marked with the inequality of economic power and information asymmetry. However, the legally established cooling-off period is not free from limitations, and only a combination of various measures, including effective remedies

for breach of information duties, will help develop the potential of the B2C e-commerce within the European internal market.

Keywords
information duties, breach of information duties, e-commerce, B2C contracts, economic analysis of law

Topic
law, e-commerce, behavioural economics

Incumplimiento de los deberes de información en el comercio electrónico con consumidores: adecuación de los remedios disponibles

Resumen
El comercio electrónico con consumidores se caracteriza por la asimetría informativa entre las partes contratantes. Para corregir dicha asimetría, la legislación tanto europea como nacional impone varios deberes de información, partiendo de la hipótesis de la racionalidad de los consumidores. No obstante, el desarrollo de la economía conductual cuestiona la hipótesis de racionalidad. La utilidad de los deberes de información precontractual depende también de los remedios disponibles a los consumidores en el caso del incumplimiento. Dichos remedios están a menudo influidos en gran medida por el derecho nacional general privado que se aplica a la relación contractual entre las partes. Sin embargo, dada la importante diferencia entre el derecho privado general y el comercio electrónico con consumidores, varios problemas resultan de la aplicación de los remedios provenientes del derecho general privado al incumplimiento de los deberes de información en los contratos con consumidores. El valor limitado del objeto de la mayoría de las transacciones en línea es incompatible con el procedimiento civil que es largo y caro. Además, a menudo el incumplimiento de los deberes de información no causará suficiente daño material para que el consumidor pueda disponer de los remedios tradicionales. Se examinan varias soluciones a estos problemas, entre las que destaca MARC, el deber de asesoramiento y los mecanismos extrajudiciales que limitan la cantidad de la información precontractual. Por último, se analiza el derecho de desistimiento, como un ejemplo de un remedio específico, adaptado a la economía de las transacciones electrónicas con consumidores. A pesar de ello, el derecho de desistimiento también tiene sus limitaciones y solamente la combinación de varias medidas, incluyendo remedios efectivos ante el incumplimiento de los deberes de información, podrá ayudar al desarrollo del comercio electrónico dentro del mercado común europeo.

Palabras clave
deberes de información, incumplimiento de los deberes de información, comercio electrónico, contratación con consumidores, el análisis económico del derecho

Tema
Derecho, comercio electrónico, economía conductal

Introduction: remedies for breach of information duties

Information duties, also referred to as mandated disclosure, are legal rules that require traders to provide consumers with a certain set of information. In the scope of the European Union Member states' law, information duties are established on two different levels. On the one hand, general systems of private law impose such duties in various contractual relationships, on the other, European law through various directives harmonising Member states' contract law introduces those duties in the national legal systems. Depending on their origin, the duties will be of different nature, as they will be more general when implied by more general rules, such as a duty of good faith and fair dealing, and of a rather casuistic character, if established in European directives and sectoral legislation.

In what refers to information duties in the B2C e-commerce, two directives should be especially taken into account, the Directive on the E-commerce[1] and the Directive on Consumer Rights.[2] The latter has quite recently introduced various new information requirements applicable to B2C contracts formed online. However, this Directive, together with many previously adopted sets of rules, establishes ample information duties to be implemented in the national internal legal systems, at the same time leaving the remedies available for breach of those duties to the Member states' internal law.[3] Therefore the effectiveness of many information requirements must be guaranteed by the national internal law,[4] either through specific remedies established in sector-specific legislation, or in the rules of general private law.[5]

E-commerce, especially in its cross-boarder form, is still far from reaching its full potential within the European Union.[6] From the point of view of contract law and economics, B2C e-commerce is very special and information plays a crucial role in this market sector.[7] On the one hand, consumers are discouraged from online buying because of the lack of trust,[8] which could be remedied through adequate information requirements. On the other hand, imposing too much burden on traders may have negative impact on the functioning of the market.

Two different lines of argument should be explored when analysing information duties and their influence on the e-commerce. Firstly, the discussion should take into account the arguments of morality and social justice, balancing protection of weaker parties with principles of freedom of contract and party autonomy. This point of view is characteristic for continental legal traditions. Secondly, economic analysis of law reasoning, closer to common

