Breach of Information Duties in the B2C E-Commerce: A Comparative Analysis of English and Spanish Law

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by

Zofia Bednarz

Departamento de Derecho Privado Especial

Área de Derecho Mercantil

Supervised by Dr Juan Ignacio Peinado Gracia and Dra Patricia Márquez Lobillo

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AUTOR: Zofia Bednarz

http://orcid.org/0000-0001-6719-8101

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Examinado dicho trabajo estimamos que el mismo reúne los requisitos para ser presentado como Tesis Doctoral, autorizando dicha presentación, conforme a la normativa reguladora de los Estudios de Doctorado.

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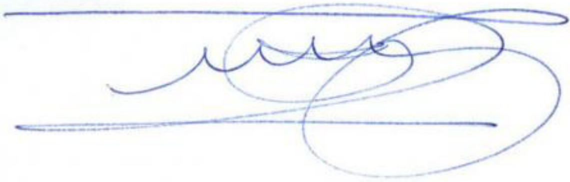

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Fdo. Dra. Patricia Márquez Lobillo

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List of abbreviations

art – article

B2C – Business-to-Consumer

CISG – United Nations Convention on Contracts for the International Sale of Goods

CJEU (previously ECJ) – The Court of Justice of the European Union

CRA 2015 – The Consumer Rights Act 1015

DCFR – Draft Common Frame of Reference

EU – European Union

GDP – Gross domestic product

LSSICE – Ley de Servicios de la Sociedad de la Información y de Comercio Electrónico

OECD – The Organisation for Economic Co-operation and Development

PECL – Principles of European Contract Law

reg – regulation

s – section

SME – Small and medium-sized enterprise

TRLDCU – Texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios

UNCITRAL – The United Nations Commission on International Trade Law

UTR 2008 – Unfair Trading Regulations 1008

WTO – World Trade Organization

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Resumen

La celebración de contratos por medios electrónicos constituye una realidad innegable en nuestro tiempo. Los empresarios se han visto abocados a realizar su actividad económica a través de Internet, casi de forma obligada, a fin de satisfacer la creciente demanda de productos y servicios *on line*.

Aunque nuestra Tesis Doctoral se centra en el examen de la normativa reguladora de los adquisición de productos, sin entrar en el ofrecimiento de servicios, tanto en un caso como en el otro se acusa que el mercado *on line* no ha adquirido el potencial pretendido por las Instituciones Comunitarias. Esto se debe, en gran medida, a la falta de confianza manifestada por los propios consumidores, y derivada, entre otros aspectos, de la falta de contacto directo con el sujeto con el que contratan; de la imposibilidad de comprobar físicamente aquello que están adquiriendo; y del hecho de que buena parte de las transacciones llevadas a cabo en la Red tienen carácter transfronterizo.

El establecimiento de deberes precontractuales de información, en cuyo estudio se centra nuestra Tesis Doctoral, viene a suplir, de alguna forma la carencia apuntada en el párrafo precedente, si bien, debemos dejar claro, desde el principio, que los mismos no deben ser el único cauce para la protección de los consumidores y para garantizar su confianza en el Mercado. Un sistema de deberes a cargo de los empresarios pierde todo su sentido si el mismo no viene acompañado del establecimiento de los remedios adecuados para garantizar el cumplimiento de dichos deberes.

Es cierto, en este sentido, que la imposición de sanciones por incumplimiento de los mencionados deberes y consagrada en las normas comunitarias sobre protección de los consumidores, comercio electrónico y competencia leal, y, como no puede ser de otra forma, en las de transposición, satisface en gran medida el interés del

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Mercado Interior y garantizan el correcto funcionamiento del mismo. Ahora bien, la imposición de una sanción administrativa a aquel empresario que, por ejemplo, omite información detallada sobre sus datos personales, sobre las características del bien, o sobre elementos esenciales del contrato, no contribuye, de igual forma, a la satisfacción de los intereses individuales de los consumidores que, sobre la base de la información que ha facilitado el empresario, han celebrado un determinado contrato electrónico. El consumidor, en general, y en especial el ciberconsumidor, necesita contar con remedios – mecanismos –*means of redress* – a los que acogerse para satisfacer sus intereses individuales.

Nos enfrentamos, en este sentido a un problema digno de un estudio pormenorizado. Si bien los deberes precontractuales de información establecidos por el legislador europeo son incorporados a los Derechos nacionales por vía de la transposición, no es menos cierto que dicha trasposición no se ha llevada a cabo siguiendo con rigor los dictados comunitarios. Esta crítica, a la que dedicamos un profundo estudio, se plasma especialmente en el establecimiento de los remedios privados frente al incumplimiento de los deberes informativos, cuya regulación, además, queda al arbitrio de los legisladores estatales. Nuestro Trabajo, centrado en el examen de los ordenamientos español e inglés, pone de relieve este hecho.

Si al inconveniente reseñado sumamos la influencia que sobre la consagración de los deberes de información y de los remedios frente a su incumplimiento tiene el Derecho interno español (*civil law*) e inglés (*common law*), los problemas se acrecientan.

Nos enfrentamos a un problema de solapamiento de recursos. Habrá supuestos de incumplimiento que podrán solucionarse acudiendo a los remedios establecidos en las disposiciones especiales de consumo, de comercio electrónico o de competencia leal; habrá otros que encontraran respuesta en el Derecho general; y habrá algunos que podrán ser resueltos por ambas vías. Será el consumidor el que deba decidir cuál de ellas satisface, en mayor medida, sus necesidades.

Dos inconvenientes adicionales al respecto pueden señalarse.

El primero debido a que los ordenamientos analizados adolecen de un importante defecto en la articulación del sistema de información y del sistema de remedios. No se regula en ninguno de ellos, de forma general, que información es fundamental y

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cual no tiene dicha consideración, lo que genera que tampoco se consagren, de forma general, los remedios atendiendo a la información incumplida, sino que los mismos se ofrecen, de forma genérica, quedando como hemos dicho al arbitrio del consumidor la opción por aquél que satisfaga mejor sus necesidades. Decimos de forma genérica porque esta regla tiene excepciones establecidas por las propias leyes, que en ocasiones consagran remedios automáticos; y, porque existen diferencias entre los ordenamientos, que, en determinados casos prevén un sistema jerárquico de remedios.

El segundo inconveniente proviene del tipo de consumidor al que se refieren las normas comunitarias. Sin entrar en detalles, se parte de un consumidor activo, informado, se confía en un consumidor que toma decisiones racionales.

Con el objeto de intentar dar respuesta a los inconvenientes apuntados hemos decidido realizar un estudio comparativo de los ordenamientos español e inglés, por considerar que el mismo permitirá poner de relieve la gran variedad de soluciones jurídicas adoptadas y, lo que es más importante, adoptables, a fin de garantizar la protección de los consumidores que adquieren productos en el mercado electrónico, por vía de la información y por vía de los remedios.

Nos planteamos tres cuestiones principales.

La primera el examen del objeto, es decir, del contenido y la articulación del sistema de deberes precontractuales de información en la contratación electrónica con consumidores. Abordamos el estudio de los deberes directamente establecidos por los legisladores, así como de aquellos otros que se infieren de otras disposiciones de forma indirecta.

Sentada esta base, abordamos, en segundo lugar, el tratamiento legislativo de los deberes precontractuales de información que lleva a cabo cada ordenamiento. Las notables diferencias, a pesar del origen comunitario de dichos deberes, fundamentan el estudio. No podemos olvidar la existencia en Derecho español de un deber genérico de buena fe en la contratación que inspira todo el sistema jurídico de los contratos e incide en la interpretación que deba darse a los mismos. No podemos olvidar igualmente que el sistema inglés se sustenta sobre la libertad contractual, reconoce la adversidad entre las partes contratantes y nos les exige un comportamiento respetuoso con buena fe alguna.

En tercer término analizamos el sistema de consecuencias o remedios frente al

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incumplimiento de los deberes de información previsto en cada ordenamiento. Con este objetivo, se tomarán en consideración tanto la regulación prevista en las normas de Derecho privado general, como en las disposiciones específicas, de consumo y de comercio electrónico, sin olvidar la referencia a las reguladoras de la competencia leal. Este examen nos lleva a estudiar la variedad de planteamientos posibles, así como, la importancia de los deberes concretos y de los remedios frente a su incumplimiento en cada sistema, sobre todo ante supuestos controvertidos como la falta de información relativa a las características principales del bien objeto del contrato, los supuestos de suministro de información falsa o aquellos en los que el empresario omite determinada información. Esto nos permite demostrar, además, la importante influencia que el Derecho Privado general de cada uno de los ordenamientos analizados ejerce sobre la configuración tanto de los deberes como de las consecuencias ligadas a su incumplimiento. Este examen va acompañado, en todo momento, del estudio de los pronunciamientos de los Tribunales, toda vez que los mismos no siempre se acomodan al remedio específicamente previsto en la normativa especial.

El examen comparativo que realizamos se basa en el principio de la funcionalidad, en tanto, las normas examinadas y comparadas cumplen el mismo papel en ambos ordenamientos. No se trata, en consecuencia de comparar normas, sino de comparar el contenido y finalidad de las normas. En cumplimiento de este objetivo hemos considerado conveniente el examen conjunto de ambos ordenamientos, o mejor dicho, el examen que ambos ordenamientos realizan de un determinado deber y de las consecuencias de su incumplimiento. Quizá ello dificulta el tratamiento de la materia, más fácil si se hubiera separado, pero permite poner de relieve en mayor medida la comparación pretendida. Ello no obstante, y a fin de evitar reiteraciones innecesarias, se ha adoptado un sistema de organización más aproximado al Derecho inglés que al español, dada por ejemplo, la importante diferencia que existe entre ambos en relación con el incumplimiento derivado del suministro de información falsa o de la omisión de información derivada del distinto rol que la buena fe contractual/precontractual cumple en cada uno de ellos.

Hemos intentado, además, seguir los principios de neutralidad e imparcialidad, en la medida en la que nos lo ha permitido su estudio tomando como referencia las diferencias inherentes al ordenamiento en el que están inmersas. Esta preferencia por el enfoque funcional nos lleva a la búsqueda objetiva de las consecuencias

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del incumplimiento de los deberes de información en ambos sistemas, sin hipótesis inicial acerca de las normas del derecho investigadas. Ello no impide, en aras de la concreción del estudio, que nos hallamos centrado, exclusivamente en el ámbito del Derecho privado de consumo y de comercio electrónico, sin atender a otros remedios que puedan derivarse de la aplicación de las disposiciones reguladoras del Derecho administrativo sancionador.

El estudio que hemos realizado, desde la perspectiva del incumplimiento se aproxima al método comparativo basado en hechos. Aunque no se examinan hechos concretos, de un caso hipotético o real, el aspecto práctico del estudio se evidencia por la investigación de las reacciones de los ordenamientos español e inglés ante la premisa del incumplimiento. Se han considerado varias posibilidades: el incumplimiento que resulta de la omisión de información y del suministro de la información falsa; el incumplimiento relativo a diferentes tipos de información. Se han realizado cuadros esquemáticos de las distintas disposiciones aplicables a los supuestos de incumplimiento de los deberes de información en el ámbito de los contratos de consumo electrónicos, a fin de realizar una presentación gráfica y esquematizada de las normas que facilite la comparación de los sistemas.

Desde el punto de vista más técnico, no hemos centrado nuestro estudio, exclusivamente en el examen de la legislación vigente, sino que se han tenido en consideración los documentos preparatorios de las mismas, tanto al nivel europeo como nacional, así como otros documentos oficiales no vinculantes, tales como, las propuestas legislativas que se están llevando a cabo en orden a la modernización del Derecho de obligaciones o las derivadas del propuesto Marco Común de Referencia. El examen de los pronunciamientos judiciales dimanantes tanto del Tribunal de Justicia de la Unión Europea, como de los distintos Tribunales nacionales completa el examen que hemos realizado, en el que se ha tenido en cuenta, además, y como no puede ser de otra forma en un trabajo de investigación de las características del que sometemos a evaluación, los pronunciamientos de la doctrina científica.

La terminología empleada merece una explicación en este resumen, pues como hemos indicado, las diferencias propias de los ordenamientos analizados han imposibilitado, en ocasiones, el recurso a la traducción de los términos, pues la misma hubiera llevado a la referencia a instituciones jurídicas diferentes en uno y en otro. Así sucede por ejemplo en relación con los conceptos de error provocado y dolo,

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del Derecho español, y el de *misrepresentation* del Derecho inglés, que aunque relacionados refieren a realidades jurídicas diferentes. Hemos recurrido, no obstante, cuando lo hemos considerado necesario para mantener la claridad del discurso a la aproximación terminológica.

Nuestra Tesis Doctoral se ha estructurado en tres capítulos fundamentales, más uno dedicado a exponer las principales conclusiones obtenidas de la misma.

El Capítulo primero tiene como objetivo centrar el marco social y jurídico en el que se desenvuelve la materia objeto de estudio. Se parte del examen del régimen de la contratación electrónica como modalidad especial de contratación a distancia, completamente diferente por ejemplo de la que se lleva a cabo fuera de establecimiento mercantil, por su accesibilidad, su rapidez, su celeridad, su inmediatez. Aunque las figuras contractuales básicas no varían en su estructura en la contratación *on line y off line*, si hay incidencia del medio en la comunicación entre las partes, su celeridad e inmediatez, formas de manifestación del consentimiento, etc. Se han analizado así aquellos caracteres de la contratación electrónica que inciden, de forma directa sobre el eje de nuestra Tesis Doctoral, el deber de información.

Para ello, hemos tenido que concretar los elementos que la hacen diferente del sistema de contratación, digamos, tradicional y sobre la base de los cuales se impone la necesidad de establecer mecanismos de protección del consumidor diferentes de los tradicionales y sustentados sobre la obligación de suministro de información. Esto es así puesto que la información se convierte en el único elemento con el que cuenta el consumidor para fundar su consentimiento y decidir sobre si quiere quedar vinculado por un determinado contrato celebrado en forma electrónica. Así, por mencionar algunos caracteres especialmente relevantes para el objeto de nuestra Tesis: la falta de presencia física simultánea de las partes, suplida por la vía de la obligación de proporcionar una información detallada sobre el empresario con el que se contrata, el lugar desde el que realiza su actividad económica (fundamental en el entorno transfronterizo en el que se desenvuelve la contratación electrónica para determinar la legislación aplicable y la jurisdicción competente) y sobre los medios que permitan un contacto directo y personal con él; la imposibilidad de examinar físicamente aquello que se está adquiriendo, que se consigue por vía de la obligación de suministro de información detallada sobre el producto, las características esenciales del mismo, su precio, etc.

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La información se convierte, como analizaremos, en un elemento clave en la Política europea de protección de los consumidores y, especialmente, en el ámbito del *e-commerce*. Así lo ha puesto de relieve el legislador comunitario en la Directiva sobre el comercio electrónico de 2002 y en la relativa a los derechos de los consumidores de 2011, hasta el punto que, el sistema ha merecido duras críticas a las que hemos dedicado un análisis en profundidad. Apuntamos en este momento , simplemente el sentido de las mismas.

Se critica que la exigencia de información se pueda convertir en el único mecanismo de protección del consumidor y de garantía de funcionamiento del Mercado. No cabe olvidar que en la economía clásica, la idea de mercado perfecto estaba asociada a la no existencia de asimetrías de información. Entre otras causas porque el precio era por si mismo el crisol de toda la información existente. Sin embargo, la asimetría de la información tiene una incidencia especial en la contratación *on line* pues dificulta los escrutinios y comparaciones además de incentivar una manifestación del consentimiento inmediata (no podemos olvidar el potencial problema de la selección adversa, que hemos analizado). Respecto a esta crítica quizá no debe partirse, al menos de forma absoluta, del concepto de consumidor activo, toda vez que actitud no debe confundirse con aptitud. Para que la información precontractual pueda cumplir con la función que tiene atribuida, el consumidor debe haber fundado su decisión en la información recibida, lo que supone que es capaz no solo de entenderla, sino de asimilarla, eligiendo entre las distintas ofertas de forma racional conforme a dicha información. Los riesgos derivados de este concepto de consumidor y de la importancia del denominado empoderamiento a través de la información son objeto de estudio en este Capítulo.

Se critica de la misma forma que el sistema se sustente sobre la cantidad y no calidad. No se tienen en cuenta, al menos en la medida en que debiera, que información es la que realmente necesita el consumidor para fundar su consentimiento. Se le suministra una ingente cantidad de información, unas veces innecesaria y otras poco comprensible (piénsese en lo sucedido hace años con los prospectos de medicamentos). La idea de calidad de la información a suministrar constituye otra parte importante de este Capítulo.

Sobre estas bases, concluimos con el examen pormenorizado de los deberes precontractuales de información, que se realiza desde la perspectiva comparativa de

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ambos ordenamientos. Se estudian los deberes de información que hemos calificado como directos, porque de forma expresa se contemplan por los legisladores de comercio electrónico y consumo. Se abordan los deberes de información de carácter indirecto derivados de la aplicación al ámbito del comercio electrónico tanto de las disposiciones generales en materia de contratos vigentes en ambos ordenamientos, como de aquellas más específicas, relativas, por ejemplo, a la protección de la competencia leal. En este examen se detallan las diferencias encontradas en el régimen de Derecho español e inglés, especialmente, en cuanto a principios de relevancia en uno de ellos (el de buena fe) inexistente en el otro.

El Capítulo segundo de nuestra Tesis Doctoral tiene como objetivo el análisis general tanto de la forma en la que ha de cumplirse la exigencia de suministro de información, como del concepto sobre lo que hemos de entender como su incumplimiento o, más precisamente, por el conepto legal de incumplimiento del deber.

Partiendo del contenido y alcance de los deberes de información, que nos ha llevado al examen de la importancia de la publicidad como cauce para su suministro y de la inserción de la información en el contrato por vía del condicionado general del mismo, hemos analizado la forma requerida para el cumplimiento del deber (transparencia, claridad, documentación, gratuidad, etc.), acusando las principales diferencias observadas en los ordenamientos español e inglés.

Para poder analizar el incumplimiento de los deberes de información, no solo hemos tenido que estudiar los deberes concretos, sino lo que es más importante determinar su contenido y ámbito. Los deberes de información son obligaciones legales, que normalmente se presentan en la fase precontractual, pero que terminan integrando el contrato por voluntad del propio legislador (buena muestra de ello son el artículo 97.5 del TRLDCU y las secciones 11(4), 11(5), 12, 36(3), 36(4), 37, 50(3) y (4) del CRA 2015).

Analizar el cumplimiento es imprescindible para concretar que sea el incumplimiento, porque no siempre la falta de información va a merecer el mismo calificativo. Habrá casos de incumplimiento absoluto, otros de incumplimiento parcial, otros de omisión, otros de suministro de información falsa. La calificación de las distintas modalidades constituye parte significativa de nuestro Capítulo segundo.

El incumplimiento de los deberes precontractuales de información demanda,

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como no puede ser de otra forma, la reacción del ordenamiento, plasmada en el establecimiento de los remedios adecuados para garantizar los derechos individuales de los consumidores afectados. No todos los remedios son iguales no cualquier remedio es idóneo. Por ello, hemos considerado conveniente abordar en el Capítulo segundo los aspectos generales de los mecanismos, cauces, remedios, soluciones, *means of redress*, previstos por los ordenamientos español e inglés frente al incumplimiento. Lo hemos hecho porque entendemos que un sistema de exigencia de información, de imposición de deberes a los empresarios en este sentido, carece de fundamento, desde la perspectiva de la protección del consumidor, si las consecuencias son, exclusivamente, de naturaleza administrativa sancionadora.

Nos planteamos la necesidad de que los legisladores, europeos y nacionales, prevean mecanismos concretos para la satisfacción del consumidor que ve incumplido los deberes precontractuales de información y entramos a analizar qué sistema se considera más adecuado a dicha finalidad. Lo hemos hecho poniendo de relieve las deficiencias acusadas tanto en el Derecho europeo, por omisión en muchos casos, como en los Derechos nacionales, por exceso en el establecimiento de remedios, por falta de concreción de cuáles sean aplicables al caso concreto y por falta de establecimiento de procedimientos jerárquicos en la ordenación de los remedios disponibles.

Estas deficiencias nos han llevado a plantear otro problema íntimamente relacionado con la naturaleza de la solución que el ordenamiento prevé ante el incumplimiento del deber de información. No siempre será una responsabilidad contractual, habrá supuestos subsumibles en la extracontractual. Delimitar unos casos y otros constituye el punto final del Capítulo segundo.

El objetivo del Capítulo tercero y último es el examen detallado de los remedios concretos previstos en los ordenamientos español e inglés frente al incumplimiento de los deberes precontractuales de información. Hemos considerado conveniente comenzar con una ilustración de manera gráfica de las normas aplicables, de las clasificaciones legales del incumplimiento y de los remedios disponibles en ambos sistemas analizados. El objetivo no es otro que resaltar o poner en evidencia las diferencias existentes en ambos ordenamientos y facilitar el conocimiento de las normas aplicables en cada uno de ellos.

Aplicando el principio de especialidad hemos comenzado con el análisis de los

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remedios previstos en las normas sobre consumo y sobre comercio electrónico, para proceder posteriormente a estudiar los concretados en las normas de Derecho general, intentando pronunciarnos sobre la adecuación de estos últimos a los contratos de consumo electrónicos.

El análisis de los remedios específicos previstos en las normas sobre Derecho de consumo y sobre comercio electrónico se ha abordado desde la perspectiva de dos incumplimientos fundamentales. El primero, aquel que afecta a la información relativa a las principales características del bien (producto) objeto del contrato. El segundo, aquel que toma en consideración los supuestos en los que no se facilita información sobre el empresario, sobre los pasos técnicos que han de llevarse a cabo para celebrar el contrato o sobre el contenido de las comunicaciones comerciales. Hemos dedicado un tratamiento especial, porque especiales son las consecuencias previstas en ambos ordenamientos, a los supuestos de incumplimiento del deber por omisión de información y a aquellos que consisten en el suministro de la información falsa.

El examen de la adecuación de los remedios que ofrece el Derecho privado general de los ordenamientos analizados a la contratación electrónica con consumidores ocupa un papel relevante en el contenido del Capítulo tercero, quizá porque la respuesta de los Tribunales, sobre todo en España, ante supuestos de incumplimiento de los deberes de información se fundamenta más en el Derecho general que en el especial.

Hemos considerado necesario hacer un análisis de cuáles son los remedios que ofrecen el Derecho de contratos en cada uno de los ordenamientos (resolución por incumplimiento, cumplimiento forzoso, reclamación de daños y perjuicios, nulidad del contrato por vicios en el consentimiento, común en Derecho español e inglés; reducción del precio y derecho a rescindir el contrato a corto plazo, propio del Derecho inglés), centrándonos en los planteamientos doctrinales al respecto.

De forma específica se han analizado las diferencias entre los supuestos de incumplimiento por omisión de información y por provisión de información falsa, poniendo de relieve las notables diferencias existentes en ambos ordenamientos y que se relacionan, como ya hemos apuntado, con la aplicación del principio de buena fe contractual del Derecho español, inexistente en el Derecho inglés.

