IACL Questionnaire: Information/disinformation consumers including negotiation

Introduction

Consumers deserve legal protection on account of their inferior position. This is the well-known rationale for adopting special rules for consumers. Prohibiting misleading information and informing consumers with correct information lies at the core of the so-called information paradigm which resulted in consumer information models across the world.

To combat the market inefficiencies resulting from the information asymmetry that exists between businesses and consumers, an increasing number of mandated information disclosures are imposed on businesses. Consequently protective measures of consumers have frequently sought to give consumers the means to protect their own interests by making autonomous, informed choices. In those models consumers are often perceived as benefit maximizing creatures. Information requirements allow consumers to make decisions themselves, decisions which are supposedly better than anyone else can make for them. It follows that if consumers are given full information, they will consistently make decisions that maximise their welfare. Hence informed consumer decisions are efficient decisions. Pre-contractual information duties and labelling requirements for foodstuffs are well-known illustrations of such mandatory information obligations. In a number of legal systems they range among the earliest information obligations that have been adopted in view of protecting consumers. Together with the prohibition of misleading commercial practices these measures seek to respectively forestall and to combat the deception of consumers. Therefore they will be the subject of this questionnaire.

The last decade models based on mandatory disclosures increasingly become the subject of criticism not in the least by behavioural economists. Without going into too much details behavioural economics scholars mark as major critiques on consumer information policies based on disclosures, the bounded rationality of consumers, the fact that consumers often lack the time to read information, the absence of rules on the presentation of the information, the length of the information and the understandability of information for consumers in general and for vulnerable consumers in particular. More particularly the continuous accumulation of information requirements gives rise to the question whether the ‘inundation’ of information does not risk to dis-inform the consumer rather than inform.

In this debate also the so-called digital consumer and consumer of financial services must be given specific attention. The first because of the communication medium that poses new threats to consumers, the latter because the financial services sector is characterised as a complex area with specific technicalities.

Consumer law is often also characterised by more intrusive measures to party autonomy. In those areas in which the consumer is not able to make a rationale choice on the basis of adequate information or a cooling-off period would not have much effect, more intrusive measures such as the control of contract terms may be introduced. Bans of unfair contract terms are the result. These prohibitions are often paired with specific transparency requirements. These transparency requirements are complementary to the general pre-contractual information requirements and hence also dealt with in this questionnaire. On a more general account the position of the consumer vis-à-vis businesses is analysed in view of obtaining deeper insights on how party autonomy, negotiation capacities and bargaining power of consumers function in the legal systems.
Questionnaire

1. General characteristics of the consumer information model

a. What are the main features of your national consumer model? Is it based on the economic market model and the inherent ‘homo economicus’ or is it (also) characterised by other features?

b. Which consumer (e.g. the reasonably well informed, reasonably observant and circumspect consumer who is capable of processing information which is disclosed to him and value it in view of his purchase decisions) serves as the general benchmark for your national consumer legislation? Are there specific types of consumers, e.g. types of vulnerable consumers, that have an impact on what information must be provided to consumers and how it is provided? Please specify briefly whether different benchmarks are used in relation to pre-contractual information, labelling, misleading practices, unfair terms, financial services and online sales.

2. Pre-contractual information requirements

General information obligation

a. Is there a general obligation imposed on businesses to provide consumers with pre-contractual information? When (before conclusion of the contract etc.) and how (durable medium etc..) must this information be given? What information must be given to the consumer?

b. Are businesses allowed to add voluntarily information to the information particulars, if any, imposed by law?

c. Can the lack of pre-contractual information give rise to sanctions, and if yes, what sanctions? Can it give rise to a culpa in contrahendo? How does it relate to party autonomy and negotiation powers in your legal system? Is there a benchmark of reasonable consumer expectations applied in this respect? Please explain.

In some legal systems rules about the presentation of information include transparency requirements like: the information must be clear, unambiguous, understandable, comprehensible, intelligible etc... for consumers.

d. Are there rules in your jurisdiction which impose transparency requirements and how the information must be presented to the consumer?

e. If some of the abovementioned requirements exist in your legal system, how are these requirements then handled by courts? Please explain.

f. Is there any sanction when a business omits to provide an obligatory information particular to consumers? Please explain.

Specific food information requirements for consumers.

a. What general features characterise your legal system’s food labelling requirements (e.g. list of ingredients, no deception...)?

b. Are manipulative marketing techniques that exploit the fact that consumers are easier to persuade when they have not engaged their conscious decisionmaking faculties, for
instance the use of specific packaging colors, addressed in your legal system? If yes, in what way? Please explain.

Some legal systems require mandatory food information to be marked in a conspicuous place in such a way as to be easily visible, clearly legible and, where appropriate, indelible. It is sometimes also stated that food information may not in any way be hidden, obscured, detracted from or interrupted by any other written or pictorial matter or any other intervening material. Some legal systems further contain rules as regards font size and characters of mandatory particulars.

c. Are there rules in your legal system on how food information must be presented to consumers? Please explain.

d. Is there any sanction in case a business omits to provide certain mandatory particulars in accordance with the presentation requirements? Please explain.

3. Misleading commercial practices

For the purposes of this subsection commercial practice is taken in its broadest meaning, namely any act, conduct, omission, commercial communication, advertising, marketing that directly or indirectly is related to the promotion, sales or supply of goods, services, etc...