1. "Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market". *Official Journal of the European Union* L 178 (July 17, 2000), pp. 01-16.
2. "Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights". *Official Journal of the European Union* L 304 (November 22, 2011), pp. 64-88.
3. This is true for other Community directives; see for example Professor Twigg-Flesner's comments to the Green Paper on the Review of the Consumer Acquis 2007, Ch. Twigg-Flesner (2007). Also, this general trend was already observed more than ten years ago, and not much has changed since then; see T. Wilhelmsson (2003).
4. H. W. Micklitz (2012, p. 38) confirms that: "The directives leave it to the Member States to decide whether and how they sanction a lack of provision of the mandatory remedies." This solution was criticized as leading to market fragmentation and incoherence; see *eg*. R. Guillén Catalán (2012, pp. 3 *et seq*).
5. See, for instance, the UK "Consumer Rights Act 2015". *Chapter 15*, London: The Stationery Office, and its sections 12(2) and 19(5) that establish some specific consequences of breach of information duties and section 19(9) which reminds that general private law remedies, such as damages or specific performance, are applicable in addition, instead of, or where no specific remedy is available.
6. Hence new Commission's initiative concerning cross-boarder online contracts for the sale of goods and relative to digital content, so soon after the Consumer Rights Directive 2011/83/EU that was supposed to revolutionize B2C e-commerce. In its Commission's Communication to the European Parliament, the Council and the European Economic and Social Committee. "Digital contracts for Europe - Unleashing the potential of e-commerce". COM (2015) 633 final, Brussels, 9.12.2015 p. 2. Commission indicates the need to make the most of the e-commerce in the internal market: "The European e-commerce market has grown rapidly in recent years within the overall retail sector. It is a main driver for overall EU growth. However, it still has a significant untapped potential. Instead of taking full advantage of the opportunities of e-commerce, businesses and consumers are too often constrained to their own domestic markets."
7. P. Rekaiti and R. Van Den Bergh (2000, p.379-380). The authors consider that the problem of asymmetric information can be easily noticed in distance selling transactions, where consumer and trader are physically separated, and therefore by the very nature of the transaction, the consumer is inadequatly informed. This consideration is confirmed by empirical studies; see for example A. Ureña *et al* (2014).
8. See for example A. Ureña *et al.* (2014), *op. cit.*, p. 51 *et seq.*; see also: European Commission (2015).

law systems,[9] should assist answering questions about the extent of protection through information duties in the e-commerce. The latter perspective will be the focus of this study.

1. Information duties as an important tool in consumer protection in the e-commerce

1.1. Information asymmetry as justification for mandated disclosure

Parties enter contracts seeking favourable terms and expecting profit. In an ideal world of perfect information, parties would know equally much about the good being an object of their transaction, and they would know each other's valuations.[10] Therefore in an ideal world of perfect complete contracts rational parties would be able to allocate their assets efficiently and contracts would constitute perfect means for exchange.[11] From the economic perspective, contract law as such is mainly concerned with maximizing social welfare, and therefore the laws adopted should focus on preventing market failures,[12] aiming at achieving market equilibrium as close to perfect as possible.[13]

Effective market equilibrium, understood as a perfectly competitive market where all consumers are in possession of complete relevant information, is impossible in reality because of market failures.[14] Information asymmetry, a concept of particular importance for the analysis of B2C electronic contracts, is one of the sources of market failure.[15] Information asymmetry occurs when one of the contracting parties is better informed than the other about the good (or service) being the object of the contract, the contract terms and all the other circumstances relevant to the parties' relationship. Information asymmetries contribute to increasing transaction costs,[16] thus being the main obstacle that impedes perfect bargaining between consumers and traders.[17] Classical trend in economic analysis of law assumes that when market players possess relatively complete information, they will create a market of goods and services superior to what can be generated through government regulation.[18] Although information asymmetry can be found in all types of contracts, it is in consumer contracts that it reaches levels high enough to justify legislator's (ex-ante) and judicial (ex-post) intervention.[19]

The traditional law and economics trend accepts that consumers might not have the abilities necessary to search for the information – hence the information should be provided to reduce the search costs for consumers.[20] First of all, mandated disclosure allows warning consumers against entering unfavourable or even unwanted contracts therefore preventing inefficient transactions.[21] Furthermore, information duties are designed to act as a special reminder making consumers realise they are effectively assuming some obligations.[22] Together with other measures, such as a reversed burden of proof or protection from unfair

9. P. Giliker (2005, pp. 637, 639).
10. E. Posner (2002, p. 4).
11. R. Cooter, T. Ulen (2011, p. 233).
12. S. Becher (2008, p. 728).
13. C. Collins (1994, p. 254), the author considers that to overcome market failures, legislature has to impose compulsory terms in contracts, and especially a requirement of good faith.
14. R. Cooter, T. Ulen (2011, *op. cit.*, p. 38).
15. *Ibid.*, p. 40 *et seq.*
16. E. Posner (1998, p. 1553).
17. R. Cooter, T. Ulen (2011, *op. cit.*, p. 41, 292).
18. R. Epstein (2007, p. 804).
19. Or at least where such intervention is being put in place in theory, as in the consumer protection through information paradigm; see G. Howells (2005, p. 354); and practice, hence protective legislation such as the Consumer Rights Act 2015 in the UK or TRLGDCU ("Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias". *Boletín Oficial del Estado* núm. 287 (November 30, 2007), pp. 49181-49215) in Spain. Nevertheless, it is a highly controversial issue, which I will look at in more detail further on.
20. A. L. Sibony (2014, p. 902 *et seq.*); Ch. Willett and M. Morgan-Taylor (2010, p. 148).
21. Compare T. Wilhelmsson (2006, p. 18), who identifies 5 main purposes of information duties, of which no No. 1 and 2 are especially relevant for this study, i.e. (1) Protection of real consent and (2) Equipment for rational market behaviour.
22. B. Hermalin *et al.* (2007, p. 48).

contract terms, information duties are supposed to fill out with meaning contracts that are incomplete because of market failures.[23] Finally, in the case of information duties, legal intervention into the freedom of contract is minimal[24] – the protection stops when information is given.[25] The EU consumer policy is based on the information paradigm, which aims at protecting consumers, but also – more importantly – at guaranteeing healthy economy.[26] A rational, circumspect consumer, making good use of the information provided is at the centre of the European internal market integration through harmonisation.[27]

Transaction costs, which can be actually reduced to one category, as they all represent resource losses due to lack of information,[28] render all contracts incomplete and increase the risk of suboptimal market outcome.[29] Information requirements, logically, should be a perfect remedy allowing the decrease of transaction costs, especially for consumers in B2C contracts. Nevertheless, the evidence from behavioural economics suggests something different.