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No procede entrar en detalles en este resumen, sin embargo, si consideramos conveniente apuntar las deficiencias del sistema, objeto de estudio detallado en nuestra Tesis. La doble naturaleza de los remedios a disposición del consumidor (de Derecho especial y de Derecho general); la falta de establecimiento de un sistema jerárquico, ordenado y coherente de remedios que tenga en cuenta el deber incumplido y que establece de forma coordinada el reproche; las deficiencias en el establecimiento de exclusiones de un remedio a favor de otro, de los generales sobre los especiales; etc., provoca un efecto contrario al inicialmente pretendido, generando dudas e incertidumbres en el consumidor que han sido puestas de relieve.

Nos hemos planteado, por ello, la adecuación del sistema general de remedios a los supuestos de incumplimiento del deber de información en los contratos de consumo electrónicos. Debemos aventurar que las conclusiones no son buenas, porque entendemos que el legislador debe establecer remedios más directos, como hace por ejemplo en los supuestos de falta de información sobre la obligación de pago en supuestos de adquisición de productos que la conlleven, o en los casos en los que amplía el plazo de desistimiento porque el consumidor no ha sido informado debidamente sobre este derecho.

No pretendemos en este resumen aventurar los resultados de nuestra investigación, porque los mismos han quedado de alguna forma plasmados en las conclusiones con las que se cierran nuestra Tesis Doctoral. En ellas hemos intentado plasmar las ventajas e inconvenientes del sistema articulado, por el legislador europeo y por los legisladores nacionales (español e inglés) para el establecimiento de remedios individuales frente al incumplimiento de los deberes precontractuales de información en los contratos de consumo electrónicos.

No puede culminarse un trabajo de investigación de la envergadura del que presentamos sin una obligada referencia a las fuentes que nos han servido para su elaboración.

Hemos incorporado, en este sentido, un documento en el que se reseñan las principales resoluciones judiciales que han tenido como objeto el examen de los deberes analizados, haciendo la oportuna distinción entre las resoluciones que proceden de Derecho europeo y las dictadas por los distintos Tribunales nacionales, españoles e ingleses.

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Hemos incluido una bibliografía detallando la doctrina que nos ha servido de fuente. Respecto de esta última, la novedad de la materia objeto de estudio, nos ha llevado a una importante labor de clasificación. Es obvio que se han tomado como referencias las fuentes doctrinales clásicas en materia de contratos, referenciando incluso aquellas que se han considerado imprescindibles, pero también lo es que la novedad de la materia y los constantes cambios legislativos que la misma ha experimentado nos ha llevado a centrarnos, fundamentalmente, en los autores posteriores a las reformas.

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Introduction

Background and Motivation

There has been a proliferation of information duties in the B2C electronic contracts in the law of the EU and its Member States. Electronic commerce plays nowadays a crucially important role in both professional and private activity of European consumers and businesses, as it has been emphasized by the European Commission on numerous occasions.[1] Although the possibility of forming a contract online revolutionised the B2C commerce and e-commerce is becoming one of the most popular ways of selling goods and services in the European internal market, it is still far from reaching its full potential, especially in what refers to the cross-boarder transactions,[2] as it has been observed:

> Consumer expenditure accounts for 56 % of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth. Stimulating this demand can play a major role in bringing the EU out of the crisis. To make this possible, the potential of the Single Market must be realised. Data show that consumers shopping online across the EU have up to 16 times more products from which to choose, but 60 % of consumers do not yet use this retail channel. As a result of this reluctance, they do not fully benefit from the variety of choice and price differences available in the Single Market. Improving

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1 See, eg Commission, 'A coherent framework for building trust in the Digital Single Market for e-commerce and online services' (Communication) COM(2011) 942 final, 1.

2 Commission, 'Digital Agenda Scoreboard 2013' (Staff Working Document) SWD(2013) 217 final, 18.

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> consumer confidence in cross-border shopping online by taking appropriate policy action could provide a major boost to economic growth in Europe. Empowered and confident consumers can drive forward the European economy.[3]

The scope of this study is limited to the electronic contracts also due to the particular importance of the information duties for this type of contracts on the one hand,[4] and the proliferation of the information requirements on the other. When dealing on the Internet with traders from foreign jurisdictions consumers experience the inequality of economic power to a higher extent than in other situations due to an information asymmetry particularly influencing the B2C online relationship.[5] Moreover, studies show that lack of trust, which could be remedied through providing relevant information, is one of the main factors responsible for discouraging consumers from online buying.[6] Identifying those and other obstacles that prevent the cross-boarder e-commerce from flourishing is particularly relevant in the current economic situation of post-crisis Europe.[7]

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[3] Commission, 'A European Consumer Agenda – Boosting confidence and growth' (Communication) COM(2012) 225 final.

[4] OECD, 'Empowering and Protecting Consumers in the Internet Economy' (2013) 216 OECD Digital Economy Papers (OECD Publishing) ¡http://dx.doi.org/10.1787/5k4c6tbcvvq2-en¿ accessed 9 June 2016, 5-6: 'Clarification of consumer rights and obligations in online and mobile commerce is (...) needed. Work in this area could be done through countries' examination of the effectiveness of their B2C e-commerce frameworks, including through initiatives aimed at providing consumers with the information and tools they need to make informed decisions in e-commerce. This could also be done through the development of standards which would specify the type of essential information that should be provided to consumers prior to purchasing products. In the area of digital content products, this could cover information on the functionality and interoperability of products. Any such work should take concerns relating to competition, the rapid pace of technological innovation, and differences in legal frameworks.'

[5] Lorna E GILLIES, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Markets and the Law, Ashgate 2008) 1, where a number of factors specific for the online cross-boarder transactions is listed, such as the consumer reliance on the information listed by the traders themselves on their webpages; see also Annette NORDHAUSEN SCHOLES, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009) 213ff.

[6] Alberto UREÑA and others, *Estudio sobre Comercio Electrónico B2C 2013: Edición 2014* (Observatorio Nacional de las Telecomunicaciones y de la SI 2014) 10ff.

[7] Desirée van WELSUM and others, 'Unlocking the ICT Growth Potential in Europe: Enabling people and businesses, Executive Summary: A study prepared for the European Commission' (DG

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The European *acquis* relative to consumer contracts is to an important extent organised around the central aim of empowering consumers through information.[8] This approach resulted in legislation establishing significant amounts of information duties that have been transposed into the national legal systems. Despite such emphasis put on the duties to inform,[9] the consequences of their breach are very often left to the discretion of Member States' regulators.[10]

The principle of effectiveness can be sufficiently fulfilled through simple introduction of institutional sanctions imposed on traders breaching information duties in the B2C e-commerce.[11] Nevertheless, information duties also necessarily interfere with the contract law of the Member States,[12] as the duties regulate the contracting

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Communications Networks, Content & Technology, UE 2013) <http://ec.europa.eu/digital-agenda/en/download-scoreboard-reports> accessed 12 June 2014, 3.

[8] Geraint HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349, 351; Norbert REICH and Hans-W MICKLITZ, 'Economic Law, Consumer Interests and EU Integration' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 22; see also Gillian K HADFIELD and others, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131, 132 who call information an 'organizing idea of consumer protection'; Hans-W MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 79 refers to 'pivotal position of information paradigm'.

[9] Much attentions has been devoted to information duties both in legislation and in academic literature.

[10] This was already observed as a general trend more than ten years ago, see Thomas WILHELMSSON, 'Private Law Remedies against the Breach of Information Requirements of EC Law' in Reiner Schulze and others (eds), *Informationspflichten und Vertragsschluss im Acquis Communautaire* (Mohr Siebeck 2003) 247, who explains that '(...) remedies for breaches of information duties are often the responsibility of national law. Usually, the Directives only require Member States to ensure that adequate and effective means exist to ensure compliance.'; see also NORDHAUSEN SCHOLES (n 5) 223; Raquel GUILLÉN CATALÁN, 'La Directiva sobre los Derechos de los Consumidores: un Paso hacia Delante, pero Incompleto' (2012) 7801 Diario La Ley 1, 3ff.

[11] Horst EIDENMULLER and others, 'Towards a Revision of the Consumer Acquis' (2011) 48 Common Market Law Review 1077, 1118-1119.

[12] Often despite declarations found in various directives that they are without prejudice to the national contract law, see eg recital (9) of the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 on unfair commercial practices [2005] OJ L149/22 or recital (14) of the Directive 2011/83/EU of the European Parliament and of the Council of 25 Oc-

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behaviour of the parties and often overlap with traditional doctrines relative to the information exchange in the pre-contractual phase.[13] The focus of this study is only on the contract law — or private law as including also tortious liability — rules and remedies for the breach of information requirements.

The national general contract law of the Member States coexists with the specific legislation concerning consumer contracts, as '(...) consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it is built on them and cannot be developed without them.'[14] Due to the vast amount of the rules and provisions concerning information duties and private law consequences of their breach both at the European and national level, the research presented needs to be limited mainly to the contracts for the online sale of goods, although other contracts concerning supply of digital content or services are also mentioned. This study aims at showing mechanisms and tendencies governing the breach of information duties in consumer contracts from the perspective of private law and individual redress rights.[15]

The focus of this study is not the European law but the national legal systems of England and Spain and the approach those two systems take to the information duties and their breach and remedies available to consumers in an event of breach. English and Spanish law are legal systems that represent two different European legal traditions: common law and civil law,[16] distant in what refers to their origins and basic concepts, yet close in practice due to cross-boarder online transactions being an everyday reality. The research in the field of information duties is of both

tober 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

[13] EIDENMULLER (n 11) 1119.

[14] DCFR Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian von Bar and others (Munich 2009), Introduction para 40.

[15] However is by no means a complete guide to the remedies and information duties in all consumer contracts due to the amount of the information requirements established.

[16] Konrad ZWEIGERT and Hein KOTZ, *An Introduction to Comparative Law* (3rd edn, translated by Tony Weir, Oxford University Press and JCB Mohr Paul Siebeck 1998) 41 propose to focus on great legal families: Anglo-Saxon, Romanistic, Germanistic and Nordic.

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practical[17] and theoretical interest, as it is closely connected to the core concepts of the contract law such as the caveat emptor rule, duty to disclose, pre-contractual good faith and a principle of fair dealing;[18] the starting point of the analysis being the existence of fundamental differences in approach to the issue between the common law and civil law systems.[19]

The analysis of the national laws in the context of information duties and their breach is necessary as it is where the consequences of breach are established, a comparative analysis of two systems allows to present various possible solutions adopted.[20] The comparative approach to law can serve many different purposes,[21] the first and foremost being simply knowledge as such, discovery of national models, identifying a wide range of possible solutions to a problem.[22] The main purpose being pursued in this study is better understanding of the rules of both systems analysed through comparison.[23] Main problems relative to the breach of information duties

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17 As electronic commerce is not restricted to consumers and businesses situated in one jurisdiction, see eg observations made in the context of the private international law, but relevant to substantial law as well by GILLIES (n 5) 6.

18 'An investigation of the "duty to disclose" on a comparative law basis is most rewarding; it leads us straight to the philosophy underlying the law of contracts', see the classic work of Friedrich KESSLER and Edith FINE, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 Harvard Law Review 401, 438.

19 Thomas WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (2006) 7 ERA Forum Journal of the Academy of European Law 16, 16.

20 As ZWEIGERT and KOTZ (n 16) 15 observe: (...) no study deserves a name of science if it limits itself to phenomena arising within its national boundries. (...) [C]omparative law offers the only way by which law can become international and consequently a science.

21 Hugh COLLINS, 'Methods and Aims of Comparative Contract Law' (1991) 11 Oxford Journal of Legal Studies 396 points to four often adopted purposes of comparative legal studies: a quest for a natural law of obligations – 396; examine of law in order to discover the forces and mechanisms causing changes in legal systems and societies – 396-397; finding the best solutions to legal problems through comparison – 397-398; understanding one's own domestic legal system better – 398ff; ZWEIGERT and KOTZ (n 16) 16ff name five practical benefits of comparative law: (1) an aid to the legislator; (2) a tool of construction, ie interpretation of national rules of law, eg when common law courts make reciprocal references – English to Australian decisions for instance; (3) a component of the curriculum of the universities; (4) a contribution to the systematic unification of law; (5) the development of a private law common to the whole Europe.

22 Rodolfo SACCO, 'Legal Formants: A Dynamic Approach to Comparative Law (Instalment I of II)' (1991) 39 The American Journal of Comparative Law 1, 4-5; ZWEIGERT and KOTZ (n 16) 16.

23 COLLINS, 'Methods and Aims of Comparative Contract Law' (n 21) 398ff.

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are identified, and, where appropriate, solutions are proposed. Nevertheless, finding the best solution and then recommending its adoption in the other system is not the main focus of the study.[24]

Research Questions

The focus of this work is the issue of breach of information duties in the B2C electronic contracts in two European legal systems: English and Spanish; the analysis of the complex framework of specific consumer law provisions and general private law rules and their interactions in the two legal systems aims at identifying the legal mechanisms governing the disclosure duties and possible different solutions adopted. The present study provides response to three main questions relative to the breach of information duties from a comparative perspective.

The first question concerns the information duties in consumer electronic contracts existing in both legal systems analysed. There are various sources of information requirements in the national laws of England and Spain, which need to be determined as the origin and type of the duties breached imply different consequences of the breach. The perspective of breach adopted in this study assists in identifying the requirements which are established in a less explicit manner, both at the European level and in the national systems as a result of the transposition of the European rules and originating in national internal law of general or specific nature.

The second question is relative to the approach of the two analysed legal systems to the information duties and their breach. The dominant role of the European law in establishing information requirements makes it necessary to look at the justification of introduction of information duties in consumer contracts for the functioning of the European internal market. However, also the general contract law of the analysed systems independently recognises various doctrines relating to the information duties based on the premise of the general disclosure duty – or lack thereof – founded on

[24] COLLINS, 'Methods and Aims of Comparative Contract Law' (n 21) 397 refers to such approach as positivist and utilitarian; such approach results in recommending legal transplants, which are nevertheless a highly controversial issue, see: Pierre LEGRAND, 'The Impossibility of "Legal Transplants"' (1997) 4 Maastricht Journal of European and Comparative Law 111; see also: Otto KAHN-FREUND, 'On Uses and Misuses of Comparative Law' (1974) 37 The Modern Law Review 1.

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the good faith and fair dealing principle. The standpoint of the English and Spanish law needs to be examined and compared as a starting point for further analysis of more concrete duties and consequences of their breach established in the general contract law and specific consumer legislation.

The third question consists in describing various possible classifications of the breach of information duties in English and Spanish law, identifying problematic issues and proposing possible solutions. Both general private law rules and specific consumer statutory provisions need to be taken into account. The solutions adopted by the two systems need to be compared in order to present a variety of approaches to the transposition of the European law on the matter on the one hand, and to establish the significance of the concrete duties and the remedies for their breach in each system on the other. Moreover, the comparative perspective should help ascertain the influence of the general law and traditional approach to the issue of disclosure on the practical solutions in place. The analysis of the remedies also aims at determining whether different types of breach, such as information omission or provision of false information, and different types of information duties, for instance relative to the main characteristics of the subject-matter of the contract or to other information items, result in availability of different remedies and if so, how the manners in which the problem is resolved in the two legal systems analysed vary. Finally, the survey of the remedies for breach should lead to identification of the main problematic areas, and comparative approach contributes to proposing improvements.

Methodology

The methodology of research adopted in this study corresponds with various layers of the analysis of the breach of information duties in the B2C contracts from a comparative perspective. The comparative approach involves engaging in a study that presents certain features of a vicious circle: comparative analysis is only possible and fruitful if the compared phenomena are known to the researcher, however the knowledge deepens and develops through the very activity of the comparative

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analysis.[25] The same is true for this study, and even more so, as various new laws pertinent to this study have been adopted recently,[26] which results in significant lack of literature and court decisions dealing with those new provisions.

The comparative approach is based on the principle of functionality: the legal rules examined and compared are those that fulfil the same function in both English and Spanish law.[27] A neutrality and impartiality of the analysis have been pursued,[28] although it needs to be pointed out that the presumption of differences between the two systems resulting from their belonging to different legal families[29] have been accepted as a starting point for the analysis.[30]

The functional approach adopted means that the search for the consequences of breach of information duties in both systems needs to be carried out without initial presumptions as to the areas of law that are to be investigated,[31] however this study is only focused on private law and individual redress rights, therefore the institutional sanctions resulting from application of administrative law or competition law stay outside of the scope of research. Nevertheless, within the private law offering redress rights all potentially applicable rules originating in general law, specific legislation

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25 SACCO (n 22) 5.

26 Such as: Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre. Boletín Oficial del Estado, 28 de marzo de 2014, núm. 76, p. 26967 (Ley 3/2014 de 27 de marzo); The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134 (Consumer Contracts Regulations 2013); The Consumer Protection (Amendment) Regulations 2014, SI 2014/870 (Consumer Protection Amendment 2014); Consumer Rights Act 2015 (CRA 2015).

27 ZWEIGERT and KOTZ (n 16) 34.

28 My premise is to analyse two systems objectively rather than comparing a foreign system to my own; I studied both of the systems analysed, together with two other systems: Polish and French and although I qualified as '*abogada*' under Spanish law, I do not treat any of those legal systems as my own strictly speaking; cf also John CARTWRIGHT and Martijn HESSELINK, 'Introduction' in John Cartwright and Martijn Hesselink (eds), *Precontractual Liability in European Private Law* (The Common Core of European Private Law, Cambridge University Press 2008) 10.

29 On legal families of the world see eg ZWEIGERT and KOTZ (n 16) 64ff.

30 A presumption of similarity might turn out to be harmful to the research, see eg ZWEIGERT and KOTZ (n 16) 39; Ruth SEFTON-GREEN, 'General Introduction' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2004) 15.

31 ZWEIGERT and KOTZ (n 16) 35.

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and case law have been looked at in both systems.

The criticism of the functional approach is well-known;[32] however adopting a remedial perspective – starting from the premise of the main focus of the study: breach of information duties, allows to overcome the main shortcomings of the functional method. First of all, these are definitely not only the black-letter law provisions that are taken into account when investigating the treatment of the breach of information requirements in the English and Spanish systems: court decisions[33] and academic writing have all been considered.[34] The general approach of the systems towards the information duties and their breach is being investigated. Secondly, as already noted, no similarity is being presumed, although necessarily there is a high degree of resemblance between the systems especially where the transposition of the European rules has taken place.

Taking up the breach of the information duties as the starting point for the analysis approximates the approach adopted in this study to the classic factual method.[35] Although no concrete facts of a hypothetical (or real) case are examined, there is nevertheless a significant practical side to the research conducted in this study: the possible reactions of the English and Spanish systems to the premise of breach of information requirements in a consumer electronic contract are under investigation. Various possibilities of breach are taken into account: breach consisting in omission of material or required information and that relative to providing false information; breach concerning different types of information items.

Various diagrams are elaborated and presented in *Figures* 1.–4., which show the multiple possible provisions and rules to be taken into account when the breach of information duties occurs in a B2C electronic contract. Such presentation of rules makes it easier to compare the systems and also provides guidance for readers not

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32 See eg CARTWRIGHT and HESSELINK, 'Introduction' (n 28) 4ff in the context of the Trento Common Core Method.

33 Especially in Spain where there is no precedence principle and therefore court decisions form part of the legal culture rather than being case-law as the court decisions in English law.

34 Which roughly correspond to legal formants, see SACCO (n 22) 21ff.

35 As first applied in Rudolf B SCHLESINGER and Pierre G BONASSIES (eds), *Formation of Contracts: a Study of the Common Core of Legal Systems, conducted under the auspices of the General principles of law project of the Cornell Law School* (Oceana Publications 1968).

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familiar with the law of England or Spain on that matter. It is evident that a certain degree of preparation was needed in order to divide the consequences of breach according to various factors (false information v information omission; information relative to the main characteristics of goods v other information items), however this is also the illustration of the comparative law vicious circle: comparison is only possible when (some) knowledge has already been acquired previously.

From a more technical point of view, the research carried out in the present study consisted mainly of black-letter law analysis, together with preparatory documents, both at the European and national level, official documents and soft law propositions of various international bodies and court decisions of the CJEU and national English and Spanish courts. Furthermore, a lot of time was dedicated to the research of literature both concerning the European and national law relative to the matters examined in this study.

No separate reports of English and Spanish law, apart from the diagrams, have been prepared and the rules and provisions are analysed together and compared within the same subsections of the study.[36] The main aim of this study is not the preparation of thorough description of each of the systems analysed but rather the comparison of the specific provisions and rules fulfilling a similar function in relation to the breach of information duties. Certain characteristics of the systems analysed will necessarily influence the shape of the study: the division of the remedies for breach, ie the distinction between information omission and provision of false in-

[36] ZWEIGERT and KOTZ (n 16) 43-47 suggest to prepare separate reports on the different systems analysed and subsequently proceed with their evaluation and comparison according to the principle of functionality; in various studies such reports are included expressly, see eg John CARTWRIGHT, 'Defects of Consent in Contract Law' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011); Hanna SIVESAND, *The Buyer's Remedies for Non-conforming Goods: Should There be Free Choice Or are Restrictions Necessary?* (European Legal Studies Vol 2, Sellier European Law Publishers 2005). Nevertheless, in various other studies, no complete separate reports are incorporated in the published text, see eg Paula GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (2005) 5 European Review of Private Law 621; Hugh BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (2008) XIV Juridica International 42; Hugh BEALE and others, *Cases, Materials and Text on Contract Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing 2010). It does not mean however, that those reports have not been produced at an earlier stage of the research in form of notes and drafts that were subsequently turned into a coherent text including comparative remarks and evaluation. I do not see the need to present separately the relevant law of England and Spain, as the main purpose of this study is comparison.

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formation, is inspired by a different treatment of those by the English system. As this issue is not of such significance for the Spanish law,[37] it is therefore logical to follow the English law pattern, as it will allow to show how the systems deal with particular situations of breach. Moreover, a distinction between the breach of information duties relative to the main characteristics of goods or other information items is common to both systems as it is a consequence of the implementation of the European law, therefore it was also applied in this study.

Such an organisation of the work will inevitably lead to some repetition – referring to the same legal rules more than once, as the possible classifications of breach and remedies often overlap within each system. I tried to limit the repetition to the necessary minimum through presenting each issue only once in more detail and cross-referencing to the relevant subsection when needed.

Finally, the terminology used needs to be briefly referred to. Some concepts referred to in this study are unique to each system analysed, as for instance the concept of misrepresentation. In such case an equivalent – a similar doctrine of the other system is referred to; in the example of misrepresentation it would be fraud (*dolo*) for fraudulent misrepresentation and provoked mistake (*error provocado*) for negligent and innocent misrepresentation. It is clearly much more than just an issue of terminology:[38] it is evident that those concepts do not denote identical doctrines in both systems, the differences and similarities are presented, however some approximation of terminology for the sake of simplicity and flow of the written work is

[37] However strictly speaking there are also some differences in what refers to the provisions applicable depending on the type of breach, their pertinence for the final ourcome is less significant than in the case of the English law.