How is the consumer protected against misleading commercial practices in your jurisdiction? The following questions may serve as guidelines for your answer:

Is there a provision that prohibits misleading actions and omissions? What benchmark is used to assess the misleading character of commercial practices? Are there specific rules for the protection of groups of particularly vulnerable consumers against misleading practices? Are there specific rules for information that is provided to consumers through specific media, e.g. comparison websites? Is the assessment of the misleading character of a commercial practice influenced by the way in which pre-contractual information was provided to consumers? Please explain.

4. Unfair contract terms – bargaining power

Bargaining power:

The prohibition of unfair contract terms rests upon the assumption that consumers are less experienced than businesses and lack the legal knowledge and the bargaining power to negotiate pre-drafted standard terms. Hence bans on unfair terms are often restricted to terms that have not been the subject of individual negotiation.

a. Are standard terms treated differently from individually negotiated terms in your legal system? If yes, in what way?

b. How is in this respect the bargaining power of consumers characterised vis-à-vis businesses in your legal system? Please explain.

c. Who bears the burden of proof that a term has been individually negotiated? How can it be proven? Please explain.
d. If parties have a dispute about whether a term was individually negotiated or not, how is this dealt with in court practice? Please explain.

e. Are so-called core contract terms excluded from the unfairness test? Please explain.

Transparency of (core) contract terms

a. If the use of written standard terms (or the exclusion of core contract terms from the unfairness test) is subject to a transparency requirement: how is this transparency requirement then defined and how is it applied in practice? Please explain.

The following questions may serve as guidelines for your answer:

Do requirements like for instance ‘contract terms have to be clear and comprehensible’ solely refer to the formal or grammatical correctness of the terms or does it also include the obligation to inform the consumer about the economic or other consequences of a term? Is the (more) vulnerable consumer offered a higher level of protection in terms of transparency?

If the exclusion from the unfairness test of core contract terms is subject to a transparency requirement, is it then also subject to the obligation to bring core contract terms to the consumer’s attention in such a way that an average consumer would be aware of the term?

Can pre-contractual information have a bearing on the interpretation of the precise content of a contract term? Are individually negotiated terms dealt with differently than standard terms as regards their transparency? If yes, in what way?

Is there any sanction for not complying with the transparency requirement?

5. Sector specific rules: the financial consumer

Financial services are for the purposes of this questionnaire defined broadly including banking, insurance and investment services. In most legal systems specific information requirements exist as regards financial services, e.g. in terms of the comprehensibility, reliability, transparency and comparability of the information, bans on specific unfair terms.

a. In what way do these specific measures in your legal system deviate from the requirements imposed in other consumer sectors? Please explain.

b. Does the critique from legal and other scholars that the information disclosed to consumers in this field is too expansive play a role in recent legislative developments? For instance is there discussion in your jurisdiction about forms of ‘smart’ or ‘more targeted’, simplified information, e.g. key information documents, the use of icons or the use of scores = one dimensional summaries of product features like e.g. the annual percentage rate in consumer credit? Please explain.

6. Sector specific rules: the digital consumer

In most legal systems specific information requirements exist concerning online consumer sales/distance sales.

a. In what way do these specific measures deviate from the requirements imposed on offline sales to consumers? Please explain.
b. Consumer information can shape the reasonable expectations of consumers, and consequently also the level of protection consumers can reasonably expect. Does the legislation make use of a benchmark of reasonable consumer expectations? Please explain.

Most legal orders require that the storing of information, or the gaining of access to information already stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been provided with clear and comprehensive information about the purposes of the processing.

c. The fact that consent legitimizes nearly any form of collection, use, or disclosure of personal data begs the question how the consumer must be informed about to what exactly he consents?

The following questions may serve as guidelines for your answers:

Are there specific rules in your jurisdiction in this respect? Is the use of default options allowed? How can a trader proof that e.g. the consumer consented to the cookies policy of the business and was aware of how they function? How is the bargaining power or negotiation capacity of the consumer in this area dealt with in your legal system; does it correspond to reality or have consumers no choice but to agree with the proposed use of data? Please explain.

7. The information model under pressure and the problem of disinformation

a. Does the legislature take recent outcomes of studies criticizing mandatory information models into account? If so, how does this discussion affect your current legislation? For instance is the streamlining or regrouping of information debated in your jurisdiction or the fact that information in the pre-contractual stage must focus on essentials whilst more detailed information should be required only at the moment before the contract is concluded? Is it debated that consumer information should become more accessible, accurate, comprehensive, and timely, and should allow consumers to fairly compare material product features to those of competing products available on the market? Please explain.

b. Is there specific legislation that deals with the problem of disinformation of consumers as a result of an overload of information? For instance, can an overload of information be characterised as a misleading commercial practice? If so, under what circumstances (e.g. in consequence of voluntary information that confuses consumers when it is added by a business to mandatory information disclosures or could there also be a case of disinformation of consumers which results from mandatory information alone that is complied with by the business)? Please explain.

8. Other relevant topics

Do measures relating to the education of consumers (improvement of illiteracy in certain fields) complement the measures studied above and are they effective? Please explain.

Are there other relevant topics related to (dis)information/negotiation capacities of consumers that are debated in your legal system but might have been overlooked in the preceding parts?