1.2. Controversies surrounding information duties

The traditional law and economics logic assumes that all individual market users will make rational decisions,[30] their rationality being composed mainly of two factors: individual preferences and external incentives; their market behaviour will be predictably influenced by stable preferences on the one hand, and changing circumstances on the other.[31] In the context of contract law, parties' rationality is considered to be a twofold concept – rational behaviour implies that no party would contract voluntarily if expecting worsening of their *status quo* position and that the parties are capable of reasonable and objectively correct evaluation of the consequences of entering a contract.[32]

Behavioural law and economics, basing its findings on empirical research, questions the premise of rationality.[33] It is argued that consumers are not always rational, especially in the second sense, and that individuals often make mistakes in deciding whether a certain contract is profitable for them or not.[34] Consumers that contract with traders on disadvantageous terms believing that they are profitable are rational in the sense of wanting to improve their own situation, but are naïve in what refers to evaluating correctly the prospects of such a positive outcome.

A plain duty to inform will not be of assistance to irrational consumers – information paradigm assumes rationality as its basic premise. Moreover, B2C electronic contracts

23. E. Posner (2002, *op. cit*., p. 4).
24. S. Weatherill (2013, p. 92); B. Lurger (2005, pp. 442-468).
25. Ch. Willett and M. Morgan-Taylor (2010, *op. cit*., p. 148).
26. G. Howells (2005, *op. cit.*, p. 350); A. L. Sibony (2014, *op. cit.*, p. 902 *et seq.*).
27. A. L. Sibony (2014, *op. cit.*, p. 903); in what refers to harmonisation, article 114 of the "Treaty on the Functioning of the European Union". *Official Journal of the European Union* C 326 (October 10, 2012), pp. 0001-0390, requires that the functioning of the internal market be the objective of harmonisation. European Court of Justice case law established that the legislative measures have to serve internal market functioning both subjectively and objectively – see Case C- 491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd.* [2002] *European Court Reports* I-11453 at para. 60; Case C- 58/08 *Vodafone Ltd. and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] *European Court Reports* I-04999 at para. 32; see also S. Weatherill (2013, *op. cit.*, p. 200 *et seq.*); and V. Mak (2009, p. 5 *et seq.*)
28. See C. Dahlman, C. (1979, pp. 141-162, p. 148); also E. Posner (2002, *op. cit*., p. 3 – 4), on how lawyers and economists understand transaction costs.
29. See for instance J. I. Peinado Gracia (2000, pp. 1109-1154); also S. Hoeppner (2014, p. 250).
30. E. Posner (1998, *op. cit., p. 1553, 1555),* although the author, representing traditional economic analysis accepts that people may be rational in different ways, e.g. as individuals composed of different 'selves', each of those rational, but competing with other 'selves' within the individual.
31. K. Mathis and A. Steffen (2015, pp. 31-48, p. 32 *et seq.*); H. Kerkmeester (2005, p. 75). Nevertheless, one has to keep in mind there are various concepts of 'rationality'; see R. Korobkin and T. Ulen (2000, p.1060 *et seq.*)
32. B. Hermalin *et al.* (2007), *op. cit.*, p. 40 *et seq*., authors offer a vivid example of what rationality means in both contexts: "For instance if you respond to some get-rich-quick spam email, you presumably expect to enrich yourself, but such expectations are not rational; that is, you are rational in the first sense, but not the second."
33. For more on bounded rationality see F. Gomez Pomar (2010, p. 104 *et seq.*); H. Kerkmeester (2005, *op. cit.,* p. 75); G. Howells (2005, *op. cit.,* p. 358 *et seq.*).
34. O. Bar-Gill (2007, p. 749).

are usually standard-form contracts, terms of which are not negotiable. Evidence suggests that consumers simply do not read the pre-contractual information and terms of such contracts.[35] Therefore, an informed consent is a myth in B2C online contracts,[36] and providing pre-contractual information cannot improve consumers' rationality. Furthermore, e-commerce makes choice available to consumers practically limitless, however ironically the genuine free consent and choice is impossible also due to oversupply of pre-contractual information.[37] Too much information causes adverse effects as consumers are not able to neither understand nor process it.[38] Especially under pressure, which may occur if the time available for the consumer to spend on their electronic purchasing is limited, and such circumstances are usually the case in nowadays society, consumers tend to focus only on few main characteristics of the product, such as its price and recognizable brand.[39] It appears therefore that imposing too detailed information duties, although seems justified by market inefficiencies, rests on false assumptions concerning the way people make choices and decisions.[40]

The problem of consumers not reading their contract terms results in market conditions being deformed,[41] as the traders cannot compete offering better contract terms, if consumers are simply unaware of their existence. Paradoxically, information duties designed to protect consumers, who are less rational and even sometimes naïve in their choices, make individuals' lives even more complicated.[42] Secondly, the important drawback of too detailed information duties is that they tend to become exemption clauses, thus evolving from consumer protection measures into an instrument limiting traders' liability, which is the exact contrary of what they were designed for.[43]