[38] Cf COLLINS, 'Methods and Aims of Comparative Contract Law' (n 21) 399 in the context of comparing English and French contract law: 'The problem is that it is simply no good to compare superficially similar legal doctrines. Just because the word "erreur" is usually translated by the word "mistake", that cannot provide a ground for restricting the comparison to those two doctrines in French and English contract law. Since French law regulates most mistakes which induce contracts by the doctrine of erreur (and vices cachees in the law of sales) whereas English law regulates most mistakes by the doctrine of misrepresentation and implied terms, the correct focus of comparison should be between erreur on the one hand and misrepresentation, implied terms, and mistake on the other. In other words, this fourth comparative method demands a comparison not between legal doctrines directly, but between the legal doctrines regulating a common social problem such as serious mistakes inducing agreement to a contract. The success of the enterprise thus turns upon the selection of an instructive social problem which the two legal systems address in different ways.'

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necessary. Other issues with terminology may arise out of discrepancies present in each system internally, such is the case of the notions of contract being void (*nulo*) or voidable (*anulable*) in the Spanish law. There I am trying to use the term correct in what refers to the consequences of the legal rules and not necessarily the one corresponding with the literal translation of the provision. The choice of the English language for this study does not mean that any more emphasis is put on the English system or that the English law is anyhow closer to me personally,[39] however it implies the use of English — or rather anglicized[40] — terminology to describe legal concepts analysed.

Outline of the Study

There are three main Chapters in this study; the motivation, research questions and methodology used in the study are presented in the Introduction, and conclusions and final observations are set out at the end in Conclusions.

In Chapter 1 the focus is placed on putting the information duties and their breach in the social and legal framework. The Chapter responds to the first research question, concerning the information duties in the systems analysed. Particular aspects of the e-commerce, relevant to abundant introduction of information duties in electronic contracts are presented, then the information duties and their breach are looked at in more detail. I examine the role that the information requirements play in the European internal market together with justifications for the proliferation of the duties in B2C electronic contracts. The model of consumer deserves special attention as it is central to the European information paradigm. The information duties are subject to vast criticism which needs to be mentioned, some observations are made as to possible improvements of the status quo, for instance such as finding an optimal level of information duties in the consumer contracts. Subsequently, vari-

[39] See footnote 28 above on my background.

[40] On the issues arising out of the use of the English language to talk about legal concepts of the European law and the main problem being not linguistics as such but rather semantic differences deeply embedded in the national legal traditions see Ruth SEFTON-GREEN, 'How Far can we Go when Using the English Language for Private Law in the EU?' (2012) 8 European Review of Contract Law 30.

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ous sources of information requirements in the national laws of England and Spain are identified and legal provisions of various origin, nature and type introducing information duties are presented, including the constitutional foundations, general disclosure duty resulting from the good faith principle and specific requirements that can be found in general law and consumer legislation. The information duties of direct and indirect character are considered. Also, I compare the approach that the two systems adopt in what refers to the information duties and their breach, pointing to various differences having an important impact on the treatment of the breach of disclosure duties in English and Spanish laws, which answers the second research question.

Chapter 2 examines the characteristics of the duties to inform and their breach and introduces the issue of the remedies available for breach of information duties. Various types of information duties, such as duties to disclose and advise, among others, their content and scope are presented. The third research question relative to various possible classifications of breach is tackled in this Chapter. Breach of information duties can give rise to diverse consequences resulting from both specific consumer legislation and general private law: various possible classifications of the breach of information duties in English and Spanish law are identified. Next, I focus on the problematic aspects of the remedies potentially available for breach of information duties, stemming from the dual and casuistic nature of the information requirements, and discuss the types and nature of the remedies.

Chapter 3 consists of a thorough description and analysis of the remedies available for breach of information duties in English and Spanish law arising under different heads. First, the specific remedies established in the sectoral legislation are discussed. I decided to tackle the specific remedies first, despite the fact that the way they operate is in many instances an evidence of the influence of the general private law. Nevertheless, the specific remedies not only suit consumer needs better in many situations, but their application may exclude the availability of the general law remedies. The general law remedies, that is mainly those arising out of contractual liability and under the heads of defects of consent, fulfill rather a subsidiary function, although evidence is presented of their usefulness in consumer cases as well. Furthermore, the analysis of the general law remedies, although not the main focus of the study, is necessary also for comparative purposes, as demonstrates the

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approach to the information duties and their breach of each of the systems and up to certain extent explains legislative choices made in what refers to the specific remedies. In Chapter 3 I also point out to problematic issues relative to the remedies for breach and propose some punctual improvements on the basis of the comparative analysis carried out.

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1 Social, conceptual and legal framework of information duties and their breach in the B2C e-commerce

1.1 Information duties and their breach in the B2C e-commerce

1.1.1 Particular aspects of the B2C e-commerce

1.1.1.1 Characteristics of the e-commerce

Consumer protection takes special importance in the context of the electronic commerce.[1] The e-commerce[2] has become very popular with both consumers and traders

[1] See *OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999)*, Pt two. General principles, s I. Transparent and effective protection, where it is noted that the special circumstances of electronic commerce require effective consumer protection; see also James CATCHPOLE, 'The Regulation of Electronic Commerce: A Comparative Analysis of the Issues Surrounding the Principles of Establishment' (2001) 9 International Journal of Law and Information Technology 1, 1 who observes: '[t]he consensus (...) is that e-commerce should be embraced as an integral part of business and, therefore, regulated and controlled to afford consumers, and alike, the legislative protections that are available in the physical world'.

[2] This Chapter focuses only on the aspects of the e-commerce relevant to the present study as a whole. The law of the electronic commerce, or e-commerce, has been an object of numerous studies

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in the EU, practically changing the trade as we knew it.[3] European Commission acknowledges 'the digital revolution' pointing out to the benefits further development of the e-commerce could bring to European consumers.[4]

The words 'e-commerce' can be understood in a broad sense as any exchange of data through electronic means and interactive networks.[5] More precisely however, e-commerce refers to commercial transactions between individuals and (or)

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published in many different languages on various legal systems, see inter alia: Gema Alejandra BOTANA GARCÍA (ed), *Comercio Electrónico y Protección de los Consumidores* (La Ley 2001); Fransisco Javier ORDUÑA MORENO and others (eds), *Contratación y Comercio Electrónico* (Tirant lo Blanch 2003); Ruth NIELSEN and others (eds), *EU Electronic Commerce Law* (Djof/Juristog Okonomforbundet 2004); Pablo Luis GARCÍA MEXÍA (ed), *Principios de Derecho de Internet* (2nd edn, Tirant lo Blanch 2005); José Antonio VEGA VEGA, *Contratos Electrónicos y Protección de los Consumidores* (Colección de Derecho de las Nuevas Tecnologías, Reus 2005); Paul TODD, *E-commerce Law* (Cavendish 2005); Alan DAVIDSON, *The Law of Electronic Commerce* (Cambridge University Press 2009); Diane ROWLAND and others, *Information Technology Law* (4th edn, Routledge 2012); Javier PLAZA PENADÉS and others, *Derecho y Nuevas Tecnologías de la Información y la Comunicación* (Aranzadi 2013); Ian J LLOYD, *Information Technology Law* (7th edn, Oxford University Press 2014); Pedro Alberto de MIGUEL ASENSIO, *Derecho Privado de Internet* (5th edn, Thomson Reuters Aranzadi, Civitas 2015).

3 Agustín MADRID PARRA, 'Uso de las Nuevas Tecnologías en la Construcción del Mercado Interior Europeo' in José María Baño León and others (eds), *Memorial para la Reforma del Estado. Estudios en Homenaje al Profesor Santiago Muñoz Machado* (Vol I Centro de Estudios Políticos y Constitucionales 2016) 322-323 refers to new technologies as essential and indispensable in today's society.

4 Commission, 'A European Consumer Agenda – Boosting confidence and growth' (Communication) COM(2012) 225 final: 'e-commerce can deliver considerable welfare gains since consumers have at least twice the choice when shopping online rather than offline. Cloud computing in particular can offer more flexible services that are device or platform independent. It has been calculated that, if e-commerce in goods reaches 15% of retail sales and all Single Market barriers are removed, the overall gain for consumers would be around EUR 204 billion (1.7% of EU GDP).'

5 Fernando HERNÁNDEZ JIMÉNEZ-CASQUET, ''El Marco Jurídico del Comercio y la Contratación Electrónicos' in Pablo Luis García Mexía (ed), *Principios de Derecho de Internet* (2nd edn, Tirant lo Blanch 2005) 439; United Nations General Assembly, 'Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law' Resolution 51/162 of 16 December 1996, amended in 1998 (UNCITRAL Model Law on Electronic Commerce) in Article 1 refers to 'any kind of information in the form of a data message used in the context of commercial activities', where '[t]he term "commercial"' is understood widely 'so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.'; *OECD Guidelines* use the concept of a 'global network environment'; see also VEGA VEGA (n 2) 57 who points out that the e-commerce can be perceived even broarder as a concept including economic activities of varied nature.

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traders which are carried out through electronic means,[6] including activities additional to the mere contract formation, such as previous negotiations, advertising and information search.[7] It is then a relatively new form of trade taking place over the Internet[8] and linked with the information society,[9] not necessarily restricted

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[6] Cf Jesús Ignacio FERNÁNDEZ DOMINGO, 'Algunas Notas acerca de la Contractación y el Comercio Electrónico' in Francisco Javier Orduña Moreno (ed), *Contractación y Comercio Electrónico* (Tirant lo Blanch 2003) 241, who describes the e-commerce as a possibility (or even better — possibilities) to buy or sell 'anything' what is possible, anything that can be legally traded, between individuals, companies, or companies and individuals.

[7] Cf DAVIDSON (n 2) 1, who begins with the following definition: 'Electronic commerce refers to all commercial transactions based on the electronic processing and transmission of data, including text, sound and images. This involves transactions over the internet, plus electronic funds transfers and Electronic Data Interchange (EDI)'; Lorna E GILLIES, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Markets and the Law, Ashgate 2008) 24 points out that '[e]lectronic commerce enables parties to use digital language on computers to communicate, negotiate and contract with each other'; see also HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 439; David LÓPEZ JIMÉNEZ and Francisco José MARTÍNEZ LÓPEZ, 'La Formación del Contrato Electrónico' (2009) 105 Revista de Contratación Electrónica 3, 5 highlight that to be able to talk about the e-commerce, both the offer and acceptance have to take place through electronic means; Augustín MADRID PARRA, 'Contratos Electrónicos y Contratos Informáticos' (2011) 111 Revista de Contratación Electrónica 5, 6 considers that in any case, whatever terminology we use, what is relevant is the fact that the electronic means were used to form the contract, whatever the contract type and whatever its object is. In what refers to the formation of electronic contracts, see: Ma del Pilar PERALES VISCASILLAS, 'Formación del Contrato' in Gema Botana García (ed), *Comercio Electrónico y Protección de los Consumidores* (La Ley 2001) 405-460; HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 454ff; VEGA VEGA (n 2) 224ff; Luis DIEZ-PICAZO, *Fundamentos del Derecho Civil Patrimonial. Vol.1: Introducción, Teoría del Contrato* (6th edn, Thomson-Civitas 2007) 366ff; Natalia FERNÁNDEZ PÉREZ, *El Nuevo Régimen de la Contratación a Distancia con Consumidores: Especial Referencia a la Relativa a Servicios Financieros (* (La Ley 2009) 35ff; Pablo Luis GARCÍA MEXÍA, *Derecho Europeo de Internet: Hacia la Autonomía Académica y la Globalidad Geográfica* (Netbiblo 2009) 238ff; FERNÁNDEZ DOMINGO (n 6) 255ff; Christine RIEFA, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14 Lex Electronica 1, 26ff; MIGUEL ASENSIO (n 2) para 894ff.

[8] In this study I am referring to the e-commerce as a phenomenon taking place over the open access networks, as CATCHPOLE (n 1) 2 highlights: '(...) e-commerce is a term that has become synonymous with commercial transactions involving both organisations and individuals, based upon the processing and transmission of digitised data, including text, sound, and visual images, transmitted over open networks such as the Internet'; see also GILLIES (n 7) 24ff; however some researchers give the e-commerce a broader meaning, as DAVIDSON (n 2) 1 and Barry B SOOKMAN, 'Electronic Commerce, Internet and the Law: A Survey of the Legal Issues' (1999) 48 University of New Brunswick Law Journal 119, who also include in their definitions transactions formed over restricted access networks such as EDI (Electronic data interchange).

[9] VEGA VEGA (n 2) 57-58; information society is a relatively new socio-economical and legal context brought about by an important technological development, one of its manifestations being a major

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only to business-to-consumer contracts. A concept of a more limited scope than the e-commerce are electronic contracts – contracts formed with the use of electronic means.[10] E-commerce, on the other hand, includes not only contract formation, but also other forms of economic activity and commercial information exchange based on the data transmission through communication networks.[11]In this study I shall refer to the e-commerce to denote the activity of traders consisting of selling goods and services online, over the Internet, to consumers.

The Directive 2000/31/EC on electronic commerce[12] does not define the e-commerce, and neither does Spanish nor English legislation.[13] However, the e-commerce belongs to a broader category of the information society services,[14] defined in a generic manner by the legislation of the European Community as: 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.[15] Parts of this definition are further explained by the Directive 98/34/EC[16] – a distance service is provided without the parties being

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role played by the e-commerce in all the sectors of contracting, see FERNÁNDEZ PÉREZ (n 7) 26-27.

[10] FERNÁNDEZ PÉREZ (n 7) 178ff.

[11] VEGA VEGA (n 2) 62.

[12] 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 [2000] OJ L178/1 (Directive on electronic commerce).

[13] See the English Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013 (E-commerce Regulations 2002) and the Spanish Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico. Boletín Oficial del Estado, de 12 de julio de 2002, núm. 166, p. 25388 (LSSICE).

[14] Information society services comprise e-commerce and electronic content in general, see recital (18) of the Directive on electronic commerce, which starts in the following words: 'Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line(...).'; see also Gema Alejandra BOTANA GARCÍA, 'Noción de Comercio Electrónico' in Gema Alejandra Botana García (ed), *Comercio Electrónico y Protección de los Consumidores* (La Ley 2001) 35ff; VEGA VEGA (n 2) 59; Andrej SAVIN, 'E-Commerce in the Single Market Context – the Invisible Framework' in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Research Handbooks in European Law, Edward Elgar Publishing 2014) 286; MIGUEL ASENSIO (n 2) para 117.

[15] In its Article 2(a) the Directive on electronic commerce defines information society services as services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC.

[16] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a

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simultaneously present; 'electronic means' makes reference the service being sent and received at its destination by means of electronic equipment for the processing of data (which includes digital compression and storage of data) and entirely transmitted, conveyed and received by electromagnetic means; finally the service defined has to be provided through the transmission of data on individual request. The Directive refers to a 'service normally provided for remuneration', which is considered to include situations where there is an economic benefit for the provider, albeit not necessarily coming from the end user, as in the case of the remuneration resulting from the advertising.[17]

E-commerce includes not only transactions where contract formation, payment and performance all happen online, ie direct e-commerce, but also those where only the contract formation (and sometimes payment) is done through the Internet, whilst performance is a traditional one, usually fulfilled through goods delivery or service performance, ie indirect e-commerce.[18] Both types of transactions are relevant to the consumer contracts being the focus of this study, the first one could be exemplified by the contracts for digital content, the second one includes for instance contracts for tangible goods, formed online with the goods being delivered to the consumer some time after the contract formation. The distinction is of significance in what refers to the legislation potentially applicable, since provisions of pieces of legislation relative only to online activities, as eg Directive on electronic commerce, will apply exclusively to the online part of transactions in the indirect e-commerce, all offline activity staying outside of the scope of that legislation.[19]

procedure for the provision of information in the field of technical standards and regulations [1998] OJ L204/37 as amended by the Directive 98/48/EC.

17 Cf BOTANA GARCÍA, 'Noción de Comercio Electrónico' (n 14) 36ff; see also MIGUEL ASENSIO (n 2) para 112.

18 VEGA VEGA (n 2) 60ff; FERNÁNDEZ DOMINGO (n 6) 253; MIGUEL ASENSIO (n 2) paras 117, 888.

19 MIGUEL ASENSIO (n 2) para 117; RIEFA (n 7) 12; any type of the e-commerce is characterised by certain particularities, which are reflected in the legislation. Nevertheless, online contracts for digital content -– an example of the direct e-commerce — can be regarded as a certain subcategory of the e-commerce, hence numerous rules specifically applicable to digital goods, such as the provisions of the Chapter 3 of Part 1 of the Consumer Rights Act 2015 (CRA 2015) — s 33(1) of the Act states: 'This Chapter applies to a contract for a trader to supply digital content to a consumer, if it is supplied or to be supplied for a price paid by the consumer.' or new European

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1.1. INFORMATION DUTIES AND THEIR BREACH IN THE B2C E-COMMERCE

Distinctive features of the e-commerce, summarised below, make it a form of trade that on the one hand is currently revolutionising the market of B2C transactions,[20] but on the other creates a specific need for consumer protection.[21] The aim of the mechanisms designed to ensure consumer protection in the e-commerce is not only the safety and well-being of consumers, but also, even more importantly, the promotion of the e-commerce itself[22] by means of encouraging market actors to participate in electronic transactions, especially through boosting consumers confidence in this form of trade. It is indeed consumers' lack of trust in the e-commerce that is believed to be one of the main obstacles to its development.[23]

Some characteristics of the e-commerce are due to the fact that it is a form of distance contracting,[24] other are specific to the electronic contracting through the

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Commission's initiative — Commission, 'Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content' COM(2015) 634 final (Proposal for a Directive on supply of digital content). Digital content due to its very nature is especially suitable to being provided online, nevertheless various new legal issues have recently arisen and are now being tackled by national and European legislation alike, eg a problem of conformity of digital content.

[20] Due to the Internet being a perfect instrument to form contracts online in a fast, easy and interactive way, see: GARCÍA MEXÍA, *Derecho Europeo de Internet: Hacia la Autonomía Académica y la Globalidad Geográfica* (n 7) 238; RIEFA (n 7) 3.

[21] GILLIES (n 7) 19'[t]he consumer is in a contractually weaker position than the seller no matter whether the consumer contracts with a business by electronic means or not. However, the nature of the online contract renders the consumer's already weaker contractual position more acute'.

[22] E-commerce development is one of the key priorities of the European Commission and consumer protection in relation to main policy areas within the e-commerce, see eg COM(2012) 225 final; Ecommerce Foundation, 'European B2C E-commerce Report 2015' [2015] E-commerce: a Priority for the European Commission <www.ecommerce-europe.eu/facts-figures/free-light-reports> accessed 10 December 2015, 11.

[23] Cf Commission's communications, among others: Commission, 'A coherent framework for building trust in the Digital Single Market for e-commerce and online services' (Communication) COM(2011) 942 final, 2; COM(2012) 225 final; Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final, 4; see also OECD, 'Consumers in the Online Marketplace: the OECD Guidelines three years later' (Report by the Committee on Consumer Policy on the Guidelines for Consumer Protection in the Context of Electronic Commerce) DSTI/CP(2002)4/FINAL (2003) <www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=dsti/cp(2002)4/final> accessed 15 July 2016 (OECD Guidelines 3 years later report).

[24] E-commerce is considered both by European legislator and by great majority of academics to be a form of distance contracting; electronic contracts are distance contracts formed through electronic means — see for instance art 8.2 of the Directive 2011/83/EU of the European Parliament and of

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Internet. European legislator considers the lack of simultaneous physical presence of the contracting parties to be the main feature of a distance contract, for instance in the article 2(7) of the Directive on consumer rights a distance contract is defined as:

> (...) any contract concluded between the trader and the consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;(...).

The lack of simultaneous physical presence of the trader and consumer together with other features of the Internet brings about various implications, both advantageous and disadvantageous for the contracting parties and more broadly for the economy of the market as well. First of all, the greatest benefit of the e-commerce for all the parties and what makes it so revolutionary in comparison with the traditional trade, as well as other types of distance contracts, is its accessibility — from practically anywhere in the world,[25] without time restrictions, in a fast and

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the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 (Directive on consumer rights) which starts in the following words: 'If a distance contract to be concluded by electronic means (...).' The Spanish 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, 30 de noviembre de 2007, núm. 287, p. 49181 (TRLDCU) can constitute another example — in its article 92.1 the Act stays that among others, are to be considered as means of distance communication: mail, Internet, telephone or fax; see also: BOTANA GARCÍA, 'Noción de Comercio Electrónico' (n 14) 43; Rocío de ROSSELLÓ MORENO, *El Comercio Electrónico y la Protección de los Consumidores* (Cedecs 2001) 12ff; Diego CRUZ RIVERO, 'Contratación Electrónica con Consumidores' (2009) 109 Revista de la Contratación Electrónica 3, 8 who affirms directly that the electronic commerce is a kind of distance contracting; Patricia MÁRQUEZ LOBILLO, 'El Consumidor en la Contratación Electrónica de Servicios Turísticos' (2011) 282 Revista de Derecho Mercantil 209, 212 who points out that provisions relative to distance contracts are to be applicable to electronic contracts; HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 449; nevertheless, some authors believe that not all electronic contracts can be considered distance contracts, see for example: Yanixet Milagro FORMENTÍN ZAYAS, 'La Contratación Vía Electrónica: Algunas Perspectivas Teóricas' (2012) 118 Revista de la Contratación Electrónica 65; in conclusion, however, it seems that within the European Union internal market, any ciberconsumer will enjoy the protection established in the legislation relative to distance contracts.

[25] See Diego P FERNÁNDEZ ARROYO, 'Consumer Protection in Private International Relationships' in Karen B Brown and David V Snyder (eds), *XVIIIth Congress of the International Academy*

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immediate way potential buyers can access simultaneously a practically unlimited range of offers, compare prices, and enter contracts without leaving their homes.[26] Moreover, electronic commerce allows traders to lower the prices of products, goods or services they offer — the reduced costs of operating business come from the lack of necessity to maintain premises open to public, allowing more small-medium enterprises (SMEs) to participate in the market and giving the traders access to unlimited numbers of potential customers practically with no geographical or time restrictions.[27]

of Comparative Law (Springer 2012) 143 who points out to the e-commerce as a factor that 'ha[s] increased the global volume of consumer operations to such an extent that it is now absurd to consider them exclusively as questions relating to small, individual transactions'; MIGUEL ASENSIO (n 2) para 891, who underlines especially the cross-boarder potential of online transactions; see also GILLIES (n 7).

[26] Cf OECD Guidelines 3 years later report 5; in United Nations Conference on Trade and Development, 'Unlocking the Potential of E-commerce for Developing Countries' (Information Economy Report 2015) 2 <http://unctad.org/en/PublicationsLibrary/ier2015_en.pdf> accessed 15 July 2016, the benefits of the e-commerce for the economy are noted: '[e]-commerce offers potential benefits in the form of enhanced participation in international value chains, increased market access and reach, and improved internal and market efficiency, as well as lower transaction costs.'; Norman SILBER, ''From *The Jungle* to *The Matrix*: The Future of Consumer Protection in Light of its Past' in Jane K Winn (ed), *Consumer Protection in the Age of the 'Information Economy'* (Markets and the Law, Ashgate 2006) 24 notes: '[t]he Internet has made many kinds of shopping easier, quicker and more competitive, and perhaps less susceptible to some kinds of fraud and discrimination.'; DAVIDSON (n 2) 1 observes: '[t]he advantages of electronic commerce to commercial parties include ease of access, anonymous browsing of products, larger choice, the convenience of shopping from the computer and enormous efficiencies'; FERNÁNDEZ PÉREZ (n 7) 27ffpoints out that the main advantages of the e-commerce over traditional one comprise: savings on premises and distribution costs, the fact that it allows to enter into transactions without leaving one's home, thus making commercial activities faster, it fits perfectly within the progressive internationalization of the commerce in general, a simultaneous access to a wide range of offers allowing for a greater choice, it eliminates time restrictions -– forming contracts online any day of the year at any time becomes possible, it also reduces geographical restrictions, and allows to reduce costs thanks to savings due to elimination of premises open to public and intermediaries; see also FERNÁNDEZ DOMINGO (n 6) 250; ROSSELLÓ MORENO (n 24) 17ff, lists advantages of the e-commerce for traders: it increases the efficacy of the commercial activities, it promotes the participation of SMEs through reducing trade barriers, it allows the companies to choose their location freely, it reduces or even eliminates the need of intermediaries, it opens great marketing possibilities; and for consumers: it allows to save time and money increasing the choice and comparison possibilities, it makes it unnecessary to travel to physical locations for shopping, customer help centres are accessible online 24/7, better personalization of products offered is possible due to the companies being able to adapt their offers to consumers' preferences much easier, and in what refers to digital content, it can be accessed immediately after buying.

[27] Ibid.

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However, the activities of the e-commerce carried out in the virtual reality, despite the advantages over the traditional trade mentioned above, are also marked with potential risks and disadvantages, which can even become obstacles to the development of the e-commerce itself. The lack of face-to-face contact with the trader deprives consumers from the key aspects of trade that help to generate trust in commercial relationships.[28] There are no physical premises, where not only the business person or their agents can be identified, but also other customers can be seen, which has a reassuring, albeit sometimes unfounded, effect on consumers. More importantly even, the consumer has no opportunity to physically examine the product they are buying – in the electronic reality they have to rely on the image or representation, often inaccurate, provided by the seller, and effectively pay for the product before receiving it. Moreover, in order to execute payment, consumers have to provide personal financial data through traders' websites, which may lack security.[29] Also proliferation of goods and services available on the Internet is not always beneficial for consumers, as too much choice makes it more difficult to find the right offer,[30]

[28] As FERNÁNDEZ DOMINGO (n 6) 253 aptly points out, consumers start to worry about issues that were not really problematic in traditional trade, such as 'is the seller reliable?', 'will I be able to return the product if I don't like it?', 'will the seller use my personal data to spam me with unwanted advertising?', 'will the seller hand over my personal data to other companies?', 'is an electronic contract, invoice, order etc. valid?' and so on.

[29] Ibid 251; GILLIES (n 7) 1; MIGUEL ASENSIO (n 2) para 891; Sutatip YUTHAYOTIN, *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer 2015) 15.

[30] Barry SCHWARTZ and Andrew WARD, ''Doing Better but Feeling Worse: The Paradox of Choice' in PAlex Linely and Stephen Joseph (eds), *Positive Psychology in Practice* (John Wiley & Sons Inc 2004) point to the paradox of choice — the greater the choice, the more difficult it becomes, and hence the need to use intermediaries, albeit of a different kind than in the traditional trade, eg price comparison webpages and applications or search tools; FERNÁNDEZ DOMINGO (n 6) 243 also mentions the necessary intermediaries such as certification authorities, electronic commercial centres that guarantee products quality, mediators for conflict resolution etc. Other drawbacks of the e-commerce include, according to DAVIDSON (n 2) 1, the potential for invasion of privacy and security risks, uncertainty in what refers to jurisdiction, standards, protection of intellectual property, taxation, trade law and many other issues. Disadvantages specific for consumers comprise, according to ROSSELLÓ MORENO (n 24) 19ff: lack of knowledge relative to the use of new technologies and insufficient access to them; issues relative to the insuffient consumer protection in what refers to private data protection, misleading advertising or spamming, security of online transactions, interoperability of payment technology, illegal activity on the Internet and harmful content; technical issues including connectivity problems, slowness of the system, network breakdowns and loss of information; difficulty in localizing the desired information and seller's trustworthiness; law

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nor for traders, especially in what refers to SME, due to the high costs of marketing necessary to make their offers stand out against bigger companies.[31] Finally, what is relevant especially in the context of cross-boarder transactions, is that it may be difficult for both parties, ie consumer and trader alike, to determine other party's identity, location, qualification as consumer or trader, and consequently the jurisdiction and law governing their contract, due to the fact that the place where contractual activities occur becomes dematerialised.[32]

The issues presented above create a significant informational disadvantage on the side of the consumer[33] and influence consumers' perception of online sales contributing to one of the most important obstacles to the e-commerce, which is consumers' lack of trust. Some of the problems mentioned can be remedied through legislative action, some, being more of a question of technology, might require a combined approach.[34] Nevertheless, it seems that technological issues will be of a lesser importance when it comes to inspiring consumers' trust in the e-commerce, consumers rather consider factors such as: trustworthiness of the seller (eg their reputation or rating and opinions added by other customers) and the possibility of easy and fast contact, the existence of the right to withdraw from an electronic contract without excessive return costs, the availability of effective mechanisms of conflict resolution

and jurisdiction applicable in a case of a potential conflict; the lack of possibility to physically examine the product offered.

[31] Also SME operating only locally may find it difficult to compete with global brands operating through the Internet. E-commerce presents also other possible disadvantages for the traders, as ROSSELLÓ MORENO (n 24) 19 points out: consumers buying habits, some products may be unsuitable for electronic sale, traders may lack knowledge and experience in using new technologies, lack of normalization and legal standards, costs relative to investing in new technologies and setting up online business.

[32] GILLIES (n 7) 1 considers that '[t]he combination of the risks consumers experience [ie the potential disadvantages of the e-commerce mentioned above] and the dematerialised nature of electronic commerce have increased the need for effective juridical protection for consumers and the improvement of consumer confidence in the electronic marketplace' (words in brackets added).

[33] Cf DCFR art II.–3:103 see *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian von Bar and others (Munich 2009).

[34] RIEFA (n 7) 4 points out that one of the main issues is sellers' compliance with the regulation in place.

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and the protection of personal and financial data (including regulations limiting consumers' liability if their credit card data was stolen).[35]

1.1.1.2 E-commerce law as a separate branch of law

E-commerce at first glance seems to be just a different way to form contracts, not an entire new legal reality.[36] Indeed, it was argued in the wider context of 'cyberlaw' that there cannot be a separate body of law determined just by some specific technology being used.[37] A parallel was made to 'the law of the horse' — in the common law there is a lot of case law concerning horses — contract law cases often deal with horses' sale, tort law cases examine liability for damage caused by horses, etc. This, however, does not mean that a subject 'law of the horse' should be taught at the university.[38] Lawyers should be concerned with general rules that can be applicable to various contexts, be it sale of a horse or a car or digital content — it remains the contract of sale and thus contract law will apply. Nevertheless, the law of the e-commerce is nowadays[39] much more than 'the law of the horse' — it is not just the technological common denominator that makes the law of the e-commerce a separate branch of law. In what refers to the B2C contracts, the e-commerce constitutes a very important part of the economy, and is characterised by various specific features discussed above — the speed and immediacy of communication combined with lack of face-to-face on-premises contact and a potential risk of problems with data privacy. The sheer amount of legislation and soft law rules,[40] which required

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[35] Cf FERNÁNDEZ DOMINGO (n 6) 251-253.

[36] Cf Juan Ignacio PEINADO GRACIA, 'La Edad del Derecho, la Edad de Internet. La Seguridad Jurídica e Internet' in Javier Cremades and Enrique Badía y Liberal (eds), *e – Abogacía* (La Ley 2007) 163-168; see also FERNÁNDEZ DOMINGO (n 6) 240.

[37] See eg Frank H EASTERBROOK, 'Cyberspace and the Law of the Horse' [1996] University of Chicago Legal Forum 207; Joseph H SOMMER, 'Against Cyberlaw' (2000) 15 Berkeley Technology Law Journal 1145.

[38] EASTERBROOK (n 37) 207-208.

[39] This argument was raised by Easterbrook ibid in 1996, and a lot has changed over the last 20 years in what refers to the Internet and the e-commerce in particular.

[40] See the legislation of the European Union presented in this study (Directive on electronic commerce, Directive on consumer rights, Proposals for new Directives: Proposal for a Directive on supply of digital content and Proposal for a Directive on online sales of goods — Commission, 'Proposal for

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various national and supranational bodies to spend considerable amount of time and effort to prepare, indicates that the law of the e-commerce is to be taken seriously as a specialised branch of law due to both its economic importance and specificity of issues that arise.

One of the issues relative to legislation, and especially when market regulation at a supranational level is being considered, such as in the case of the European Union, is the fact that law cannot easily regulate social phenomena[41] nor the future,[42] and the e-commerce is both — from the point of view of private law it is more of a social reality than technological process, yet in the end these are individuals and companies and their relationships that create the e-commerce, and technology is just a fast developing medium, constantly offering new opportunities and presenting new challenges.[43] The e-commerce should not be regulated just on the basis of technology being used — it is the social context, in this case — the market, that matters.[44] It is true, more often than not, that such a complex reality as the electronic commerce is difficult to regulate. Moreover, the legislative response is inevitably marked with inertia,[45] the greater, the higher is the level at which the law is made. In what refers to the e-commerce, and especially in the context of information duties in the B2C e-commerce, that there has been a significant amount of legislation enacted, on many occasions focusing on issues of lesser importance and not really contributing

a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods' COM(2015) 635 final); UNCITRAL Model Law on Electronic Commerce; United Nations, *Convention on the Use of Electronic Communications in International Contracts* (General Assembly Resolution 60/21 of 23 November 2005); for more on UNCITRAL instruments relative to the e-commerce seeAgustín MADRID PARRA, 'Instrumentos de la CNUDMI / UNCITRAL sobre Comercio Electrónico (Contratación, Firma y Comunicaciones Comerciales)' in Javier Plaza Penadés and others (eds), *Derecho y Nuevas Tecnologías de la Información y la Comunicación* (Aranzadi 2013) 299ff; *OECD Guidelines*; WTO 'Work Programme on Electronic Commerce' Adopted by the General Council, 25 September 1998 etc.

41 SOMMER (n 37) 1151ff.

42 EASTERBROOK (n 37) 207-208.

43 See PEINADO GRACIA, 'La Edad del Derecho, la Edad de Internet. La Seguridad Jurídica e Internet' (n 36) 165-166 giving an example of various modifications that were introduced in the LSSICE over a short period of time in order to adapt the legislation to the reality of the Internet.

44 SOMMER (n 37) 1157ff.

45 See RIEFA (n 7) 5.

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to solving some burning problems.[46] Up to a certain extent, the market should be able to regulate itself,[47] and therefore not all the legislation, which is often unable to keep up with the pace of technology and social changes, is necessary. Sometimes, on the other hand, the traditional law, because of some specific challenges posed by the cyberspace, results inapplicable. For instance, in the context of the e-commerce, consumers experience various risks, which are not present in traditional trade, such as lack of possibility to examine the good prior to purchasing it. The law then, as put by Lessig, 'faces a choice. (...) Should the law change in response to these differences [between reality and cyberreality]? Or should the law try to change the features of cyberspace, to make them conform to the law?'[48]

I believe the e-commerce is complex enough for there to be no simple answer to this either one or other question. Especially in the context of consumer protection, the law should adapt to new technologies, maintaining the established level of protection.[49] The present study analyses a specific extract of the e-commerce and rules governing it, namely the pre-contractual information duties, and some areas where this regulation fails will be looked at further on. Nevertheless, some legislative intervention is necessary, especially in what refers to the remedies for breach of information duties, since it is close to impossible to enforce duties unless there are clear consequences of their breach. Furthermore, consumers need easily available

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[46] A Directive 2011/83/EU can constitute an example, see Ángel CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' in Sergio Cámara Lapuente and Esther Arroyo Amayuelas (eds), *La Revisión de las Normas Europeas y Nacionales de Protección de los Consumidores: Más Allá de la Directiva sobre Derechos de los Consumidores y del Instrumento Opcional sobre un Derecho Europeo de la Compraventa de octubre de 2011* (Civitas-Thomson Reuters 2012) 311.

[47] EASTERBROOK (n 37) 210, where the issue of whether to regulate the e-commerce or not (in the context of intellectual property law) is considered, the author there observes: 'Well, then, what can we do? By and large, nothing. If you don't know what is best, let people make their own arrangements.' An obvious exaggeration but with a lot of common sense wisdom. In the context of consumer protection, however, some regulation is necessary to avoid situations such as adulterated food, see eg SILBER (n 26) 17-18.

[48] Lawrence LESSIG, 'The Law of the Horse: What Cyberlaw might Teach' (1999) 113 Harvard Law Review 501, 505.

[49] In the context of information duties and its breach, see Hans-W MICKLITZ and Betul KAS, 'Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I' (2014) 10 European Review of Contract Law 157 commenting on the Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* [2012] ECLI:EU:C:2012:419.

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remedies for breach of their rights for them to trust in the national, as much as cross-boarder, e-commerce.[50]

Some basic principles of the e-commerce have been established,[51] intended to uphold a set of values embedded in the law, that are now widely accepted as fundamental to the modern e-commerce law. The principle of non-discrimination applies to the electronic form of documents, which cannot be denied validity only because of their form.[52] It is closely connected to the principle of functional equivalence, meaning that electronic communications are considered equal to traditional written or oral communications.[53] According to the Guide to Enactment of UNCITRAL Model Law on Electronic Commerce:

> A new approach, sometimes referred to as the "functional equivalent approach", (...) is based on an analysis of the purposes and functions of the traditional paper-based requirement with a view to determining how those purposes or functions could be fulfilled through electronic-commerce techniques. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially

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50 See Hugh COLLINS, *The European Civil Code: The Way Forward* (Cambridge Studies in European Law and Policy, Cambridge University Press 2008) 20 on common rules among Member States (providing safety standards, rights to compensation and remedies) increasing consumers' confidence in domestic as well as cross-boarder transactions.

51 Cf UNCITRAL Model Law on Electronic Commerce; United Nations, *Convention on the Use of Electronic Communications in International Contracts*; DAVIDSON (n 2) 26.

52 See United Nations, *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce 1996 with additional article 5 bis as adopted in 1998* (New York 1999) <www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf> accessed 16 January 2016 (Guide to Enactment of the UNCITRAL Model Law) para 46-7; DAVIDSON (n 2) 333; MIGUEL ASENSIO (n 2) para 870.

53 *Guide to Enactment of the UNCITRAL Model Law* para 15ff; FERNÁNDEZ DOMINGO (n 6) 246; DAVIDSON (n 2) 26; MIGUEL ASENSIO (n 2) para 870.

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> with respect to the identification of the source and content of the data (...).[54]

The principle of functional equivalence shows how the law can adjust to new technology without the need to force changes or limitations on it. The use of new technology cannot be ignored and the previously existing traditional law, in order to be applicable to electronic communications, needs to be adapted. On the other hand, it was also pointed out, that the existing law, and especially contract law, should not undergo substantial changes, as far as some new rules specific to electronic contracts can be just added.[55] In the context of consumer electronic contracts this observation looses somewhat its significance, since the B2C e-commerce is governed by quite a separate body of law and its provisions have been influencing not only the rules relative to other distance contracts, but also more general provisions as well.[56]

Another principle often mentioned in the context of the e-commerce is the one of technological neutrality.[57] The rules governing the e-commerce should be neutral with respect to technology used, ie established in such a way as not to exclude any communication technique, including future ones, from their scope.[58] A good example[59] of how the principle of technological neutrality operates is regulation of the electronic signature – no specific technology of electronic signature is to be

[54] *Guide to Enactment of the UNCITRAL Model Law* para 16.

[55] MIGUEL ASENSIO (n 2) para 871; FERNÁNDEZ DOMINGO (n 6) 247ff.

[56] Cf eg general rules on information duties and right of withdrawal in the Directive on consumer rights art 5; cf also Dirk STAUDENMAYER, 'The Place of Consumer Contract Law Within the Process on European Contract Law' (2004) 27 Journal of Consumer Policy 269, who mentiones the influence of consumer contract law harmonisation on general contract law; Paula GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' in Stefan Grundmann and Martin Schauer (eds), *The Architecture of European Codes and Contract Law* (Private Law in European Context Series, Kluwer Law International 2006) 307 who discusses the influence of the consumer *acquis communautaire* on the general law of contracts.

[57] *OECD Guidelines*, Foreword; *Guide to Enactment of the UNCITRAL Model Law* para 24; MIGUEL ASENSIO (n 2) para 901, 977ff; DAVIDSON (n 2) 26, 43, 333; FERNÁNDEZ DOMINGO (n 6) 248.

[58] Cf *Guide to Enactment of the UNCITRAL Model Law* para 8 which states: '(...) as a matter of principle, no communication technique is excluded from the scope of the Model Law since future technical developments need to be accommodated.'

[59] DAVIDSON (n 2) 26 gives another example: '(...) as "electronic mail" connotes a certain medium, the Model Law uses the general expression "data message".'

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preferred by the law over other existing and future methods of electronic signature.[60]

The rules of the e-commerce law, especially in what refers to the B2C contracting, relevant to the information duties and their breach, belong to the private law of contracts and other obligations.[61] E-commerce is not the same as traditional commerce, as discussed above, and it is not sufficient to just apply the existing commercial and civil contract law to the transactions formed online.[62] Nevertheless, it results from the principles of the e-commerce law that the e-commerce is regulated in many aspects through more general rules which often existed before even the Internet was invented. Same general principles that are established in the traditional law will then continue to apply to the e-commerce. For instance, a principle of good faith is being highlighted in the UNCITRAL Model Law on Electronic Commerce[63] and is also referred to by Spanish legislation.[64] Not surprisingly, however, the English system, to which the concept of good faith is foreign,[65] focuses rather on the freedom of contract principle, which is recognised also by Spanish law.[66] This example shows how the private national law, developed in different legal systems and traditions, transfers its values to the relatively new body of the e-commerce law. Given the growing number of cross-boarder electronic transactions, it is interesting to see how

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[60] Cf United Nations General Assembly, 'Model Law on Electronic Signatures adopted by the United Nations Commission on International Trade Law' Resolution 56/80 of 12 December 2001; MIGUEL ASENSIO (n 2) para 977ff; DAVIDSON (n 2) 43, 333.

[61] FERNÁNDEZ DOMINGO (n 6) 241; cf HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 448 who argues that electronic contracting is primarily of civil, not commercial nature.

[62] According to DAVIDSON (n 2) 2: 'The majority of legal problems arising through the use of electronic commerce can be answered satisfactorily by the application of standard legal principles. Contract law, commercial law and consumer law, for example, all apply to the internet, email communications, electronic banking and cyberspace generally. However, cyberspace gives rise to unique and unusual circumstances, rights, privileges and relationships that are not adequately dealt with by traditional law. This has necessitated legislation, international agreements and a plethora of cases before the courts to resolve myriad questions.'

[63] See art 3(1): 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'

[64] Eg art 98(1) TRLDCU; see also FERNÁNDEZ DOMINGO (n 6) 248; MIGUEL ASENSIO (n 2) para 910.

[65] See below Subsection 1.2.2.1*Good faith, fair dealing and pre-contractual duties of disclosure.*

[66] Paula GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (2005) 5 European Review of Private Law 621, 623; FERNÁNDEZ DOMINGO (n 6) 249-250.

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those different legal systems coexist; understanding the rules applicable to electronic consumer contracts can help remove the obstacles which hinder the development of the cross-boarder e-commerce in the internal EU market.

The concrete legislation applicable to the B2C e-commerce, which establishes information duties and remedies for their breach, will be specifically looked at in more detail further on.[67] Here, however, it is worth highlighting that the analysis of the e-commerce the present study focuses on has to take into consideration general private and contract law, as well as more specific provisions regulating consumer contracts broadly, applicable due to the category the contracting parties belong to, and B2C distance transactions more precisely, including but not limited to provisions targeting issues caused by the very particular character of the electronic means of communication used to form the contract. The legal framework of the e-commerce is considered to be incoherent, because it is often necessary to adapt the existing legislation to the new technologies, applying simultaneously general contract law rules, new specific provisions of the e-commerce and other rules that can be applied on the analogy to the e-commerce.[68] Various legal frameworks applying to the e-commerce sometimes overlap but may as well not cover all the problematic areas.[69] This fragmented legislative approach, especially evident within the EU, is not entirely impracticable however. For example, when the Directive on electronic commerce was being adopted, the primary consideration for the legislator was to quickly establish a reasonable framework for the e-commerce within the internal market, therefore plans involving important intervention into internal contract law regimes of Member States were abandoned in favour of reaching an agreement. This decision allowed the Directive on electronic commerce to be adopted without protracted negotiations, which proved to be a reasonable approach given the pos-

[67] See below Chapter 3 Section 3.1 *Specific remedies available to consumers.*

[68] HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 431; OECD, 'Empowering and Protecting Consumers in the Internet Economy' (2013) 216 OECD Digital Economy Papers (OECD Publishing) <http://dx.doi.org/10.1787/5k4c6tbcvvq2-en> accessed 9 June 2016, 5 lists legal frameworks applicable to the e-commerce as: '(...) including general consumer protection and contracts rules, specific e-commerce rules, legislation combating fraudulent, misleading and unfair commercial practices, anti-spam, copyright, privacy, and telecommunications rules.'

[69] OECD (n 68) 5; see also RIEFA (n 7) 7ff.

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itive effect the Directive had on the e-commerce within the internal market.[70] The e-commerce law can be also described as multidisciplinary, since the issues that appear in the e-commerce belong to various branches of law, private as much as public, although public law provisions stay outside of the scope of the present study, and transnational, due to it being independent from boarders and individual States.[71]

1.1.2 Pre-contractual information and its breach in the e-commerce

1.1.2.1 The role of pre-contractual information in the European consumer policy

Consumer protection and the EU internal market

The consumer protection era, which we are still living in, is often said to be started in the 1960s,[72] about the time of the famous speech of American President, John Fitzgerald Kennedy, to the Congress.[73] The President believed that:

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70 RIEFA (n 7) 7-8, nevertheless the fragmented approach has also drawbacks, since it is creating a complex incoherent framework which can be difficult to navigate, see ibid 10ff.

71 Ibid.

72 Jules STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (2000) 37 Common Market Law Review 367, 368ff.

73 John F KENNEDY, 'Special Message to the Congress on Protecting the Consumer Interest' [1962] (The American Presidency Project by John Woolley and Gerhard Peters, President Message from March 15, 1962) <www.presidency.ucsb.edu/ws/?pid=9108> accessed 21 April 2016. President Kennedy's speech is often cited in works relative to consumer protection and disclosure duties, see eg Gordon BORRIE, *The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls* (The Hamlyn lectures, Stevens & Sons 1984) 101; Pierre LEGRAND, 'Pre-contractual Disclosure and Information: English and French Law Compared' (1986) 6 Oxford Journal of Legal Studies 322; STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72) 369; Ewoud HONDIUS, 'The Notion of Consumer: European Union versus Member States' (2006) 28 Sydney Law Review 89, 90; Suzanne AUGENHOFER, 'A European Civil Law -– for Whom and What Should it Include? Reflections on the Scope of Application of a Future European Legal Instrument' (2011) 7 European Review of Contract Law 195, 205; Vanessa MAK, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (2012) 1 Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht 254, 254; Stephen WEATHERILL, *EU Consumer Law and Policy* (2nd edn, Elgar European Law series, Edward Elgar Publishing 2013) 6; Hans-W MICKLITZ, 'Do Consumers and Businesses

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> Fortunate as we are, we nevertheless cannot afford waste in consumption any more than we can afford inefficiency in business or Government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers. On the other hand, increased efforts to make the best possible use of their incomes can contribute more to the wellbeing of most families than equivalent efforts to raise their incomes.