From the more traditional standpoint, information duties are accepted as the lesser of two evils, when compared to other protective measures that involve further intervention in the freedom of contract, especially involving regulating contracts content.[44] Nonetheless, there has always been a lot of criticism concerning information duties imposed by law and the potentially adverse effects they may have on the functioning of the market.[45] Information requirements still constitute a significant intervention into the contractual balance, as although they are designed to reduce transaction costs of a weaker, less informed party, in our case – a consumer, they will almost certainly increase the costs for the other party.[46] For rational parties to contract, the transaction costs must be smaller than the benefit expected from the contractual relationship.[47] The risk of putting too much burden on traders, and this is especially true for SME, is that they could decide to remove

35. As O. Ben-Shahar (2009, p. 2), points out: "Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract. (...) And what if they did read? Surely, there is nothing they can do about the bad stuff they know they will find."
36. S. Becher (2008, p. 724).
37. F. Gomez Pomar and J. J. Ganuza (2014). In psychology it has been even established that too much choice available to consumers induces unhappiness and misery; see for instance B. Swartz and A. Ward (2004, p. 86 *et seq.*).
38. M. Arias Pou (2014, p. 418 *et seq.*).
39. S. Haupt (2003, p. 1142).
40. O. Ben-Shahar and C. Schneider (2011, p. 705), who point out: "More fundamentally, mandated disclosure rests on false assumptions: that people want to make all the consequential decisions about their lives, and that they want to do so by assembling all the relevant information, reviewing all the possible outcomes, reviewing all their relevant values, and deciding which choice best promotes their preferences. These assumptions so poorly describe how human beings live that mandated disclosure cannot reliably improve people's decisions and thus cannot be a dependable regulatory mechanism."
41. See for instance *Ibid*., p. 705. The authors conclude that the very fact of imposing information duties rests on false assumptions and is almost certainly doomed to be inefficient and consequently fails to contribute to improving market functioning.
42. Legislators try to remedy information asymmetries through information supply, which again is based on purely impracticable assumptions; see O. Ben-Shahar (2009. *op. cit.*, p. 3).
43. H. W. Micklitz (2012, *op. cit.*, p. 5).
44. S. Weatherill (2013, *op. cit*., p. 92).
45. The classical and neoclassical trends in economics of contract law oppose any intervention in the market; see R. Epstein (2007, *op. cit.*, p. 804 *et seq*.); A. Schwartz and L. Wilde (1978, p. 631).
46. Information duties are another mandatory obligation imposed on traders in a generic manner on the basis of their formal status and "irrespective of any real inequality between them and the perhaps well-informed consumer"; see P. Giliker (2005, *op. cit*., p. 633). Moreover, goods and services are cheaper when there are fewer mandatory duties imposed on traders; see, e.g. H. Collins (1994, *op. cit.*, p. 231-232).
47. C. Dahlman (1979, *op. cit.*, p. 141-142).

their offer from the market if the costs of complying with legal requirements are too high. It has also been pointed out a lot that the duty to disclose discourages parties from searching for information for themselves and from investing into precautions.[48]

Professor Weatherill put it simply: "If consumers – some consumers, most consumers – simply do not absorb and act on this disclosed information then market correction through information disclosure is a sham."[49] Other possible solutions improving consumers' confidence in the e-commerce and protecting their interest should be explored. It is often proposed to determine an optimal level of information, which together with effective remedies for its breach could correct, at least to some extent, undesired asymmetries in bargaining power of the parties. It would be essential to establish what an optimal level of information requirements is in what refers to quantity as well as quality. From the economic point of view, the optimal information level should not exceed the point where marginal costs of additional information duties are greater than their marginal benefit.[50]

In the B2C e-commerce a duty to advise may constitute a better solution than plain information requirements, flawed especially from the behavioural perspective. Duty to advise goes further than information requirements,[51] however its scope is not necessarily broader, and therefore probably should not replace, but rather complement information duties in their current form. The example of such duty are is the rules on goods fit for particular purpose in the UK Consumer Rights Act 2015.[52] A duty to advise requires nevertheless some kind of personal communication between trader and consumer, in the e-commerce through e-mails for example, which is fairly common, but difficult and impractical to enforce on a broader scale.

Also, non-legal mechanisms, probably the most adequate in the context of e-commerce, are being proposed.[53] They are already functioning in various contexts,[54] but nevertheless consumers still need to have access to all the contract terms before and after contracting, at least to be able to refer to them, should the product occur to be faulty for instance.

Another possible practical solution to the excess of information requirements that consumers have to face would require analysis of consumers' expectations regarding contractual terms they receive, especially in the Internet standard form adhesion contracts.[55] Then, consumers' attention could be brought to those particular pieces of information they do not expect or which they believe to be more favourable than they actually are.

Moreover, there is a view expressed by some that inequality of bargaining power between consumers and traders and its negative market consequences should be addressed through competition law measures and therefore there would be no need to add more information requirements to the list of pre-contractual duties in individual contracts.[56] From the behavioural point of view, the mechanisms of competition may promote traders who take advantage of consumers' lack of rationality.[57] Therefore, dealing with the issue at the level of competition law could contribute to limiting the unnecessary use of information requirements.