The EU is following the path laid by President Kennedy in his message and indeed the EU is considered nowadays to have a very high level of consumer protection in many aspects, such as health and safety measures, material harmonisation and private international law for consumer contracts.[74]

Consumer protection as an independent principle under European, then – Community law, was first expressly acknowledged in the Maastricht Treaty,[75] albeit with an auxiliary character in relation to the legislation of internal market[76] and policy of the Member States.[77] It was also with the Maastricht Treaty that the concept of consumer policy resting on double foundations — as an internal market policy, as well

Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (2013) 32 Yearbook of European Law 266, 270.

74 Up to a point where 'the world's legislators and academics deem the European regulations to be exemplary models when suggesting laws relating to consumer protection' – see FERNÁNDEZ ARROYO (n 25) 146.

75 Treaty on European Union (Treaty of Maastricht) [1992] OJ C191/01; see WEATHERILL, *EU Consumer Law and Policy* (n 73) 2, who notes that '[Maastricht Treaty] added to then-existing EC Treaty a provision which, for the first time, would explicitly empower EU action in the consumer protection field'; see also Gunter VERHEUGEN, 'Consumer Policy and Corporate Policy in the EU' (2012) 1 Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht 134, 134-135.

76 Currently the internal market is defined in the Article 26(2) TFEU as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties'. It was the Single European Act [1987] OJ L169/01 that 'allowed majority voting in the Council for instruments affecting the establishment of the internal market' through the then new Article 100a EEC (now Article 114 TFEU) that grants the EU (then Community) a possibility to adopt harmonisation measures, ie directives – see Klaus TONNER and Kathleen FANGEROW, 'Directive 2011/83/EU on consumer rights: a new approach to European consumer law?' (2012) 1 Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht 67, 68.

77 Norbert REICH and Hans-W MICKLITZ, 'Economic Law, Consumer Interests and EU Integration' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 17.

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as a specific action to support consumer policy measures taken by Member States was recognised.[78] It was not, however, until the Treaty of Amsterdam,[79] that the consumer protection policy emerged to an independent position[80] it has today. Finally, the Lisbon Treaty[81] can be said to strengthen the consumer protection within the EU even more.[82]

The Article 169 of the Treaty on the Functioning of the European Union (TFEU)[83] mbraces consumer protection as an explicit EU competence; its wording echoing President Kennedy's propositions:

> In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.[84]

The consumer law at the EU level can be characterised by '"positive" commitment to market regulation (...) and "negative" emphasis on removing trade barriers'.[85] Article 12 TFEU reads: 'Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities', which

[78] See REICH and MICKLITZ (n 77) 12; cf Article 169(2) of the Treaty on the Functioning of the European Union (TFEU).

[79] Treaty of Amsterdam [1997] OJ C340/01.

[80] REICH and MICKLITZ (n 77) 19.

[81] Treaty of Lisbon [2007] OJ C306/01.

[82] Sybe de VRIES, 'Consumer Protection and the EU Single Market Rules – The Search for the "Paradigm Consumer"' (2012) 1 Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht 228, 236ff lists various instances in which consumer dimension of EU law has been reinforced by the Lisbon Treaty through a deeper commitment to fundamental rights and social protection, such as including the concept of 'social market economy' in Article 2 TEU, incorporating of the consumer integration clause in Article 12 TFEU, which places it on an equal footing with the environmental integration clause or the EU Charter of Fundamental Rights (Charter of Fundamental Rights of the European Union [2012] OJ C326/391) which states in its Article 38 that 'Union policies shall ensure a high level of consumer protection.'

[83] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

[84] Article 169(1) TFEU.

[85] WEATHERILL, *EU Consumer Law and Policy* (n 73) 2.

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especially include market integration.[86] Consumer protection is connected to harmonisation policy through Article 169(2)(a), which enables the EU to adopt harmonisation measures of Article 114 TFEU in execution of the consumer protection policy.

Consumer protection law is a specific interdisciplinary framework where provisions originating in civil, commercial and administrative law come together forming a unique set of rules, due to the fact that the nature of issues arising in consumer contracts is 'at the borderline of private/public problems and social/commercial ones.'[87] Consumer law, aiming at consumer protection, combines all those rules without being precisely delimited from other branches of law.[88] In consequence, specific pieces of legislation in both English and Spanish law: the CRA 2015 and the TRLDCU regulate consumer contracts.[89] Consumer contract law rules, which are the focus of this study, can be characterised by the use of private law mechanisms to provide consumers with protection in their contractual relationships with businesspersons.[90] On the other hand, however, as already mentioned, the consumer protection law can be viewed as serving also another aim: market regulation.[91] Especially in the context of

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86 Ibid 12.

87 Francisca WEBER, *The Law and Economics of Enforcing European Consumer Law: A Comparative Analysis of Package Travel and Misleading Advertising* (Markets and the Law, Ashgate 2014) 3.

88 See VEGA VEGA (n 2) 27ff, and the Spanish *Tribunal Constitucional*'s decision quoted there.

89 Although there are ideas voiced in the context of the Spanish system to include the (some) rules relative to the consumer contracts in the *Código civil*, see eg Exposición de Motivos IX of the Comisión General de Codificación, Sección de Derecho Civil, *Propuesta de Anteproyecto de Ley de Modernización del Derecho de Obligaciones y Contratos*, Boletín de Información, Ministerio de Justicia, 2009.

90 Cf however Roger BROWNSWORD, 'Regulating Transactions: Good Faith and Fair Dealing' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009) 88 who clearly states that 'we should stop thinking about the regulation of consumer transactions as an application of contract law. The reason for this is not so much that we can no longer tolerate such an exceptional deviation from classical principles of self-reliance but that, for all practical purposes, consumer transactions are regulated, much as the law of tort regulates our interactions. There is nothing voluntary about the assumption of obligation; it is imposed. So far as suppliers, in particular, are concerned this is simply a regime of command and control regulation.'

91 Geraint HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349, 350; VEGA VEGA (n 2) 27-28; Vanessa MAK, 'A Shift in Focus: Systematisation in European Private Law through EU Law' [2009] Tilburg Institute

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the European market integration, consumer protection rules are often used as a tool complementing market regulation measures, resulting from competition and administrative law provisions. Above all, consumer law rules stem from private law and are designed to correct market functioning without excessive intervention into its freedom.[92] Internal market development contributes to the consumer protection, since promoting healthy and efficient market stimulates competition and consequently provides consumers with an increased choice[93] of products of high quality and in a variety of prices -– '[t]he project to construct internal market is in itself a form of consumer policy.'[94] Furthermore, the development of internal market is the main legal justification for all directives and regulations relative to both e-commerce and consumer protection; it is hardly surprising bearing in mind that the very project of the EU, and earlier Community, has always been inspired by the need to facilitate the trade between European countries.[95] The new European Consumer Agenda that replaced Consumer Policy Strategy 2007-2013[96] emphasises the role consumers play in building the internal market and underlines especially the necessity to improve their confidence in online shopping in order to boost the European economy:

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of Comparative and Transnational Law Working Paper 2009/12, <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1511624> accessed 11 May 2016, 8, who points out to the twofold objective of the European consumer law directives — consumer protection together with internal market development; cf also VRIES (n 82) 228 noting that the very idea of consumers and the market itself benefiting together from the removal of trade barriers can be traced back to the Roman times.

92 Cf Brigitta LURGER, 'The Future of European Contract Law between Freedom of Contract, Social Justice, and Market Rationality' (2005) 1 European Review of Contract law 442, 452ff.

93 Stephen WEATHERILL, 'The Role of the Informed Consumer in EC Law and Policy' (1994) 2 Consumer Law Journal 49, 49 notes that '[t]he essence of common market theory holds that market integration serves the consumer. The removal of trade barriers between States induces fiercer and more efficient cross-boarder competition, yielding enhanced consumer choice.'; VRIES (n 82) 234 observes that '[w]ith respect to the EU competition rules, we see a (...) broad approach, (...) based on the assumption that competition policy contributes to consumer welfare. After all, the promotion of efficiencies through competition will ultimately create benefits for the consumer, including improvements and innovations in costs and prices, quality, choice, and services. This is reflected in the decision practice of the Commission and the Courts.'

94 WEATHERILL, *EU Consumer Law and Policy* (n 73) 307.

95 See MAK, 'A Shift in Focus: Systematisation in European Private Law through EU Law' (n 91) 5ff; SAVIN (n 14) 285ff.

96 Commission, 'EU Consumer Policy Strategy 2007-2013' (Communication) COM(2007) 99 final.

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> Consumer expenditure accounts for 56% of EU GDP and is essential to meeting the Europe 2020 objective of smart, inclusive and sustainable growth. Stimulating this demand can play a major role in bringing the EU out of the crisis. To make this possible, the potential of the Single Market must be realised. Data show that consumers shopping online across the EU have up to 16 times more products from which to choose, but 60% of consumers do not yet use this retail channel. As a result of this reluctance, they do not fully benefit from the variety of choice and price differences available in the Single Market. Improving consumer confidence in cross-border shopping online by taking appropriate policy action could provide a major boost to economic growth in Europe.[97]

Nevertheless, there has always been some conflict between the consumer policy, strongly linked with the economics of internal market, and consumer protection policy, an approach stemming from the welfare state doctrine.[98] Even if the market functions properly from the economic point of view, the concern is that social justice, redistribution of wealth, may not be socially desirable.[99]

In what refers to consumer protection within the European contract law, the harmonisation measures play a major role.[100] Article 26(1) TFEU requires the EU to 'adopt measures with the aim of establishing or ensuring the functioning of the internal market.' It shall do so 'in accordance with the relevant provisions of the Treaties', of which Article 114 confers upon the European Parliament and the Council the power to 'adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.' Harmonisation of laws of Member States involves regulatory competence transfer from Member States to the EU -– as set out in the Article 5(2) of the Treaty on European Union (TEU):[101] '[u]nder the principle of conferral, the Union shall act only within the

[97] COM(2012) 225 final pt 1.

[98] TONNER and FANGEROW (n 76) 69; this issue will be analysed in more detail in the context of the model of consumer inspiring protection through information duties, see below Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

[99] Stephen WEATHERILL, '19. Consumer Protection' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012) 243.

[100] WEATHERILL, *EU Consumer Law and Policy* (n 73) 2.

[101] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

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limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

It is then the internal market, its functioning and development, that justifies harmonisation of laws of the Member States in the EU. The CJEU case law[102] requires that the legislative measures genuinely serve the internal market functioning, 'actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition.'[103] The Court emphasizes that:

> While a mere finding of disparities between national rules and the abstract risk of infringements of fundamental freedoms or distortion of competition is not sufficient to justify the choice of Article 95 EC (now Article 114 TFEU) as a legal basis, the Community legislature may have recourse to it in particular where there are differences between national rules which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market (...).[104]

Nevertheless, some reservations are voiced regarding the internal market discourse being used as justification for harmonisation measures, especially from the constitutional point of view.[105] Weatherill points out that the disparity among Member States internal laws in itself does not reach the threshold required by the CJEU for legal intervention founded on the Article 114 TFEU — there need to be a proof of the actual contribution of the planned harmonisation action to eliminating market obstacles or competition distortion.[106] It is also argued that the fragmentation

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[102] Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453; Case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771; Case C-58/08 *Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-04999.

[103] *British American Tobacco (Investments) Ltd* para 60.

[104] *Vodafone Ltd and Others* para 32.

[105] See eg Leone NIGLIA, 'Of Constitutionality and Private Consumer Law in Europe' (2012) 1 Zeitschrift fur Europaisches Unternehmens- und Verbraucherrecht 223.

[106] WEATHERILL, *EU Consumer Law and Policy* (n 73) 200, who nevertheless admits that the Court approved the large majority of legislative interventions.

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of rules in the internal market due to different national laws in place, does not in itself constitute an obstacle to the smooth functioning of the internal market.[107]

Another controversial point is the extent of harmonisation,[108] ranging from minimum, where Member States could increase the required level of consumer protection to full (or maximum), prohibiting Member States from adopting provisions diverging from the level of protection established in the directive. The latter approach

[107] Zofia BEDNARZ, 'Cómo Influirá la Nueva Directiva 2011/83/UE en el Comercio Electrónico?' in A Cerillo i Martínez and others (eds), *Retos y oportunidades del entretenimiento en línea: Actas del VIII Congreso Internacional Internet, Derecho y Política* (Universitat Oberta de Catalunya, Barcelona, 9-10 de julio de 2012, Huygens Editorial 2010) 169-170; Roger HALSON and David CAMPBELL, 'Harmonisation and its discontents: a transaction costs critique of a European contract law' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013).

[108] Widely discussed in the context of the Directive on consumer rigths and the preparatory work leading to its adoption, see eg Hans-W MICKLITZ, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009); Geraint HOWELLS and Reiner SCHULZE, 'Overview of the Proposed Consumer Rights Directive' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009); Simon WHITTAKER, 'Unfair Terms and Consumer Guarantees: the Proposal for a Directive on Consumer Rights and the Significance of "Full Harmonisation"' (2009) 5 European Review of Contract Law 223; Martijn W HESSELINK, 'The Consumer Rights Directive and the CFR: Two Worlds Apart?' (2009) 5 European Review of Contract Law 290; Christian TWIGG-FLESNER and Daniel METCALFE, 'The Proposed Consumer Rights Directive: Less Haste, More Thought?' (2009) 5 European Review of Contract Law 368; Hans-W MICKLITZ and Norbert REICH, 'Crónica de una Muerte Anunaciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46 Common Market Law Review 471; Martijn W HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' [2009] Centre for the Study of European Contract Law Working Paper Series No. 2009/06 <http://ssrn.com/abstract=1416126> accessed 15 May 2016; Jan SMITS, 'Full Harmonisation of Consumer Law? A Critique of the Draft Directive on Consumer Rights' (2010) 18 European Review of Private Law 5; Martin EBERS, 'De la Armonización Mínima a la Armonización Plena: La Propuesta de Directiva sobre Derechos de los Consumidores' [2010] InDret: Revista para el Análisis del Derecho 1; Geraint HOWELLS and Norbert REICH, 'The Current Limits of European Harmonisation in Consumer Contract Law' (2011) 12 ERA Forum Journal of the Academy of European Law 39; Luis María MIRANDA SERRANO, 'La Directiva 2011/83/UE sobre los Derechos de los Consumidores: una Nueva Regulación para Europa de los Contratos Celebrados a Distancia y Extramuros de los Establecimientos Mercantiles' (2012) 11 Revista de Derecho de la Competencia y la Distribución 77; Silvia DÍAZ ALABART, 'Artículo 4 Nivel de Armonización: Comentario' in Silvia Díaz Alabart and María Teresa Álvarez Moreno (eds), *Contratos a Distancia y Contratos fuera del Establecimiento Mercantil: Comentario a la Directiva 2011/83 (Adaptado a la Ley 3/2014, de modificación del TRLCU)* (Reus 2014).

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has become more popular with the Commission in the recent years,[109] of which the Directive on consumer rights can constitute an example. However, the level of harmonisation finally established in that Directive, 'the targeted full harmonisation',[110] is less strict than the traditional full harmonisation approach – only some key provisions are subject to the full harmonisation.

Finally, harmonisation in general, and in the context of the European consumer contract law in particular, is a political issue. Approximation of the legal systems of Member States is a process in which the laws are changed to fit the same model; the EU effectively re-regulates certain areas of law.[111] The choice of standard rules to which the legal systems of Member States will have to adhere and which will be incorporated in their national laws is not only a question of legislative technique, but also, even more importantly, a political one concerning the shape of those rules, including the influence of different legal families.[112] Wilhelmsson and Twigg-Flesner observe that the legitimacy of European harmonisation policy is of particular interest in what refers to the area of information duties, since the starting points for various Member States are profoundly different — with English system regarding disclosure of essential information in a rather negative way, whilst continental systems tend to adopt a more positive attitude.[113] Moreover, the new, harmonised rules are to

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109 Eg in the Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 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 on unfair commercial practices [2005] OJ L149/22 (Unfair Commercial Practices Directive) and in the Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66; see also Norbert REICH, 'From Minimal to Full to "Half" Harmonisation' in James Devenney and Mel Kenny (eds), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012) 3.

110 MICKLITZ, 'The Targeted Full Harmonisation Approach: Looking Behind the Curtain' (n 108) 65ff; REICH, 'From Minimal to Full to "Half" Harmonisation' (n 109) 5; TONNER and FANGEROW (n 76) 77-78.

111 WEATHERILL, *EU Consumer Law and Policy* (n 73) 3.

112 Jules STUYCK, 'STUYCK, Jules, 'Book Review: *The Harmonisation of European Contract Law: Implications for European Private Laws, Businesses and Legal Practice*, by Vogenauer S and Weatherill S (Oxford: Hart Publishing, 2006)' (2007) 44 Common Market Law Review 528, 531.

113 Thomas WILHELMSSON and Christian TWIGG-FLESNER, 'Pre-contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441, 446.

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be introduced in the national systems of law, which leads to situations where alien provisions have to coexist with local legal norms.[114]

Economically justified need to protect the weaker party

There is little doubt that the EU legal system recognises consumer law as such, as the numerous directives aiming at consumer protection indicate. Nevertheless, there is an ongoing debate[115] concerning the current and future shape of consumer law in the EU, where not only the adopted and proposed measures, but also, even more importantly, the very objectives of the consumer law and the extent of protection needed are being discussed. Three fundamental questions are being asked: *who* should be protected? *Why* do we want to protect them? And finally *how* are we going to do that? On the margin of those issues, one also has to take into account policy considerations, or -– to put it bluntly — the fact that legislative decisions made in a political body of a size of the EU are necessarily heavily influenced by

[114] WILHELMSSON and TWIGG-FLESNER (n 113) 443 note that maximum harmonisation causes important invasion into national legal systems and requires them to adapt through deep structural changes in order to avoid 'a comple legal mess'; TONNER and FANGEROW (n 76) 75-76; see also the discussion on legal transplants and their acceptability and utility for the legal systems, eg Otto KAHN-FREUND, 'On Uses and Misuses of Comparative Law' (1974) 37 The Modern Law Review 1; Pierre LEGRAND, 'Against a European Civil Code' (1997) 60 The Modern Law Review 44; Alan WATSON, 'Legal Transplants and European Private Law' (2000) 44 Electronic Journal of Comparative Law Law <*www.ejcl.org/44/art44-2.html*> accessed 16 May 2016; Michele GRAZIADEI, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006).

[115] Especially in the context of legislative measures recently adopted and/or proposed in the EU, such as the Directive on consumer rights and CESL (Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM(2011) 635 final) see eg collection of essays in Geraint HOWELLS and Reiner SCHULZE (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009); Christian TWIGG-FLESNER, *A Cross-Border-Only Regulation for Consumer Transactions in the EU: A Fresh Approach to EU Consumer Law* (Springer Briefs in Business, Springer 2012); essays in Sergio CÁMARA LAPUENTE and Esther ARROYO AMAYUELAS (eds), *La Revisión de las Normas Europeas y Nacionales de Protección de los Consumidores: Más Allá de la Directiva sobre Derechos de los Consumidores y del Instrumento Opcional sobre un Derecho Europeo de la Compraventa de octubre de 2011* (Civitas-Thomson Reuters 2010); MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (n 73); Ruben de GRAAFF and others, 'From Here to Eternity: The Proposal for a Regulation on a Common European Sales Law (CESL)' (2013) 21 European Review of Private Law 1145.

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different political aims of various Member States.[116]

In its current shape the consumer protection law within the EU aims at protecting consumers in general — not only the most vulnerable, but all the natural persons fulfilling the definition of a consumer. Before the consumer protection was introduced, in what refers to contract law, which is relevant to this study, there had already been in place some general principles, which, albeit differing among various national legal systems, were nevertheless guaranteeing a certain level of protection to all the persons involved in transactions in the market — principles of fairness, of good faith, liability for negligence and deceit, finally liability for breach of contract.[117] However, this protection of general contract law was deemed in the EU insufficient for certain market players. The very much discussed question is '*who?*' those market users that should be protected by the EU private law are – 'citizens in general, in their capacity as consumers?'[118] At the very beginning the protection was aiming at consumers regarded as weaker parties, and especially at vulnerable consumers. However somewhere along the way the distinction between them and the circumspect, attentive and well-informed individuals became blurred.[119] This is reflected in the protective measures used in the EU legislation, and especially in the context of information requirements — as I will discuss below.[120] Furthermore, another issue that needs consideration is the objective qualification of the party as a consumer. What about SMEs[121] or independent entrepreneurs without employ-

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[116] The very process of harmonisation in the context of consumer law can constitute a good example, cf WEATHERILL, *EU Consumer Law and Policy* (n 73) 204ff; this issue will be also important in what relates to information duties as consumer protection measures, since in many cases the choices are made in function of what is politically achievable and not necessarily economically the best possible option.

[117] STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72) 375.

[118] Ibid.

[119] MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (n 73) 274 notes: 'The European legislative authority has, meanwhile, (...) created a backup category by introducing the concept of "vulnerable consumers". Thirty years ago this translation would have been interpreted as a pleonasm, since the consumer was per se vulnerable.'

[120] In Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

[121] European law in some cases can be found as '(...) protecting SMEs as weaker parties to asymmetric

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ees[122] – can those subjects be regarded as consumers under certain conditions? It all boils down to the specific model of consumer, analysed in more detail in Subsection 1.1.2.2 *The model of consumer in the e-commerce law* below, that has been applied by the EU legislation and courts for a reason -– the reason which answers the second pertinent question: '*why?*'.

The rationale of consumer protection in the EU is twofold.[123] First of all, consumers are traditionally regarded as weaker party to the contract needing protection in the context of transactions with professionals.[124] On the other hand, it is the economic consideration that motivates consumer protection, as expressed by President Kennedy 'we (...) cannot afford waste in consumption,' we do not want consumer's 'dollar [to be] (...) wasted'.[125] Those two main grounds for protecting consumers are intertwined and hard to separate -– protecting consumers helps contributing to promoting consumption which in turn keeps the market healthy and the economy developing.[126]

The CJEU[127] has always considered consumer protection to be particularly im-

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contract relationships with stronger businesses.' see Vincenzo ROPPO, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' (2009) 5 European Review of Contract Law 304, 313.

[122] HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 32.

[123] WEATHERILL, '19. Consumer Protection' (n 99) 237-238.

[124] Stefan HAUPT, 'An Economic Analysis of Consumer Protection in Contract Law' (2003) 4 German Law Journal 1137, 1137; MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (n 73) 4; also HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 33-34; María Ángeles ZURILLA CARIÑANA, 'El Derecho de Información del Consumidor en los Contratos con Consumidores y Usuarios en el Nuevo Texto Refundido de la Ley General para la Defensa de Consumidores y Usuarios' (Universidad de Castilla La Mancha, Centro de Estudios de Consumo 2009) <www.uclm.es/centro/cesco/pdf/comentarios/8.pdf> accessed 15 May 2016, 1-2.

[125] See KENNEDY (n 73).

[126] And the law always needs to be founded on the economic and social needs, see eg Jesús ALFARO ÁGUILA-REAL, 'Los Juristas – Españoles – y el Análisis Económico del Derecho. European Contract Law and Economic Welfare: A view from Law and Economics' [2007] Indret: Revista para el Análisis del Derecho 1, 5.

[127] Before 1 December 2009, when the Treaty of Lisbon came into force, the Court was referred to as European Court of Justice (ECJ).

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portant within the legal system of the European Union and previously Community. The Court on various occasions highlighted the rationale of consumer protection as 'based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.'[128] The rationale for consumer protection certainly has evolved, at first main motivation was to protect consumers from 'malevolent trader trying to con consumers.'[129] Hesselink presents a series of arguments often invoked to justify consumer protection measures, such as the fact that consumers are economically weaker, they are insufficiently informed, not fully rational, do not pursue a profit and they lack other options,[130] which nonetheless can be reduced to the reasons the CJEU gives for consumer protection. The weaker bargaining position of consumers is related to their different motivation for entering contracts -– it is not profit, as in the case of traders, but the utility of goods and services in the everyday life of individuals that matters.[131] Consumers lack other options, since the market is dominated by businesses providing similar products for similar prices, and again consumers' weaker position is both consequence and cause for this. The bounded rationality issue is likewise relative to the consumers being individuals, and so their contracting decisions are influenced rather by personal (even psychological) needs than motivation to multiply their wealth. Also information asymmetry between traders and consumers, discussed in more detail below, is closely connected to the issues mentioned above.

128 Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial* [2000] ECR I-4963, para 25; Case C-618/10 *Banco Español de Crédito* [2012] ECLI:EU:C:2012:349, para 39; Case C-415/11, *M. Aziz v Catalunyacaixa* [2013] ECLI:EU:C:2013:164, para 44.

129 HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) 352; however particularly in the context of the e-commerce, such concerns are reocurring nowadays.

130 HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 32 offers a following list of arguments: 'consumers are economically weaker, are insufficiently informed, are not fully rational, do not pursue a profit, lack other options; there is a legal basis in the Treaty for consumer protection; legal certainty requires categorical protection of a clearly circumscribed group; commercial law is different', which the author subsequently analyses in more depth. For the purposes of this study only some are relevant, as I explain further on.

131 It seems almost trite to note that B2C transactions are repetitive only to one party — the trader, while for the consumer they are almost always a novelty, see Juan Ignacio PEINADO GRACIA, 'Consumidores, Contratos, Seguridad y Costes Alternativos' (2000) 237 Revista de Derecho Mercantil 1109, 1123-1124.

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Nevertheless, there is a lot of criticism regarding the rationale of consumer protection, especially in relation to consumers being in a weaker position vis-à-vis traders, after all 'consumers' are simply individuals acting in a certain social role, common to everyone, and it does not make those individuals particularly more vulnerable. It is believed, especially in the neoclassical trend in economic analysis of law, that competitive market should be able to grant sufficient protection from exploitation to all its participants.[132]

Moreover, a lot depends on the background reason for consumer protection — if its primary motivation is economical, ie protection of correct market functioning, or a more socially — orientated one, focusing on restoring social justice in the society.[133] The latter motivation is more common to the Member States as opposed to the legislator at the European level. At least partially, this is due to the fact that, as already mentioned, the EU's competence to harmonise Member States' laws can only be justified by improving the functioning of the internal market. The Commission, when proposing new measures within private law, can therefore only focus on contract law. Other areas of private law, such as family law, law of tort or property stay outside of the scope of EU's competence.[134] It explains why the social dimension to the European consumer contract law is an important, albeit a bit neglected one, as the Manifesto of the Study Group on Social Justice in European

[132] Juan Ignacio PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' in José Luis Monereo Pérez and others (eds), *Comentarios a la Constitución Socio-Económica de España* (Editorial Comares 2002) 1879ff; Jesús ALFARO ÁGUILA-REAL, 'Protección de los Consumidores y Derecho de los Contratos' (1994) 47 Anuario de Derecho Civil 305, 307ff; see also: Fernando GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' [2003] InDret: Revista para el Análisis del Derecho 1; Horst EIDENMULLER and others, 'Towards a Revision of the Consumer Acquis' (2011) 48 Common Market Law Review 1077, 1082; Franziska RISCHKOWSKY and Thomas DORING, 'Consumer Policy in a Market Economy: Considerations from the Perspective of the Economics of Information, the New Institutional Economics as well as Behavioural Economics' (2008) 31 Journal of Consumer Policy 285, 286; HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 33.

[133] The protection focusing on the weaker or more disadvantaged subjects in the society has a long history, if one considers employees, tenants or later patient protection and consumer protection also fits that scheme, see HONDIUS, 'The Notion of Consumer: European Union versus Member States' (n 73) 93.

[134] Cf COLLINS, *The European Civil Code: The Way Forward* (n 50) 33.

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Private Law points out:

> A technocratic approach towards the agenda of harmonising European private law has so far predominated in discussions about the future of the European Union. The issues raised have been presented by the Commission as merely concerned with the completion of the Internal Market. Although other groups involved in these discussions, such as the European Parliament and legal scholars, may well appreciate that broader questions about European identity and social justice are at stake, as a practical matter the political process seems likely to be driven by the narrower technocratic agenda of the Commission—unless that agenda is vigorously challenged. (...)
>
> There is a real danger that, by ignoring these political issues, we will end up with a lop-sided European contract law: one that furthers market integration, but is inadequate to secure social justice.[135]

According to the neoclassical trends in economic analysis of law, the first step to tackle a market imbalance should be through competition law[136] and legal intervention of consumer law should be avoided unless inequality in bargaining power of the parties cannot be fixed naturally through market forces. The neoclassical theory is based on a reference point of a perfect market, which in itself protects consumers through optimal price and quality structures.[137] Therefore, the only legal intervention necessary would be the one aiming at creating the perfect competitive market conditions through competition law, which in theory ought to guarantee adequate protection for all market users, consumers included.

Nevertheless, consumers do experience problems even in the competitive market structures, which points to the other issues causing constraint of consumers' interests, namely information asymmetries serious enough to lead to market failures.[138]

[135] Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 European Law Journal 653, 655, 664.

[136] See GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' (n 132); RISCHKOWSKY and DORING (n 132) 33.

[137] RISCHKOWSKY and DORING (n 132) 286.

[138] Benjamin E HERMALIN and others, 'Contract Law' in AMitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics. Vol.1* (Elsevier BV 2007) 34ff; see also RISCHKOWSKY

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Information asymmetry means that one or both parties of a potential contract — we are talking about a pre-contractual stage — is in possession of information important to the other party but the incentives to reveal that information are weak; such situation creates a 'problem for the market economy [which] is that fears of being disadvantaged in a transaction because of informational asymmetry prevent otherwise mutually beneficial transactions from occurring'.[139] It needs to be highlighted that information asymmetry as such does not have to be negative — in fact asymmetric distribution of information between contracting parties in the market is an important incentive to produce information in the first place. The problems appear when the information asymmetry is of such type that one of the parties is not able to overcome it at a reasonable cost.[140]

Market failure due to information asymmetry was first described by Akerlof as a famous 'market for lemons' — based on an example of the automobiles market ('lemon' meaning bad car in America).[141] In a situation where buyers cannot evaluate the quality of products available on the market, they take decisions according to the prices of the offers. The problem arises because the demand side — consumers — will generally evaluate the offer below average price, and therefore the costs of better quality cannot be compensated. Eventually, higher quality products will disappear from the market.

The problem of Akerlof's market for lemons constitutes an example of market failure due to information asymmetry. Ulen identifies three main classes of issues that arise in connection with information in market economies:

(1) problems of inducing the socially optimal amount of investment in

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and DORING (n 132) 286, who observe that 'the Economics of Information analyses market failures, which occur due to imperfect information of market processes as well as the corresponding (inefficient) behaviour of market players'.

139 Other outcome may be that the transactions occurring will be of a wrong kind — eg fraud — or at the wrong terms: see Thomas S ULEN, 'Information in the Market Economy - Cognitive Errors and Legal Correctives' in Stefan Grundmann and others (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 99.

140 Stefan GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 Common Market Law Review 269, 279.

141 George A AKERLOF, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 The Quarterly Journal of Economics 488.

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> new, valuable information; (2) problems of inducing information revelation as a part of market transactions; and (3) problems that individuals and groups have in accurately and appropriately taking information into account in their decisionmaking.[142]

The first group of issues is the question of adequate EU policy, the second class of problems is relative to the information asymmetry marking B2C transactions that are the focus of this study, which can be illustrated by the Akerlof's market for lemons, and the third one is related to consumers' bounded rationality.

Information asymmetry between consumers and sellers is considered to be the most important among various market failures.[143] Therefore, it also constitutes the main economic justification for European consumer protection policy,[144] in the words of Ramsay: 'imperfect consumer information is a fundamental rationale for consumer protection measures.'[145] From the informational economic approach to the analysis of law standpoint, it is argued that in B2C contracts one party -– the trader -– is in possession of significantly better information about the product -– good or service or digital content — being the object of the transaction, because their professional activity evolves around this product on the one hand,[146] and often because they even created it themselves on the other.[147] Information costs are therefore much higher for the consumers, since they know much less about the product offered by the trader and because they enter much fewer transaction of a certain kind to which they have to allot the costs of gathering information.[148]

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142 ULEN (n 139) 98

143 The other market failures being externalities and restriction of competition, see Stefan GRUNDMANN and others, 'Party Autonomy and the Role of Information in the Internal Market - an Overview' in Stefan Grundmann and others (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 20; GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 140) 278; some authors recognise two instances of restriction of competition: market power and public goods, see WEBER (n 87) 2.

144 RISCHKOWSKY and DORING (n 132) 287.

145 Ian RAMSAY, 'Framework for Regulation of the Consumer Marketplace' (1985) 8 Journal of Consumer Policy 353, 359.

146 PEINADO GRACIA, 'Consumidores, Contratos, Seguridad y Costes Alternativos' (n 131) 1124.

147 RISCHKOWSKY and DORING (n 132) 287.

148 GRUNDMANN (n 143) 21; GRUNDMANN, 'Information, Party Autonomy and Economic Agents

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The consequences of information asymmetry between consumers and business persons differ importantly depending on the characteristics of the product being the object of their transaction. This consideration is significant for the policy design and especially within the context of the e-commerce, where due to the use of electronic means for contracting, the availability of information about goods and services to consumers is naturally restricted. Provision of information prior tocontract conclusion can influence consumers' choices and the ultimately successful outcome of the transaction to a different extent depending on the category the goods belong to.

According to the economic analysis of law, the goods, or more widely -– products (a concept including for instance services and digital content as well), can be categorized according to their qualities as 'search goods', 'experience goods' and 'credence goods'.[149] The quality and utility of 'search goods' can be determined by the consumer before purchase, as in the case of a greeting card,[150] a chair or a dress[151] that can be tried on, inspected, in the physical shop. In what refers to 'experience goods', the consumer will be able to assess their quality after using them for some time -– think cars,[152] canned tuna fish[153] or any meal in a restaurant. Finally, the attributes of 'credence goods' cannot be discovered through normal use — an additional, costly assessment, for example by an expert, is needed. Asbestos insulation which may pose long-term health hazards,[154] the outcome of medical procedures or

in European Contract Law' (n 140) 280.

[149] See eg Michael R DARBY and Edi KARNI, 'Free Competition and the Optimal Amount of Fraud' (1973) 16 Journal of Law and Economics 67, 69 who observe:''We distinguish then three types of qualities associated with a particular purchase: search qualities which are known before purchase, experience qualities which are known costlessly only after purchase, and credence qualities which are expensive to judge even after purchase.'; GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' (n 132) 12.

[150] Gillian K HADFIELD and others, 'Information-Based Principles for Rethinking Consumer Protection Policy' (1998) 21 Journal of Consumer Policy 131, footnote 17.

[151] Phillip NELSON, 'Information and Consumer Behavior' (1970) 78 Journal of Political Economy 311, 312.

[152] HADFIELD (n 150) footnote 17.

[153] NELSON (n 151) 312.

[154] HADFIELD (n 150) footnote 17.

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car repair[155] and technological aspects of modern items — computers, tablets and mobile phones, can constitute examples of credence goods. This division of goods into three types: search, experience and credence goods, is only theoretical, in the real life situations the products possess various qualities that match different good types.[156] Moreover, in the context of the e-commerce, it should be noted that some goods that belong to the category of 'search goods' in the traditional trade, as the example of a dress shows, will not be 'search goods' anymore when sold online.[157]

Information asymmetries present in the B2C e-commerce will influence especially negatively the experience aspect of goods — consumers who are not sufficiently informed will simply not know if the product offered can satisfy their needs.[158] In addition, the means of distance communication used will convert majority of search goods into experience goods, therefore it is particularly important to reduce information costs for the consumer in order to avoid market failure resulting from adverse selection. Nevertheless, in what refers to credence qualities of goods, information asymmetries will not be cured even after the conclusion of the contract. Pre-contractual information duties *a fortiori* are also ineffective in relation to credence goods. Consequently, different consumer protection measures will be necessary to ensure correct market functioning in relation to online sales of credence goods, especially because many breaches may simply pass undetected by consumers.[159]

The existence of the information asymmetry and economic weakness of con-

[155] DARBY and KARNI (n 149) 69.

[156] RISCHKOWSKY and DORING (n 132) 288.

[157] Nevertheless, the intervention of legal rules, eg the introduction of the right of withdrawal, can also influence the categorization of the good, as it allows the consumer to try the product and decide if it fits their needs. The right of withdrawal will be looked at in more detail in Chapter III Subsection 3.3.2 *Right of withdrawal as an example of a specific remedy.*

[158] EIDENMULLER (n 132) 1099; see also RISCHKOWSKY and DORING (n 132) 290, who give an example of market failure when 'consumers are unable to assess the quality / functionality of the products at a reasonable cost (or at all).'

[159] RISCHKOWSKY and DORING (n 132) 288-289; EIDENMULLER (n 132) 1100; see also HERMALIN (n 138) 123 who point out that: 'while reputations can, in many markets, provide powerful incentives to perform, in some markets they are less likely to be effective. For example, if performance involves a credence good (the quality of which cannot be observed even after consumption, at least not without expert diagnosis), many breaches may go undetected, with little harm to the breaching party's reputation.'

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sumers in relation to traders confirm the need to protect consumers, which brings us to the third question, '*how?*', regarding the shape of consumer protection policy. The Commission's focus is on

> Well designed and implemented consumer policies with a European dimension [that] can enable consumers to make informed choices that reward competition, and support the goal of sustainable and resource-efficient growth, whilst taking account of the needs of all consumers.[160]

The very necessity of legal intervention, even in the case of market failures, has always been subject to discussion.[161] 'Why, the sceptic may ask, might one suppose that the law should play a role in protecting the consumer? Why not let the market take the strain?' begins his essay — one of many — on consumer protection Weatherill.[162] And indeed Ben-Shahar expresses a view that legal intervention would be in principle fruitless:

> Rather than augmenting the legal remedies that consumers have under contract law (the stated goal of the consumer protection movement), the social controls of the business-to-consumer deal ought to be restricted to techniques that, unlike contract law, actually work.[163]

In his paper, Ben-Shahar describes various ways in which the market, through innovative transaction types, can actually protect consumers in a much more efficient way than contract law.[164] Nevertheless, those market mechanisms may yield unpredictable results in the first place, and it is also difficult to foresee when and to

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160 COM(2012) 225 final pt 1.

161 RISCHKOWSKY and DORING (n 132) 285 note that '[t[he question concerning when a governmental intervention in the market system is justified has occupied economists from the very beginning and has been a controversial discussion topic for just as long.'

162 WEATHERILL, '19. Consumer Protection' (n 99) 237.

163 Omri BEN-SHAHAR, 'One-Way Contracts: Consumer Protection without Law' (2010) 6 European Review of Contract Law 221, 223.

164 See ibid 223-224, Ben-Shahar gives five examples of such non-legal protections: different design of transactions (a lease on a yearly pay of 15% of a price of purchase instead of the sale contract; protection through bonds and guarantee programs by private market makers and intermediaries; further development of insurance market; reliability of feedback scores, ratings and consumer surveys; stronger incentives for businesses to offer consumers better contractual conditions.

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what extent they might appear and restore desirable market functioning. Moreover, the legal system as such would need to be designed in a way that would allow to promote and control those processes.[165]

Peinado Gracia agrees that the market itself constitutes the best tool protecting consumers, admits however that the market is not free from inefficiencies, and therefore legal intervention aiming at consumer protection can be justified.[166] Such intervention, nevertheless, should be primarily concerned with restoring market equilibrium, preferably through competition law measures, which will ensure correct market functioning in turn contributing to consumers' well-being.[167] Furthermore, it has been indicated that 'the necessity for consumer policy exists even in markets with complete competition under the assumption of incomplete information.'[168] It is also commonly accepted that legal intervention might not be adequate to the problem at hand, or as Weatherill puts it: '[r]egulators, like markets, may fail.'[169]

In addition, any measures applying to the market are susceptible to creating costs for traders, who in turn will compensate those costs increasing the price of their products.[170] t is important therefore to consider whether consumers are pre-

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[165] Ben-Shahar admits that the legal system would have to guarantee the enforceability of insurance contracts for example -– see ibid 224.

[166] PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' (n 132) 1879; cf ALFARO ÁGUILA-REAL, 'Protección de los Consumidores y Derecho de los Contratos' (n 132) 315ff.

[167] Ibid 1881; see also: GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' (n 132); EIDENMULLER (n 132) 1082; RISCHKOWSKY and DORING (n 132) 286; HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 33.

[168] RISCHKOWSKY and DORING (n 132) 292-293.

[169] WEATHERILL, '19. Consumer Protection' (n 99) 243.

[170] Cf Katie MORLEY, '"Serial returners" blamed for rising womenswear prices' *The Telegraph* (London, 30 May 2016) <www.telegraph.co.uk/news/2016/05/30/serial-returners-blamed-for-rising-womenswear-prices/> accessed 1 June 2016, who points out that the phenomenon of online shoppers returning the goods taking advantage of their right of withdrawal is known in the fashion industry as 'reverse logistics'. It is estimated that it cost the UK online shops a total of almost £96m in 2013, since between 25-40% of all goods bought online are subsequently returned. The majority of shoppers buying various clothes to then return some or all of them are women, in consequence there is a marked difference in price between men's and women's clothing; see also Ashley ARMSTRONG, 'The high street is changing – now it comes to your home' *The Telegraph* (London, 8 August 2015) <www.telegraph.co.uk/finance/newsbysector/retailandconsumer/11791316/The-

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pared to pay a higher price for the sake of protection.[171] Yet, as discussed above, it is commonly suggested that at least minimal legal protection of consumers, directed at the B2C contracts especially in the context of the e-commerce is necessary.[172] Lack of legislative intervention contributes to preserving the imbalances in the B2C contracts rather than curing them. 'The law intervenes (...) to [grant] the weaker party the sort of outcomes that might have feasibly been on offer had genuine negotiation – true freedom of contract in practice – been economically possible.'[173] The high level of transaction costs due to imperfect information in the e-commerce can consequently cause market inefficiencies serious enough to justify consumer law intervention.[174] The market simply cannot provide protection sufficient to further increase consumers' trust in the electronic transactions, particularly in the crossboarder dimension.

Legal protection offered to consumers can be shaped as ex ante restriction of possible contracts and/or *ex post* court control.[175] The protective measures in place tend to be of the former type: in what refers to the consumer protection through contract law, two main types of measures are considered, which are either substantive mandatory rules or pre-contractual information duties placed on traders dealing with consumers. *Ex post* court control can occur as private consumer redress, as in the case of remedies for breach of information duties or unfair contract terms control, but it is also present in collective redress mechanisms and competition law actions, including administrative control of market equilibrium. The choice of protective measures depends importantly on the model of consumer and their behaviour

high-street-is-changing-now-it-comes-to-your-home.html> accessed 1 June 2016.

171 WEBER (n 87) 3.

172 Since, as SILBER (n 26) 25 points out, '[i]t seems highly unrealistic to contend that the technological advances of the past decades have radically diminished the disadvantages under which consumers suffer – as unspecialized, atomized, advertising-driven household purchasers'. because indisputably '[t]he Internet is permeated with consumer problems of its own'.

173 Stephen WEATHERILL, 'Case Note: Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract". Judgment of the Court of 18 July 2013: Case C- 426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*' (2014) 10 European Review of Contract Law 167, 172.

174 RISCHKOWSKY and DORING (n 132) 299, 305.

175 HERMALIN (n 138) 34.

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that constitutes justification for establishing protective provisions. The model of consumer adopted by the EU legislator will be discussed below, nevertheless it can be noted in general terms that the two main positions are: that of neoclassical trend in law and economics, which assumes that consumers act rationally and it is enough to counterbalance the information asymmetry with pre-contractual mandated disclosure, and a more paternalistic view taking into account findings of behavioural economics, which allows for consumers' bounded rationality and advocates for further restriction of freedom of contract through introduction of substantive mandatory rules.[176]

In a more specific context of the e-commerce, consumer protection contract law rules can be characterised by their purpose going beyond the traditional rationale of consumer protection. Within the scope of the European Union, consumers are considered to be protected in various ways in any kind of B2C transaction, however their position in electronic transactions is deemed to be weaker than in traditional trade.[177] Hence various rules aim especially at creating conditions similar to traditional trade for consumers in the digital environment, thus extending consumer protection in the digital environment in comparison to the physical trade. The already mentioned European Consumer Agenda for years 2013-2020[178] underlines the importance of the e-commerce, both in its national and cross-boarder dimensions, to the development of the internal market of the EU and its contribution to the European GDP. Nevertheless, it names consumers' lack of confidence in online shopping as a main obstacle to its further popularization,[179] and calls for 'adapting consumer law to the digital age.'[180] Achieving a fully functional Digital Single Market is one of

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[176] MAK, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (n 73) 255.

[177] Cf eg GILLIES (n 7) 19.

[178] COM(2012) 225 final.

[179] Ibid pt 1.

[180] Ibid pt 4.4, where the Commission notes that: '[i]n today's changed marketplace it is imperative to ensure that consumers have the confidence to buy online both traditional, tangible goods and services as well as digital ones. Consumer laws should therefore be updated to meet the needs of changing markets and to take account of emerging insights from behavioural sciences about how consumers behave in practice. (...) To address these economic and societal issues, the Commission will work towards (...) specific objectives (...)'.