Nevertheless, the information paradigm of European law is a fact.[58] Furthermore, information duties play an important role in the case of a breach of contract, as they

48. See P. Giliker (2005, *op. cit.*, p. 636-637) and publications cited by the author.
49. S. Weatherill (2013, *op. cit.*, p. 316).
50. For more on optimal information requirements level, see S. Haupt (2003, *op. cit.*, p. 1143).
51. Duty to advise is present for example in consumer insurance law; see P. Tereszkiewicz (2010, p. 238 *et seq*). See also observations on such duty in French law, where it is well established, H. W. Micklitz *et al.*, (2010, par. 3.48).
52. See Consumer Rights Act 2015 sec. 10.
53. O. Ben-Shahar, 2009, *op. cit.*, p. 21 *et seq*.
54. For example rating of buyers, sellers and products on webpages such as e-Bay.
55. See I. Ayres and A. Schwartz (2013), where the problem of 'term optimism' is described. It is a situation where consumers expect some contract terms to be more favourable to them then than they actually are, but because of ever expanding list of disclosures consumers do not verify the terms for themselves, as it is simply humanly impossible to read all the information disclosed. Solutions to this problem proposed by the authors involve researching consumers expectations regarding terms of standard-form contracts.
56. F. Gomez Pomar (2003, p. 7 *et seq*.).
57. O. Bar-Gill (2012, p. 2.)
58. S. Weatherill (2013, *op. cit.*, p. 92).

provide consumers with means to enforce their rights.[59] The existence and usefulness of contracts depend on how efficiently a party can enforce them together with all their terms and conditions. From an economic point of view, the remedies available to the aggrieved party, i.e. the contract enforcement, is what really matters much more than doctrinal issues of how, and if, the valid contract was formed.[60] Even more importantly, without adequate information consumers may sometimes not be even able to assess if the contract has been performed correctly. How can individuals know if a device they purchased, such as a smartphone or computer, is exactly what they paid for? Or if the clothes they bought are effectively made of silk or fair trade cotton?[61] As mentioned above, European law established numerous detailed information requirements, however in many cases without introducing specific remedies in the case of breach of the duty to disclose by traders. Therefore it is the general contract law, or put more widely, the general law of obligations, that can be also of tortious nature, that comes into play providing consumers with remedies against traders' failure to disclose.

3. Remedies for breach of information duties

3.1. Private law remedies

Some information requirements are accompanied by specific remedies already at the European level. For instance, according to the article 6.1 letter e) of the Directive on Consumer Rights, the trader has to disclose the total price of the goods or services, including all the costs such as delivery charges or taxes. Then, the article 6.6 indicates that the failure to inform the consumer about the total price including all the additional charges will result in the consumer not having to bear those additional costs. This rule was directly implemented into internal legal systems of EU Member states; compare for example UK's regulation 13 paragraph (5) of The Consumer Contracts Regulations 2013[62] and Spanish article 97.6 of TRLGDCU.

Nevertheless, availability of specific remedies will usually not exclude the application of general law remedies.[63] Moreover, as explained above, European rules establish specific remedies for breach of information duties rather scarcely. In the majority of cases consumers will have to seek remedies that general private law offers for breach of disclosure duties. Those will be mainly defects of consent in civil law systems,[64] and misrepresentation, especially negligent and fraudulent, together with mistake, in common law traditions.[65] Other contractual remedies, such as damages for breach of contract may also result applicable.[66] In some cases, tortious liability should be considered as well.[67]

However, those general private law remedies had been developed much earlier than even the very concept of consumer contracts and consumer protection appeared. Therefore, if we talk about the English law, we have to bear in mind that the English contract law and remedies it offers are not only influenced to a great extent, but often even created in the course of commercial litigation between traders resulting from conflicts that appeared in some B2B transactions.[68] On the other hand, the continental law, especially French and Spanish systems, but also other

59. H. W. Micklitz (2012, *op. cit.*, p. 5).
60. B. Hermalin *et al.* (2007, *op. cit.*, p. 99).
61. *Ibid.*, p. 11 *et seq*.
62. "The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013". *Statutory Instruments 2013/3134.*
63. See for instance sec. 19 (9) of Consumer Rights Act 2015.
64. R. Guillén Catalán (2012, *op. cit.*, p. 4).
65. H. Beale (2008, pp. 42-50).
66. See S. Grundmann (2005, p. 203); remedies for breach of contract could be of relevance where the information provided becomes part of the contract, as for example in a case of a description of goods; see Baird (2013, p. 302); pre-contractual statements can often become terms of the contract; see E. Peel (2015, p. 429 *et seq*.); for Spanish law see P. Valés Duque (2012, p. 118 *et seq*.) who considers that the potential liability resulting form from the breach of information duties should be regarded as liability resulting from contract between the parties.
67. P. Giliker (2003, pp. 969-994).
68. See H. Beale (2008, *op. cit.*, p. 47), who while discussing the principle of the lack of a general obligation to act in good faith and a duty to disclose in English law, explains that: "English law is very heavily influenced by the heavy diet of commercial cases that are heard in English courts."; see also P. Giliker (2003, *op. cit.*, p. 970).

legal systems under the heritage of the Napoleonic Code, focus more on C2C contracts, where none of the parties is specialised or has importantly greater economic power than the other.[69] The economics of such contracts, be it B2B or C2C, are very different from those of B2C transactions where consumers are bargaining with traders. The Bbusinesspersons' market behaviour is more predictable, rational, their main goal being maximising their profit.[70] Consumers, looking for goods of everyday utility or leisure are more likely to be driven by irrational emotions, making their preferences less stable and predictable.[71]

3.2. Problem of adequacy of general remedies to particularities of B2C contracts

3.2.1. Problems resulting from application of general remedies

There is no agreement as to what extent information duties should be imposed on traders, mandatory disclosure in B2C contracts is a controversial issue and presents various drawbacks as mentioned above. However, the information duties are currently established in European and national legislation abundantly.[72] The logical consequence of the initial assumption on parties' inequality in B2C transactions and therefore on the particularity of such transactions, should be that of establishing specific remedies, adapted to B2C contracts. And although there are some, rather occasional remedies of such character at the European level, in general it is up to Member states to establish specific rules. In many cases a breach of mandatory information duties by traders will result in application of general private law. Nonetheless, the consequences of breach established in the general private law, that include, as mentioned above, misrepresentation, defects of consent, breach of contract remedies and tortious (extra-contractual) liability, rarely fit consumers' needs when it comes to the issue of breach of information duties, especially in the B2C e-commerce.

Traditional private law claims for defects of consent, including misrepresentation, and breach of contract involve traditional court proceedings as means of enforcement. B2C online transactions usually concern goods or services of a limited value and of an everyday utility for consumers, often related to leisure activities or hobbies.[73] Private law remedies may be well established in relation to commercial contracts in English law, or certain transactions between individuals in continental legal systems, where parties on equal footing negotiate contractual terms and conditions; nevertheless they are flawed as potential remedies in B2C e-commerce standard form contracts. The court proceedings in civil cases are costly and lengthy, which results in consumers' general reluctance to take action in court in a case of a dispute with traders in general, not only over an online transaction.[74] General law remedies may therefore be not effective as deterrent in the mass standard form adhesion contracts.[75]

Deemed to be faster and considerably cheaper than litigation, Alternative Dispute Resolution (ADR) schemes offer a possible solution to many problematic issues linked with traditional court proceedings in relation to disputes arising from B2C online contracts. Recently, a Directive on ADR and Regulation on Online Dispute Resolution were adopted.[76] Nevertheless, it is pointed out that ADRs present major drawbacks, especially for consumers in B2C contracts: consumer rights are often not protected sufficiently and the decisions are not published, which entails less legal

69. However, parties are considered to be reasonable, knowledgeable men that know law well; see E. Stebek (2008, p.361); J. Picatoste Bobillo (2011, p. 374).
70. K. Mathis and A. Steffen (2015, *op. cit.,* p. 35).
71. E. Posner (1998, *op. cit.,* p. 1553 *et seq.*).
72. Even more so, because of the behavioural and psychological findings still being inconclusive in a broader perspective as potential basis for policy changes; see F. Gomez Pomar (2010, *op. cit.*, p. 109-110).
73. Consider products commonly purchased on the Internet: transport tickets (plane etc.), holiday rentals (hotels, cars, apartments), clothes, sports equipment, cosmetics, digital content such as music, films and computer games. See for instance A. Ureña *et al.* (2014, *op. cit.*); see also: European Commission (2011, p. 204), for the reasons consumers themselves give for avoiding court proceedings.
74. See European Commission (2011, *op. cit.* p. 184, 204).
75. G. Ruhl (2015, p. 432).
76. "Directive 2013/11/EU of the European Parliament and of the Council on Alternative Dispute Resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC". *Official Journal of the European Union* L 165 (June 18, 2013), pp. 63-79; and "Regulation (EU) No. 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC". *Official Journal of the European Union* L 165 (June 18, 2013), pp. 01-12.

certainty.[77] In ADR schemes consumer cannot enforce their rights to the same extent as in litigation and the solutions – remedies – offered will often be different from the traditional ones.

Furthermore, breach of information duties will often not produce enough material damage on the side of consumers to make them willing to claim misrepresentation or defects of consent. Apart from compensation available when material damage can be proved, consumers whose contractual right of information has been breached, would often benefit from simple contract rescission. As far as the market efficiency is concerned, this solutions allows customers to allocate their resources again in a better way, and leaves dishonest traders eventually out of the market. Rescission should be granted when some important misapprehension[78] as to the contract terms or facts has occurred vitiating parties' consent at the moment of concluding the contract. Nonetheless, general private law is reluctant to intervene in misapprehension cases. In general, the mere fact of making a mistake does not allow parties to set the contract aside.[79]

Those limitations are due to the underpinning principles of contract law and the ever-present necessity to strike a balance between the certainty of transactions on the one hand, and protection of the mistaken party on the other. Neoclassical trend in economic analysis of law goes even further, implying that courts should not intervene when one of the parties to the transaction is mistaken, thus promoting active market participants who take steps to avoid mistakes by reading and analysing available information relevant to the contract beforehand.[80] It is also argued that in situations of mere information deficiency judicial intervention could be harmful, as it would lead to withdrawal of some offers from the market. This consequence would be due to the high costs of informing consumers to the satisfaction of courts, especially when there are excessive information requirements in force.[81]

A legally established relief for the mistaken party may indeed have some adverse effects discouraging parties from trying to avoid mistakes, but only when contract is being concluded between two equally situated parties.[82] However, this classic approach cannot be justified in consumer contracts where one of the parties is out of its definition less informed and imperfectly rational, as explained above. Therefore legal remedies for consumers that were mistaken, or better said, whose mistake was induced by flawed information provided by traders, should exist and be easily available.