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the EU's main aims in the context of consumer law.[181]

Further in the Consumer Agenda for years 2013-2020 document, Commission sets out how '[w]ell designed and implemented consumer policies'[182] could remedy the issues consumers experience in the digital environment and boost the European economy, fully realising the potential of the B2C online market. Four key 2020 objectives named by the Commission are: improving consumer safety, enhancing knowledge, improving implementation, stepping up enforcement and securing redress, and finally aligning rights and key policies to economic and societal change.[183] Those key objectives demonstrate that the most prominent component of the consumer policy at the EU level still is market-related, and that guaranteeing proper functioning and development of the internal market, especially in its digital aspect, continues to be the main concern for the EU policy makers.[184]

Information duties as an important tool in consumer protection in electronic contracts

The main rationale for consumer protection being information asymmetries between consumers and traders leading to market failure, information duties imposed on businesses are supposed be a perfect protective measure correcting those asymmetries.[185] Furthermore, information requirements fulfil a multitude of different func-

[181] Commission, 'A Digital Agenda for Europe' (Communication) COM(2010) 245 final/2; see also SAVIN (n 14) 295.

[182] COM(2012) 225 final pt 1.

[183] Ibid pts 4.1 - 4.4.

[184] Cf SAVIN (n 14) 311: '[T]he Single Market is an invisible framework, a silent operational setting against which digital trade is taking place. (...) [W]e are often looking at fragmented scenery. There should be nothing surprising here — it is in the very nature of the Single Market to be an attempt to bring this fragmentation into a form of unity. But this also gives a somewhat new meaning to the invisibility suggested [by us]. (...) The EU policy makers should recognize the real limits to what the Single Market as a paradigm can achieve and accept that, rather than use Digital Single Market regulation to bring about better Internet, it may make more sense to let the Internet bring about a more integrated Digital Single Market.'

[185] WILHELMSSON and TWIGG-FLESNER (n 113) 452 observe: '[T]he imposition of pre-contractual information duties has been a particularly popular tool in the consumer protection arsenal. The justification for this seems attractive in its simplicity: starting from the premise that the trader is better informed than the consumer, and that this informational imbalance should be corrected, an

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tions. Sefton-Green points out to eight — with some subdivision — different values underlying duties to inform:[186]

> i. Protecting the consent of the parties. ii. Upholding the security of transactions. iii. Controlling contractual fairness. This can be subdivided into two parts: a. Controlling procedural unfairness in the event that an injustice or abuse by one of the parties leads to damage being suffered by the other. b. Regulating the inequality of exchange through an Aristotelian view of commutative justice which can be referred to as substantive fairness. iv. Upholding the moral duty to tell the truth. Two corollaries follow: a. Dishonesty should be discouraged and treated severely. b. It is immoral to hold a mistaken party to the contract. v. Protecting or compensating the innocent reliance of a mistaken party: this means that the other party is liable for the consequences of that reliance. vi. Imposing or regulating standards of behaviour expected by contracting parties for normative purposes. vii. Setting objective standards in relation to the content of the contract. viii. Allocating risks under the contract.[187]

Although the primary focus of Sefton-Green's analysis is general private law and not the B2C transactions, a specific similarity to the twofold rationale for consumer protection can be observed — the functions which information duties fulfil can be allotted to two broad categories: firstly, as a remedy to the issue of potential market inefficiencies; secondly, as a response to the (moral and/or social) imperative of protection of the weaker individuals -– or individuals acting honestly, in good faith.

Similarly, Wilhelmsson and Twigg-Flesner distinguish five main purposes of information, of which first four are market-related, and the last one is clearly linked to morality and social justice: protection of the real consent of the party; equipment for rational market behaviour in a more general sense; upholding of informational

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obligation is imposed on the seller to make available information which he possesses (or is assumed to possess) in order to redress this imbalance.'

[186] And related legal concepts of fraud and mistake, see more on relationship between information duties, fraud and mistake in Subsection 1.2.3.1 *More general and indirect information duties* in the present Chapter.

[187] Ruth SEFTON-GREEN, 'General Introduction' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2004) 14, it should be noted that the analysis of Sefton-Green focuses mainly on general private law, hence the inclusion of concepts of mistake and fraud, and not primarily on B2C contracts.

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clarity; achievement of the fair content of the contract; and supporting a moral duty of honesty.[188]

In what refers to information duties established in the European law, their aim is predominantly creating a better informed contracting environment, which in turn helps boosting market economy,[189] whilst the disclosure duties[190] originating in domestic private law will often focus on promoting of moral and fair contracting behaviour,[191] especially through forbidding provision of false and deceptive information.[192]

Consumer protection through information is based on a certain model of consumer, which will be analysed below.[193] Generally speaking, consumers in order to be able to influence the market in a desired way must be able to use the information provided to them by traders. Only then will the information requirements provide effective and sufficient protection to the consumers and consequently guarantee correct functioning of the market — consumers buying goods and services transmit accurate messages about their preferences, but only if their purchases are adequately informed.[194] Therefore, information requirements allow the market to self-regulate, as consumers — the demand side — can choose offers depending on price and quality.

Information duties as protective measure have a great advantage that consumers

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188 WILHELMSSON and TWIGG-FLESNER (n 113) 449-451.

189 Stephen WEATHERILL, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' in Stefan Grundmann and others (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 177.

190 Which will often be indirect, eg embedded in provisions requiring honest conduct.

191 WILHELMSSON and TWIGG-FLESNER (n 113) 451.

192 SEFTON-GREEN, 'General Introduction' (n 187); WILHELMSSON and TWIGG-FLESNER (n 113) 451; WEATHERILL, '19. Consumer Protection' (n 99) 240.

193 Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

194 WEATHERILL, '19. Consumer Protection' (n 99) 240; WEATHERILL, 'The Role of the Informed Consumer in EC Law and Policy' (n 93) 51 notes also that '[t]he Court appears to hold a presumption that choice, informed where necessary by information disclosure, is a desirable feature of the integrating market. The Court invests a great deal of faith in the consumer as the pivot of a supply and demand economy.' in the context of Case 178/84 *Commission v Germany* [1987] ECR 1227.

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are free to make their own choices, thus defending their own interests,[195] unlike substantive mandatory rules, such as quality standards, which interfere importantly with the market substituting legal provisions for parties' private choice of the contract's content.[196] Mandated information disclosure to consumers is less restrictive of trade and free movement provisions within the EU internal market than other contract law measures, not to mention administrative restrictions, such as national product bans.[197] Information duties create a favourable contractual environment without influencing the contents of the contract to a great extent.[198] Moreover, if the legislator fails, imposing unnecessary obligations on traders, the harm to the market will be of much lesser extent in the case of information duties, when compared to substantive mandatory rules.[199]

As already mentioned, consumer protection in the e-commerce is especially dir-

[195] Which is true for a certain type of consumers, as in the consumer model adopted in the EU law, see VRIES (n 82) 231 who observes: '[t]he basic notion of consumer in EU law is that the consumer is considered an individual who can, if provided with the necessary information, make his own choices and defend his own interests.'; see also Annette NORDHAUSEN SCHOLES, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009) 216.

[196] WEATHERILL, *EU Consumer Law and Policy* (n 73) 92; Sergio CÁMARA LAPUENTE and Evelyne TERRYN, 'Chapter Three: Consumer Contract Law' in Hans-W Micklitz and others (eds), *Cases, Materials and Text on Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Ius Commune Casebooks for a Common Law of Europe, Hart Publishing 2010) para 3.43 (EU) observe: 'The use of information obligations as a means of consumer protection has important advantages as it is considered to be the least intrusive instrument to achieve consumer self-determination and it potentially leads to maximisation of consumer choice. Information remedies moreover allow consumers to protect themselves according to personal preferences rather than place on regulators the difficult task of compromising diverse preferences with a common standard.'

[197] WEATHERILL, 'The Role of the Informed Consumer in EC Law and Policy' (n 93) 50.

[198] WEATHERILL, *EU Consumer Law and Policy* (n 73) 92 adds that '[t]his approach to improving transparency in the pre-contractual phase has frequently been combined with protection in the post-contractual phase, most strikingly through the prescription of "cooling-off" period within which the consumer is entitled to exercise a right to withdraw from an agreed deal. These techniques do not address directly the content of the bargain between trader and consumer. (...) The assumption underlying the type of regulatory technique examined (...) is that an imbalance in economic power can be sufficiently corrected by adjusting the environment within which the bargain is struck by giving the consumer extra information in advance and extra time to consider the implications.'; see more on the right of withdrawal in relation to information duties in Chapter III Subsection 3.3.2 *Right of withdrawal as an example of a specific remedy.*

[199] RISCHKOWSKY and DORING (n 132) 291.

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ected at increasing consumers' confidence and trust in the electronic transactions.[200] Nordhausen Scholes observes that continental European jurisdiction once adhered to the Roman law principle *emptor curiosus esse deber*, nevertheless, due to the widespread use of new technologies in the contracting process, consumer protection measures are trying to tackle issues arising from the fact that consumers are dealing with remote traders over products they cannot examine or even see until contract has been performed.[201] The role of information requirements in the scope of the e-commerce is in general quite similar to that played in the context of consumer protection in general: to remedy market failures due to information asymmetries between consumers and traders. However, the e-commerce is a particular form of distance contracting presenting specific challenges for the legal system, especially due to the lack of simultaneous physical presence of both parties, speed and immediacy of their communication, issues relative to confidentiality, authentication and security of transactions and their transnational character.[202] On the other hand, as de Miguel Asensio points out, the Internet provides consumers with unprecedented possibilities of access to information about products offered by traders, including tools allowing to compare offers from all over the world, which strengthens consumer position in trade.[203]

Nevertheless, imperfect information disclosure is common in the world of digital transactions: information is often presented in an unclear way and consumers find it difficult to access.[204] as one of the major problems reported by online shoppers in the OECD area, in both domestic and cross-boarder e-commerce, which can result in a negative outcome of the transaction in the form of:

[200] MIGUEL ASENSIO (n 2) para 892; Giusella FINOCCHIARO, 'European Law and Consumer Protection in the Information Age' (2003) 12 Information & Communications Technology Law 111, 111; see also various Commission Communications as mentioned above in footnote 23.

[201] NORDHAUSEN SCHOLES (n 195) 213.

[202] HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 432 lists those aspects as main areas of influence of the e-commerce on the legal system.

[203] MIGUEL ASENSIO (n 2) para 891.

[204] OECD (n 68) 5: '[information on products, businesses and online transactions] is often long and complex (...), presented in small size, buried in footnotes, or accessible through a series of web links or windows.'

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> i) dissatisfaction with a product that did not meet expectations; ii) surprisingly high bills (i.e. "bill shock"); as well as iii) frustration with the procedures and costs that may be incurred in terminating a transaction and trying to obtain redress.[205]

Moreover, the OECD study points to the connection between misleading and fraudulent practices, such as imposing unauthorised charges on consumers, which importantly undermine trust in the e-commerce, and provision of inadequate information.[206]

Information duties aiming at ensuring a correct level of consumer protection together with the development of Internet economy, if observed by traders, could constitute one of the possible legislative solutions to the problems consumers experience while shopping online.[207] Various reports consider information provision to be a possible remedy to consumers' mistrust in the e-commerce, and especially in what refers to its cross-boarder aspect.[208] Also the Commission notes in the context of consumer policy key objectives 2020 that: '[i]f they are to be properly empowered, consumers must be provided with clear, reliable and comparable information, and the tools to understand it.'[209]

Nevertheless, there are limits to consumer protection through information. First of all, information duties have to be justified, as they constitute a legislative intervention into the market, putting additional burden on traders — the costs of information duties, albeit smaller in comparison to other protective measures[210] (substantive

[205] OECD (n 68) 6.

[206] Ibid 23.

[207] FINOCCHIARO (n 200) 111ff notes three main European legislator's actions directed at increasing consumers' trust in the e-commerce and lists providing consumers with relevant information at the first place, other two actions comprise substantive consumer protection (ie privacy protection and control of contract terms) and juridical protection (ie easy access to justice in consumer's legal system); see also MIGUEL ASENSIO (n 2) para 982.

[208] See eg Commission, 'Report on cross-border e-commerce in the EU' SEC(2009) 283 final; Civic Consulting, 'Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods' (2011) (commissioned by the Executive Agency for Health and Consmers) <http://ec.europa.eu/consumers/archive/consumer_research/market_studies/docs/study_ecommerce_goods_en.pdf> accessed 9 June 2016; OECD (n 68).

[209] COM(2012) 225 final pt 4.

[210] RISCHKOWSKY and DORING (n 132) 292.

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mandatory rules, administrative law provisions) will translate into higher prices for consumers.[211] From the economic standpoint

> a duty of disclosure makes sense only if the benefit to be derived by the obligee from being informed outweighs the obligor's costs for obtaining and transmitting the information, and if the transmission of the information, therefore, leads to an overall increase of utility.[212]

Moreover, somewhat surprisingly at first glance, information duties can also cause significant problems for consumers, such as the issue of information overload or the no-reading problem, to name just two.[213] In consequence, consumer protection and market functioning improvement through mandated disclosure results limited by consumers' ability to understand and act upon the information provided.[214]

Thirdly, it is commonly accepted that information duties may constitute a relevant protective measure when it is consumers' economic interest that is at stake. In the case of health and safety concerns, however, information disclosure alone is not considered adequate.[215] This consideration evidences how limited the information requirements are as a protective tool, it is even more so if we take into account the above-mentioned phenomenon of consumers being unable to act upon the given information. It also clearly shows that the no-reading issue in consumer contracts

[211] EIDENMULLER (n 132) 1114: 'The transmission of information is not cost-free. Although the cost of the transmission itself is often insignificant, a duty to disclose may put a considerable burden on obligors. Unless they already possess the information, they have to acquire it. If they already have it, the information may be a valuable asset that may lose its value to them if they have to share it with the obligee. If the information relates to their private sphere, a duty to reveal it may place a considerable non-economic burden on them.'; see also WILHELMSSON and TWIGG-FLESNER (n 113) 452-453.

[212] EIDENMULLER (n 132) 1114, further at 1115 Eidenmuller and others present a list of criteria that should be taken into account in deciding whether or not there is a duty of disclosure in an individual case, I will look at those in Subsection 1.1.2.4 *Finding a balance: optimal information duties in the B2C e-commerce* below.

[213] The questions relative to the issues connected to information duties, including problems that the information provision in its current form is causing to consumers, are discussed below in Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts.*

[214] CÁMARA LAPUENTE and TERRYN (n 196) para 3.43 (EU) point to the 'fundamental problem of the effectiveness and efficiency of information requirements as a means of consumer protection (...).'

[215] WEATHERILL, '19. Consumer Protection' (n 99) 241-242.

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is a fact and whilst it can be tolerated when the risk that individuals incur relates to their economic interests, the legal system resorts to more powerful measures of limiting contractual offers available to consumers — excluding those posing risk to their health or safety — through substantive mandatory rules and administrative law provisions.

Despite the limitations of information duties as protective measures, the information paradigm of EU consumer protection is a fact.[216] Information duties, together with control of fairness of contractual terms and the right of withdrawal, are the axis of the consumer protection in the contract law area. Information disclosure is arguably the most commonly used instrument of consumer protection in EU directives for various reasons. Apart from the rationale presented above, information duties are also much easier to introduce than other possible substantive mandatory rules, since they interfere to a lesser extent with contractual freedom and are easier to accept by the Member States.[217]

According to Article 169 TFEU, 'the Union shall contribute to (...) promoting [consumers'] right to information.'[218] The contents of this subjective right are detailed in secondary provisions of the EU law, and especially consumer contract law directives.[219] The CJEU also notes that: 'under Community law concerning consumer protection the provision of information to the consumer is considered one of the principal requirements.'[220]

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[216] HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) 351; REICH and MICKLITZ (n 77) 22; see also HADFIELD (n 150) 135 who call information an 'organizing idea of consumer protection.'; Hans-W MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 79 refers to 'pivotal position of information paradigm.'

[217] WEATHERILL, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' (n 189) 181; cf RIEFA (n 7) 7 in the context of the Directive on electronic commerce and its failure to regulate issues relative to contract law.

[218] See eg Reich and Micklitz (n 78) 46.

[219] Cf MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101.

[220] Case C-362/88 *GB-INNO-BM v Confédération du commerce luxembourgeois* [1990] ECR 667, para 689; see also Geraint HOWELLS and Thomas WILHELMSSON, 'EC Consumer Law: Has it come of age?' (2003) 3 European Law Review 370, 380 who note that '[t]he strong emphasis on transparency and information can be seen both in the practice of the Court of Justice, when outlawing trade barriers on the basis of the Treaty, as well as in much of the secondary legislation in the consumer law area.'

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1.1. INFORMATION DUTIES AND THEIR BREACH IN THE B2C E-COMMERCE

The faith of the European legislator in the information duties as 'a privileged instrument of consumer protection'[221] is confirmed by the Directive on consumer rights. The trend is that more duties and of a more detailed character are added in each new piece of European legislation.[222] In what refers to the e-commerce, both Directive on electronic commerce[223] and Directive on consumer rights[224] contain long lists of information requirements that consumers are to be provided with when shopping online. De Miguel Asensio identifies various provisions typically applying specifically to the e-commerce that have the purpose of ensuring that consumers' position in the electronic commerce will be equivalent to that in the B2C traditional, ie physical, trade;[225] he fundamental rules in this context are those regulating the design and configuration of websites through which traders offer and sell products to consumers.[226] Also the two new Commission initiatives: Proposal for a Directive on online sale of goods and Proposal for a Directive on digital content contain information duties, albeit of an indirect character.[227] The soft law acts, such as OECD Guidelines[228] likewise dedicate numerous provisions to information duties.

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221 Candida LEONE, 'Transparency revisited – on the role of information in the recent case-law of the CJEU' (2014) 10 European Review of Contract Law 312, 321.

222 NORDHAUSEN SCHOLES (n 195) 213-214; Joasia LUZAK, 'Passive Consumers vs. the New Online Disclosure Rules of the Consumer Rights Directive' [2015] Amsterdam Law School Legal Studies Research Paper No. 2015-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553877> accessed 13 June 2016, 1.

223 See especially art 5 on general information to be provided by a service provider, art 6 on information to be provided in relation to commercial communications and art 10 on information to be provided prior to concluding a contract by electronic means.

224 See especially art 6 on information requirements for distance and off-premises contracts and art 8 on formal requirements for distance contracts.

225 Such as specific information requirements concerning not only the product description, but also trader's contact details and transaction details, see MIGUEL ASENSIO (n 2) para 892.

226 MIGUEL ASENSIO (n 2) para 892.

227 For more on direct and indirect character of information duties see Subsection 1.2.3 *Relevant legislation establishing more specific information duties*. Information requirements from art 4 of the Proposal for a Directive on online sales of goods and art 6 of the Proposal for a Directive on supply of digital content are of such indirect character.

228 *OECD Guidelines* Part Two, s III (Online Disclosures) indicate a long list of information requirements about the business (A), about the goods or services (B) and about the transaction itself (C).

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Even though one can find endless lists of information duties in the *acquis communautaire*, the directives rarely harmonise private law remedies for their breach, leaving this matter to Member States' internal law.[229] The remedies are to be regulated by the domestic law of Member States, within the limits of the principle of effectiveness.[230]

At first glance the lack of consistent approach of the European legislator towards remedies for breach of information duties established in such numerous quantities seems surprising, indeed it has raised criticism.[231] However, the policy reasons behind such choice of the EU regulator are understandable. Information duties influence the freedom of contract and the contract law generally up to a limited extent when Member States regulate the consequences of the breach of those duties separately within their internal legal systems. The duties imposed by various directives are supposed to guarantee that the consumer be provided with certain amount of information prior to entering an electronic contract, however the consequences of non-fulfilment of those duties vary both among Member States and among different requirements that were breached.[232] For instance, in some national systems breach of certain disclosure duties may result primarily in institutional consequences of administrative or competition law.[233] In such cases, consumer may or may not have

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229 This was already observed as a general trend more than ten years ago, see Thomas WILHELMSSON, 'Private Law Remedies against the Breach of Information Requirements of EC Law' in Reiner Schulze and others (eds), *Informationspflichten und Vertragsschluss im Acquis Communautaire* (Mohr Siebeck 2003) 247, who explains that '(...) remedies for breaches of information duties are often the responsibility of national law. Usually, the Directives only require Member States to ensure that adequate and effective means exist to ensure compliance.'; see also NORDHAUSEN SCHOLES (n 195) 223; Raquel GUILLÉN CATALÁN, 'La Directiva sobre los Derechos de los Consumidores: un Paso hacia Delante, pero Incompleto' (2012) 7801 Diario La Ley 1, 3ff.

230 WILHELMSSON and TWIGG-FLESNER (n 113) 466.

231 GUILLÉN CATALÁN, 'La Directiva sobre los Derechos de los Consumidores: un Paso hacia Delante, pero Incompleto' (n 229) 3ff.

232 NORDHAUSEN SCHOLES (n 195) 213.

233 In the case of breach of indirect disclosure duties resulting from the Unfair Commercial Practices Directive, in the UK for example only specific criminal law consequences were established in the legislation: The Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277 (UTR 2008) established in Part 3 offences of which traders engaging in unfair commercial practices are guilty. It was not until The Consumer Protection (Amendment) Regulations 2014, SI 2014/870 (Consumer Protection Amendment 2014) that private law specific redress for consumers who had been subjected to unfair commercial practices was granted (in addition to – or even instead of –

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redress rights under the general private law, which in turn also vary among Member States especially due to different approaches to contractual good faith and failure to disclose.[234]

Importance of the pre-contractual information from the perspective of its breach

One of the main arguments in favour of establishing information duties in consumer law directives is considering the pre-contractual information as a factor influencing consumer's decision whether to conclude the contract, ie helping them make rational market decision.[235] However, as Eidenmuller and others point out, information duties resulting from provisions of the *acquis communautaire* usually relate to peripheral issues, without significant influence on contracting decision.[236]

Therefore, it is also suggested that the major role of the information provided to consumers is its utility in a possible case of breach of contract.[237] Such consideration could change the angle at which we look at the information duty — it could be seen 'as a duty to reach consumers with disclosure',[238] aiming at giving them a potential source of information should they need it for reference at some point posterior to

general law action for misrepresentation). In what refers to Spanish law on the same matter, only administrative sanctions are established in specific legislation, see art 49.1 l) TRLDCU.

[234] See Subsection 1.2.2 *General duty to disclose and its breach in national private law.*

[235] LEONE (n 221) 322.

[236] EIDENMULLER (n 132) 1122-1123 analyse influence of the information provided to consumers according to the information requirements originating in European directives on the possibility to claim a remedy of avoiding or modifying the contract, if a breach of the information requirements occurred. The authors observe that a contract can be avoided if it 'would not have been concluded at all, or that it would have been concluded on different terms, had the information duty been fulfilled', which is difficult to prove in practice in what refers to the specific information duties applying to consumer contracts, as 'the relevance of the information required in terms of the duties established by the *acquis* is generally not sufficiently significant to support a conclusion that the contract would not have been concluded if the information had been provided.'; see also Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts* where criticism of information duties in consumer contracts is presented.

[237] LEONE (n 221) 322-323 calls this role of the information duties 'relatively unexplored', however indicating the findings of empirical studies which suggest that individuals are more likely to refer to written contract posterior to its conclusion in a case of an undesired event than before contracting.

[238] LUZAK (n 222) 1.