Furthermore, where no particular remedy for breach of some specific information duties is established, often the breach will have no consequences whatsoever for the trader.[83] After the cooling-off period, discussed below, has expired, consumers usually have no individually enforceable rights against businesspersons who did not provide them with certain information.[84] This is due to the fact that the general private law remedies usually require a measurable damage to occur on the side of the aggrieved party, which may be quite difficult to prove in the case of lack of some information. Only specific and adapted remedies will be useful for consumers and therefore will give traders enough incentive to disclose true information in a transparent and efficient manner in order to stay on the market.[85]

77. For comprehensive analysis of disadvantages of ADRs in consumer cases, see G. Ruhl (2015, *op. cit.*, p. 443), and the studies the author cites there.
78. See H. Beale (2008, *op. cit.*) on 'misapprehension' word choice.
79. J. Cartwright (2012, p. 587 *et seq.*).
80. R. Epstein (2006., p. 116-117), Professor Epstein concludes that the solution is: "Rather it is to set up a firm rule so that all those who are about to participate in commercial affairs take steps to minimize that gap [between intention and performance] by learning to say what they mean (as well as mean what they say)."
81. E. Posner (2002, *op. cit.*, p. 15).
82. O. Bar-Gill (2007, *op. cit.*, p. 790-791), who states that: "Put differently, Professor Epstein presumes that the mistaken party is the least-cost avoider, and thus should bear responsibility for the mistake. Professor Epstein's concerns (...) are justified in the classic contractual interaction between two symmetrically-situated parties. They are not justified in consumer contracts, where sophisticated sellers with superior information engage in form contracting with imperfectly informed and imperfectly rational consumers."
83. H. W. Micklitz (2012, *op. cit.*, p. 38), considers that: "The vulnerability of the information paradigm becomes clear as we explore the weak link of individual legal redress. The violation of the detailed information obligations remains largely without consequence in civil law. The reason lies in the overwhelming number of duties which hinders the matching of obligations with adequate remedies."
84. See *Ibid.*, p. 5, where author points out: "Should it emerge afterwards that they did not receive certain information, they will realise that they have no individually enforceable rights against the business based on the lack of the required information."
85. S. Haupt (2003, *op. cit.*, p. 1148).

3.2.2. Right of withdrawal as an example of a specific remedy

Efficiency of establishing specific remedies is hindered by the ever expanding list of information requirements. Firstly, they are not all of the same importance for the consumer's informed consent and understanding of the contract, and secondly, the great and increasing with each new directive number of the duties makes it almost impossible to match a specifically tailored remedy for breach of each requirement. An often proposed solution is to create certain groups of requirements that would be protected with the same remedy, for instance information duties are so important that their breach would result in consumer's right to cancel the contract based for example on the institution of *culpa in contrahendo*, and therefore reaching beyond the scope and application of the currently established right of withdrawal.[86] This solution nevertheless also presents a major disadvantage in the context of consumer contracts, as it would involve civil proceedings in the court of law, which are not adapted well to the economics of low cost Internet contracts.

Effective remedies for breach of information duties not only should be easily enforced by consumers, but also the law should establish detailed rules as to how they operate, in so far as possible avoiding court's intervention. An example of such particular remedy can constitute the right of withdrawal, also referred to as a cooling-off period. The right of withdrawal is a special case of a remedy restoring contractual balance in B2C distance and especially electronic contracts.[87]

The cooling-off period in its very own nature constitutes a remedy to information asymmetry present in contracts formed over the Internet. It allows the consumer to check the qualities of the good personally and physically at a relatively small cost – the buyer only has to pay for the depreciation of the good and for the return. From an economic perspective, the consumer will only return the good if they value it less than the trader does.[88] In the e-commerce context the right of withdrawal works as a warranty granting the consumer an opportunity to inspect the purchase and compare its quality with its price, thus promoting those traders who offer quality products at reasonable prices.[89]

Within the European Union legal system, the right of withdrawal not only helps protecting consumers from aggressive commercial practices and allows them to understand the contract they have just entered with less pressure, but also serves as a tool encouraging them to participate in transactions without physical presence of the trader.[90] The existence of the cooling-off period is an example of a specific remedy, applicable without the need of court's intervention and protecting the functionality of the information requirement in itself. Proliferation of information requirements makes them often impossible to understand and process before the contract is formed, but the right to withdraw allows for additional time when the contract can be evaluated by the consumer.

Nevertheless, the same restrictions as to the usefulness of the mandated disclosure, especially those resulting from behavioural findings, may be applicable to the right of withdrawal as well. Too complex and detailed information will not become any more transparent, and everyday life will not give the consumer enough free time to be able to focus on the information provided prior to contracting. The consumer will benefit importantly, however, from the possibility of using or inspecting the good and seeing if it really fits their needs. In turn, consumers are more confident when contracting online, and boosting B2C e-commerce within the internal market is one of the goals of the European Union.[91] The efficiency of the right of withdrawal as a tool which promotes trade depends however on the time consumers are granted to exercise their right – in a perfect case balance between the reduction of uncertainty on their side and trader's loss (depreciation of the product they offer) must be struck.[92] When the cooling-off period is

86. H. W. Micklitz (2012, *op. cit.*, p. 38-39).
87. Within the European Union, according to the Directive on Consumer Rights (art. 10) in distance contracts traders should disclose the information on the existence of the right of withdrawal and the way it operates as well as enclose a form for consumers that can be used in the case of withdrawal. If the seller fails to do so, the withdrawal period will be extended from 14 days to up to 12 months.
88. O. Ben-Shahar and E. Posner (2010, p. 2).
89. See P. Rekaiti and R. Van Den Bergh (2000, *op. cit.*, p. 381), the authors point out that: "(...) granting of cooling-off periods works as an incentive for sellers to set product prices that correspond to products' actual quality."
90. O. Ben-Shahar and E. Posner (2010, *op. cit.*, p. 4).
91. See eg Commission's Communication, COM (2015) 633 final. *op. cit.*
92. O. Ben-Shahar and E. Posner (2010, *op. cit.*, p. 5).

fixed, as in European rules, there is a risk of inefficiency, as the traders might suffer high depreciation costs, and thus increase the prices.[93]

The right of withdrawal cannot constitute an only remedy restoring the contractual balance affected by the information asymmetry between the parties. A particular issue linked to the consumers' bounded rationality and lack of expertise is a problem of unobservable and unverifiable actions of traders in B2C contracts. In some cases of more complex purchases consumers are not able to verify if the information provided on the product was accurate, or as Hermalin *et al.* put it, "the beneficiary of a contractual promise may be unable to determine whether the promise has been kept or broken".[94] During the course of the cooling-off period the consumer may be able to observe if the product looks and works the way they expected it to, however they usually lack the possibility to check if it is not flawed in any other way. Therefore, if any problem becomes apparent after the withdrawal period expiry, the consumer will have to rely on traditional remedies such as misrepresentation or vices of consent. In such a case however, the burden of proof will be on them to demonstrate that the good was effectively flawed or malfunctioning, and doing so may quite often be impossible at a reasonable cost.

Conclusions

Traditionally, a consumer who enters contractual relationships with a businessperson is regarded as a weaker party that needs protection, not only because of a difference in economic power, but also, and even more importantly, because of information asymmetry. Protecting consumers is necessary from an economic perspective to keep the market functioning properly and ensure an optimal market outcome, as transaction costs, and especially information asymmetries, affect contracts completeness and increase the risk of suboptimal market outcome. In particular, information asymmetries affect online B2C contract formation, as lack of simultaneous physical presence of both parties often discourages consumers from the e-commerce. Numerous information requirements are therefore imposed on traders in attempt to remedy this lack of trust. This way the law intervenes to restore market equilibrium where market, especially due to existence of high transaction costs in B2C contracts, cannot regulate itself properly.

Nevertheless, a phenomenon of overuse of information requirements, resulting from the abundance of European directives, can bring about equally undesirable effects as the lack of mandated disclosure. Firstly, this is due to consumers' bounded rationality and impossibility to process all the information available. Secondly, it is very difficult to establish specific adequate remedies for breach of all information requirements, when there are simply too many of those. However, if the information level established in the rules imposing information duties is optimal, and the duties are protected through relevant remedies, market failures can be avoided.

From the economic standpoint, traditional remedies such as damages and contract rescission available to consumers as a consequence of an action for misrepresentation, mistake or breach of contract, are often inadequate to the reality of B2C electronic transactions. Due to the costly court proceedings on the one hand, and often courts' unwillingness to intervene in mistake and misrepresentation cases on the other, consumers are forced to search for different ways of enforcing their rights, for instance through mediation or other means of ADR. However, the traditional remedies stemming from the application of the general private law are not adapted to those ways of dispute resolution, especially in the context of cross-boarder electronic transactions, which means new remedies must be sought. Price reduction, product replacement or even introduction of new contract terms, beneficial for consumers, might be some of the possible solutions not offered by the traditional private law rules.

Providing consumers with actionable and effective remedies for breach of information duties by traders will boost consumers' trust in the cross-boarder e-commerce, which is one of the main goals of the European Union in what refers to the internal market development. The research centred on social effects of the legal rules being established, and this is what the economic analysis of law focuses on,[95] is what should be primarily taken into

93. *Ibid.*, p. 6.
94. B. Hermalin *et al.* (2007, *op. cit.*, p. 11-12).
95. H. Kotz (2000, p. 5).

account by the European legislator.[96] Therefore more specific remedies, adapted to the e-commerce consumer contracts, similar to the right of withdrawal, which seems to be fitting consumers' needs better than traditional remedies established in the general contract law, promoting honest traders and market efficiency, should be introduced directly in the secondary European law. Economic particularities of B2C cross-boarder electronic transactions are definitely worth further studies and legislator's careful consideration.

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About the author

Zofia Bednarz
zbednarz@uma.es

PhD candidate
Area de Derecho Mercantil
Universidad de Málaga

Facultad de Derecho de la Universidad de Málaga
Campus de Teatinos
Málaga 29071

UOC
Universitat Oberta de Catalunya