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contract formation. The requirements of providing the information to consumers in a written form or on a durable medium[239] is along these lines designed by the European legislator with the purpose of preserving the information for the parties. Furthermore, the character of some specific information duties, which provide the consumer with a reminder of their legal rights,[240] seems to confirm the post-contractual role of pre-contractual information. Wilhelmsson and Twigg-Flesner argue that this may even be the most important role of pre-contractual information requirements – 'to uphold informational clarity.'[241]

In the context of the remedies for breach of information duties, the post-contractual role of the information provided requires some clarification. From the perspective presented above, information duties are an instrument providing consumers with means of redress in the event of an unsatisfactory performance of their contract by the trader. In such situation a consumer can refer to the information provided to them previously to check if the breach of contract actually occurred, if the goods lacked conformity with the description provided, to look up their rights and remedies available or to search for trader's contact details. However what happens if the consumer's right which was breached by the trader relates to the information duties? In many instances consumers will not even realise there was a breach, as

239 As it is explained eg in the Recital (23) of the Directive on consumer rights: 'Durable media should enable the consumer to store the information for as long as it is necessary for him to protect his interests stemming from his relationship with the trader. Such media should include in particular paper, USB sticks, CD-ROMs, DVDs, memory cards or the hard disks of computers as well as e-mails.' This requirement is of a particular importance in electronic contracts, see also art 8.7 of the same Directive. For a definition of 'durable medium' see art 2(10) of the same Directive and the case *Content Services Ltd* paras 26ff where the Court rules that a hyperlink to a trader's website cannot constitute a durable medium. LEONE (n 221) 322 understands the Court's decision as a reinforcement of the role of the pre-contractual information at the stage of contract performance.

240 See eg Directive on consumer rights: art 6(h) 'where a right of withdrawal exists, the conditions, time limit and procedures for exercising that right in accordance with Article 11(1), as well as the model withdrawal form set out in Annex I(B);' or art 6(l) 'a reminder of the existence of a legal guarantee of conformity for goods.'; LEONE (n 221) 323 notes that '[t]hese rights, again, are likely to appear of little interest to the consumer when he enters the contract, but if something goes wrong it becomes important to know what actions can be taken against potential harm arising from it.'

241 WILHELMSSON, 'Private Law Remedies against the Breach of Information Requirements of EC Law' (n 229) 450: '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.'

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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?[242] Moreover, if the information provided to consumer was false, its utility in the case of breach is none.

It becomes a kind of a vicious circle very difficult to remedy. In certain cases, the European legislator tries to introduce remedies to such situations, as when the trader breaches the information duty on consumer's right of withdrawal: art 10(1) of the Directive on consumer rights states that '[i]f the trader has not provided the consumer with the information on the right of withdrawal as required (...), the withdrawal period shall expire 12 months from the end of the initial withdrawal period (...)'. It is also important that various types of remedies of different nature will be appropriate in relation to the breach of different kinds of information duties.[243] Nevertheless, an issue of unobservable breach, especially relevant in the context of credence goods, but also in what refers to experience qualities of goods when information was not provided, constitutes a pertinent question potentially leading to undesired consequences, even market failure, in the environment of online B2C transactions.

1.1.2.2 The model of consumer in the e-commerce law

Model of consumer justifying disclosure duties

At the beginnings of consumer protection policy within the EU, the then Community in its policy was focusing more on the internal market as such, and the consumer policy protection was only a sort of a 'byproduct' of internal market policy.[244] In the meantime, the Member States in their national policies and legal systems, have always been more concerned with guaranteeing consumers', ie citizens', well-being, which is understandable especially from the political point of view: consumers are

242 HERMALIN (n 138) 11ff.

243 EIDENMULLER (n 132) 1119ff.

244 TONNER and FANGEROW (n 76) 69.

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citizens with voting rights. Such tension between the two most important reasons for consumer protection — economics of the market on the one hand, and individuals' safety and prosperity on the other, still exists[245] and can be well illustrated by the model of consumer underlying the EU consumer law.

The neoclassical school in law and economics logic assumes that all individual market users will take rational decisions,[246] 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.[247] 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.[248] Assuming that consumers are rational market actors, the law only seeks to restore the contractual balance perturbed by the information asymmetries between them and traders, particularly through equipping consumers with pre-contractual information. This approach can be dubbed 'con-

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[245] Cf Social Justice in European Private Law (n 135); see also WEATHERILL, *EU Consumer Law and Policy* (n 73) 28.

[246] Richard A POSNER, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 Stanford Law Review 1551, 1553-1555, although Posner representing traditional economic analysis accepts that people may be rational in different ways, eg as individuals composed of different 'selves', the author nevertheless assumes that each of those 'selves' is rational (but competing with other 'selves' within the individual).

[247] Heico KERKMEESTER, 'Uniformity of European Contract Law: An Economic Study Between Logic and Fact' in Jan M Smits (ed), *The Need for a European Contract Law. Empirical and Legal Perspectives* (Europa Law Publishing 2005) 75; Klaus MATHIS and Ariel David STEFFEN, 'From Rational Choice to Behavioural Economics: Theoretical Foundations, Empirical Findings and Legal Implications' in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015) 32ff; nevertheless, one has to keep in mind there are various concepts of 'rationality', see: Russell B KOROBKIN and Thomas S ULEN, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051, 1060ff.

[248] HERMALIN (n 138) 40ff, the authors offer a vivid example of what rationality means in both contexts: '[f]or 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.'

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sumer empowerment.'[249]

It is based on the idea that confident consumers contribute to the development of the internal market.[250] As mentioned previously, the EU lawmaker has to invoke the internal market functioning as a justification for harmonisation of consumer contract law, and therefore consumer protection is mostly concerned with consumers participating in the market and boosting the economy.[251] A confident, alert, circumspect consumer[252] is a market player that will use the information provided effectively, exercising choice and regulating the market. It is the EU's consistent policy choice 'to require that the consumer be provided with more and better information so that he or she may then make a more carefully and fully informed choice.'[253] The Commission states along these lines:

> Empowering consumers means providing a robust framework of principles and tools that enable them to drive a smart, sustainable and inclusive economy. Empowered consumers who can rely on a robust framework ensuring their safety, information, education, rights, means of redress and enforcement, can actively participate in the market and make it work for them by exercising their power of choice and by having their rights properly enforced.[254]

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249 MAK, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (n 73) 245-255.

250 Thomas WILHELMSSON, 'The Abuse of the "Confident Consumer" as a Justification for EC Consumer Law' (2004) 27 Journal of Consumer Policy 317, 320.

251 See eg Hans-W MICKLITZ, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (2012) 35 Journal of Consumer Policy 283, 289, who bitterly observes '[t]he European Commission (...) discovered (...) the concept of the consumer as an important market actor, who played and still plays a central role with regard to the completion of the single European market. Yet this consumer, or rather the concept that stands behind this consumer, is no longer the weak, underprivileged consumer in need of protection. Such a concept would be dysfunctional for the realization of the single European market. With a weak consumer in need of protection, a single European market is not feasible. A single European market needs an active, informed and adroit consumer; in short, one that is a normative optimized, omnipotent consumer.'

252 Or '(...) the more affluent, well-educated middle-class consumers' as observes HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) 357.

253 WEATHERILL, *EU Consumer Law and Policy* (n 73) 310-311.

254 COM(2012) 225 final pt 1.

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Consumers in the eyes of the EU are consequently regarded as individuals who are not only able to absorb and understand the information provided, but also act upon it in a timely manner.[255] Although it has been noted that the Treaties do not explicitly recognise consumers as circumspect and robust individuals, the CJEU considers a paradigm consumer to be sufficiently savvy and well-informed,[256] as long as they are 'empowered' — provided with adequate tools such as information and means of redress.[257] The main goal of the consumer legislation is therefore to 'empower' consumers.[258]

Nevertheless, consumers in the EU are a definitely heterogenous group. Local consumer attitudes vary[259] but also within the same jurisdiction consumers do have different ability to process information -– as Wilhelmsson and Twigg-Flesner observe, these are 'affluent, well-educated middle-class consumers' who 'are more likely to take (...) information into account' when entering contracts with traders.[260] On the other end of the spectrum there are far more reticent consumers, not able or not willing to act 'in a manner that promotes efficiently functioning markets,'[261] who can be called 'passive' or 'vulnerable' consumers.[262]

[255] MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 78.

[256] VRIES (n 82) 236, in the context of *GB-INNO-BM*.

[257] REICH and MICKLITZ (n 77) 45.

[258] Cf Jo Swinson (then Consumer Minister) 'Biggest overhaul of consumer rights in a generation' Press Release 27 March 2015 as cited by Paula GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' Legal Studies, Record published 17.10.2016 1, 1.

[259] WEATHERILL, '19. Consumer Protection' (n 99) 241 gives an example of the UK: 'in the United Kingdom (...) markets work best when rivalry on the supply side is accompanied by consumer behaviour which is aggressively intolerant of failure to meet demand. (...)' however notes that it will not be true for all the markets, even within the EU.

[260] WILHELMSSON and TWIGG-FLESNER (n 113) 453.

[261] WEATHERILL, '19. Consumer Protection' (n 99) 241.

[262] Vulnerability *per se* does not necessarily translate into passivity in consumer's behaviour, however for the purposes of the present study it is important to distinguish between two groups of consumers -– those able not only to participate in the market, but also doing so according to EU legislator's assumptions, and those not participating so actively in transactions with traders. The latter group is definitely less active, but also more vulnerable, since they often cannot participate in the market as much as they would like to, because of physical, intellectual or economic disability, see Norbert REICH, 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Com-*

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It leads to a situation where despite invoking consumers' transactional weakness as a rationale for consumer protection, the European law tends to protect active consumers as opposed to passive ones.[263] The protection through contractual measures — including information duties -– favours consumers participating actively in the market, and actually willing to conclude those contracts with traders.[264] Passive consumers, on the other hand, do not benefit from such protective measures, as they do not enter contracts in the first place. Luzak points out that this situation goes even further — only actively claiming European consumer protection measures can bring about their operation,[265] similarly it is necessary to use the information available to be granted protection.[266]

However, that is not to say that European law in all its aspects recognises only alert, circumspect consumers. The informed consumer standard is the dominant one without a doubt but there are signs that other consumer models appear in the consumer policy.[267] For instance, in the context of the now-repealed Directive on distance contracts,[268] the CJEU seemed to have been willing to interpret substantive law on information provision in favour of passive consumers as well:

petition Law (Studies of the Oxford Institute of European and Comparative Law Bloomsbury Collections, Hart Publishing 2016).

[263] Although this is only true for substantive European consumer law -– procedural consumer law focuses on protecting passive consumers, see LUZAK (n 222) 7-8.

[264] WILHELMSSON and TWIGG-FLESNER (n 113) 453 note: 'if an information-based approach to regulation is (...) used in preference to more substantive intervention, such [disadvantaged] consumers would effectively remain without adequate protection.'

[265] LUZAK (n 222) 5 cites the CJEU judgment in the case C-32/12 *Duarte Hueros* [2013] ECLI:EU:C:2013:637 involving consumer's right to claim remedies under the Directive on the sale of consumer goods -– the Court stated that consumers must be able to actively claim the remedies in the case of non-conformity of goods in order to benefit from them.

[266] Ibid 5-6 Luzak explores the standard of an 'average' consumer in the CJEU's case law (case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-01923 and case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* [2014] ECLI:EU:C:2014:282 noting that 'a passive consumer who would not try to gather any information on the transaction she is about to conclude and who would not attempt to protect her own interests, would be unlikely to benefit from the protection of European consumer law.'

[267] REICH and MICKLITZ (n 77) 45.

[268] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 (Directive on distance contracts).

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> It should also be noted in that regard that, whereas the European Union legislature opted, in Article 4(1) of Directive 97/7, in the vast majority of the linguistic versions, for a neutral formulation, according to which the consumer is to be 'provided' with the relevant information, it chose, by contrast, a term with greater implications for the business in Article 5(1) of that directive, according to which the consumer must 'receive' confirmation of that information. That term expresses the idea that, regarding the confirmation of information to consumers, passive conduct by those consumers is enough.[269]

Luzak explains that '[t]he notions "receive" and "be given" refer to a process of transmission, in which it is unnecessary for the information's recipient to take any particular action to obtain this information, pursuant to the CJEU'.[270] However, it is unclear why consumers are expected to behave actively in the process of obtaining pre-contractual information, whilst in what refers to receiving confirmation of such information after the contract has been concluded their passivity is accepted by the European legislator.

In what refers to the Directive on consumer rights, the wording of Article 8(1), especially the phrase 'the trader shall (...) make that information available to the consumer in a way appropriate to the means of distance communication used' and Article 8(7), which refers to the neutral notion of 'providing' information: '[t]he trader shall provide the consumer with the confirmation of the contract concluded (...)' together with the guidance document concerning adoption of this Directive,[271] which demonstrates that the legislator was fully aware of the notions used,[272] suggest that again European legislator chose to restrict protective measures to active

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[269] *Content Services Ltd* para 35.

[270] LUZAK (n 222) 10.

[271] Commission, 'DG Justice guidance document concerning Directive 2011/83/EU' <http://ec.europa.eu/justice/consumer-marketing/files/crd_guidance_en.pdf> accessed 12 June 2014.

[272] Commission, 'DG Justice guidance document' 36: 'It should be noted here that Article 8(7) does not refer to "reception" of the confirmation by the consumer; instead it requires the trader to "provide" it. The meaning of the terms "provide" and "receive" in the context of the Distance Selling Directive 97/7/EC was considered by the Court of Justice in case C-49/11 *Content Services Ltd.* (...) The Court noted in its judgment that the notions of "given" and "received" are different from the term "provided", which are used in other provisions of the Directive and which the Court regarded as a "neutral" formulation.'

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consumers. The rationale of such policy choice would most definitely be the need to introduce more trader-friendly rules in order to protect EU internal market.[273]

Again, vulnerable consumers who do not reach the active and well-informed standard model stay outside of the focus of the European consumer protection. And although the concept of vulnerable consumers seems to have been included in the European consumer policy agenda[274] — recital (34) of the Directive on consumer rights states: '(...) [i]n providing (...) [pre-contractual] information, the trader should take into account the specific needs of consumers who are particularly vulnerable (...) in a way which the trader could reasonably be expected to foresee.'; this notion of vulnerable consumers stays nowhere to be found in specific information requirements resulting from the provisions of the Directive. Moreover, the Directive itself, further in the recital (34) makes a following reservation: '[h]owever, taking into account such specific needs should not lead to different levels of consumer protection.' No actual improvement of the level of protection for certain -– vulnerable -– consumers can be therefore deduced from these declarations. In addition, also the 'average consumer' concept refers to a person who is 'reasonably well informed and reasonably observant and circumspect'.[275] The case law developed in the context of the Unfair Commercial Practices Directive, which uses an 'average consumer' benchmark in assessing whether a given practice is unfair, also looks at a well-informed, circumspect consumer.[276] Nevertheless, as Nordhausen Scholes[277] rightly points out, the Unfair Commercial Practices Directive in its art 5(3) takes vulnerable consumers into account as a specific group, perhaps more prone to some unfair commercial

[273] LUZAK (n 222) 12.

[274] REICH and MICKLITZ (n 77) 47.

[275] Case C-358/01 *Commission v Spain* [2003] ECR I-13145 para 53; see also Hugh COLLINS, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 The Modern Law Review 89, 99-100.

[276] LUZAK (n 222) 5-6 notes in reference to the case *Mars GmbH*: 'the CJEU determined in its judgment (...) that reasonably circumspect consumers should realize that if there is a marking on the product's packaging saying that this product is now available in a bigger quantity for the same price as previously, the marking's size on the packaging does not need to correspond to the size of the increase. The court considers, therefore, the average consumer to be an active one, who would take her time to think this offer through and not merely assume that the marking on the packaging has a particular meaning.'

[277] NORDHAUSEN SCHOLES (n 195) 221.

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practices.[278] However, the vulnerability of consumers will affect the threshold for the misleading practice only if the practice is directed specifically at a clearly identifiable group of consumers with common vulnerability, if it is aimed at all consumers in general the needs of vulnerable consumers do not have to be considered by the traders.

The level of consumer protection which rests on information duties as its main instrument cannot be described as extremely high, since it requires active, confident consumers for its effectiveness.[279] The other end of the spectrum would be a paternalistic approach, where the law intervenes shifting the responsibility away from consumers offering them protection even when harm or loss incurred stemmed from their own actions.[280] In reality however, even though the empowered, confident consumer dominates European consumer protective measures, I find Luzak's conclusion that the 'European consumer law measures protect exclusively consumers who have used the information available to them'[281] too strict. There are various instances of substantive consumer protection in the European law;[282] contractual freedom in the B2C contracts is limited through provisions making unfair abusive terms in consumer contracts ineffective,[283] or through quality standards in relation to consumer goods.[284] Furthermore, the Commission itself acknowledges the existence of

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[278] Cf Stephen WEATHERILL, 'Empowerment is not the only Fruit' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition* (Studies of the Oxford Institute of European and Comparative Law Bloomsbury Collections, Hart Publishing 2016) 215-216.

[279] VRIES (n 82) 239.

[280] MAK, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (n 73) 254-255.

[281] LUZAK (n 222) 5.

[282] Cf Geraint HOWELLS, 'Europe's (Lack of) Vision on Consumer Protection: A Case of Rhetoric Hiding Substance?' in Dorota Leczykiewicz and Stephen Weatherill (eds), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law* (Studies of the Oxford Institute of European and Comparative Law Bloomsbury Collections, Hart Publishing 2016) 434ff.

[283] MAK, 'The Myth of the "Empowered Consumer": Lessons from Financial Literacy Studies' (n 73) 254-255.

[284] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12 (Directive on the sale of consumer goods).

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vulnerable consumers:

> (...) our population is ageing, markets are becoming increasingly complex and some people may neither have the opportunity nor the ability to master the digital environment. The question of accessibility is key to reaping the benefits of digital change in the physical, digital and economic senses. The current context may also exacerbate the disadvantaged situation of vulnerable consumers, such as people with disabilities or with reduced mobility, who face difficulties in accessing and understanding information and in finding appropriate products and services on the market.[285]

This 'inattentive (...) vulnerable consumer, the consumer who is bewildered by the complexity of modern markets and the consumer whose head spins when confronted by a mass of information that is meant to help him or her through the choices available',[286] although slowly, starts to be, if not included, than at least noticed by the European consumer policy. Nevertheless, the development of the Digital Single Market once again requires consumers using the Internet in an active way.[287] The digital environment, however, presents new challenges and new risks for consumers willing to participate in online shopping — one can easily imagine that even more vulnerable consumers have got used to traditional physical trade and it is the new digital reality, with endless possibilities of choice as well as fraud, that makes them weaker and more vulnerable than ever before.[288] There is no doubt that consumers

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[285] COM(2012) 225 final pt 1.

[286] WEATHERILL, *EU Consumer Law and Policy* (n 73) 310.

[287] MICKLITZ, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (n 251) 289; see also HOWELLS and WILHELMSSON (n 220) 381 pointing out to the fact that especially cross-boarder electronic transactions are probably more often concluded by those more active and stronger, hence the focus on empowering such group of consumers in the context of digital trans-boarder environment, an approach which however should not be extended to all consumers acting in all kinds of transactions.

[288] In the context of the confident consumer concept arising from the DCFR, MICKLITZ, 'The Expulsion of the Concept of Protection from the Consumer Law and the Return of Social Elements in the Civil Law: A Bittersweet Polemic' (n 251) 295 contemplates a following scenario referring to the future of the European consumer law: 'A "consumer," that is to say a consumer in terms of the definition of the DCFR, addresses "his" national law with the argument that he is not a consumer under the terms of this definition since he cannot fulfil the requirements the legal system places upon him concerning his intellectual capacity, he has no access to the internet, he cannot

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are a weaker party to a transaction when contracting with traders over the Internet, this weakness is common to both vulnerable and confident consumers.[289] Protection limited to imposing information duties on traders, however, can only empower, and remedy the weakness of the latter group. In conclusion, such shape of the consumer protection policy is not undesirable per se, as long as it forms part of a bigger picture where different types of consumers find protection in a fast-developing digital environment of the European Single Market.[290]

Consumers and traders — subjects of the B2C electronic transactions

Discussed above is the model of consumer used in the EU law, which constitutes a justification for establishing in such proliferation of information duties in the *acquis communautaire*. Now I am going to take a closer look at a definition -– or definitions — of consumers and traders, which in turn allow to determine who are the subjects of the B2C transactions and at whom the protection and obligations thus arising are actually aimed.[291] The importance of this issue is even greater in the digital environment, since the protection rules apply to consumers independently of the fact whether the trader knew that the other party they had been contracting with had been acting as a consumer.[292] Moreover, in what refers to the directives

operate the internet, he can neither read nor properly understand English and thus he is not able to carry out a price and information comparison. He is a human being who needs protection.'

[289] Due to structural reasons for consumer weakness, TONNER and FANGEROW (n 76) 69.

[290] WEATHERILL, 'Empowerment is not the only Fruit' (n 278) 221.

[291] It is crucial to determine if the parties to the contract actually are considered 'consumer' and 'trader', since the protection rules, and especially those on information duties apply only to B2C contracts, B2B (contracts between businesses) and C2C (contracts between consumers) do not offer such protection to any of the parties, cf GILLIES (n 7) 15ff; RIEFA (n 7) 18; MIGUEL ASENSIO (n 2) para 893.

[292] See eg Audiencia Provincial de Barcelona (Sección 15ª), Sentencia núm. 107/2012 de 13 de marzo (JUR 2012/169395), Fundamentos Jurídicos, Tercero.–4. where the judge was pondering a question whether a contract for sale of mobile phone lines was a consumer contract. A lady, whose qualification as consumer was disputed, owned a small business and admitted this fact at the moment of concluding a contract to the trader's agent. Nevertheless, the court notes that the fact that a contract falls within the scope of consumer contracts does not depend on the trader's knowledge of the purpose to which the good or service will be used by the other party. It is the actual purpose and subsequent use of the purchase that deterimines the party's qualification.

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operating under minimum harmonisation approach, domestic laws without a doubt may extend consumer definition to other parties that national legislation deems in the need of protection.[293] At first sight, the matters seem more complicated for the full harmonisation directives, such as the Directive on consumer rights. Nevertheless, the mentioned Directive clarifies its position in that aspect, moreover indicating that Member States are free to adopt measures which fall outside of the scope of the Directive.[294]

Fernández Arroyo points out to three main dimensions — criteria -– that are used to define consumers: the purpose of the purchase completed, the behaviour of the person and the type of the person.[295] In the area of contract law, the directives relevant to the B2C online transactions usually define the consumer through the purpose of their actions — it is any natural person acting for purposes which are outside of their trade, business, craft or profession.[296] Also European procedural law — and especially Rome I[297] and recast Brussels I[298] Regulations, applicable to cross-boarder transactions, at which boosting within the Digital Single Market the EU is aiming, define consumers in relation to the contract concluded, which 'can be regarded as being outside' consumer's 'trade or profession.'[299] The consumers are therefore defined in a negative way through purposes not relating to their pro-

293 REICH and MICKLITZ (n 77) 50.

294 See recital (13) and my comment in respect of that issue in footnote 327 below.

295 FERNÁNDEZ ARROYO (n 25) 149-150 lists those criteria in a different order, discussing first the type of the person, second, their behaviour and finally, the purpose of the purchase. My analysis however starts with the purpose of the purchase, as it is the main criterion used by the European legislator in the directives relative to the B2C online transactions being the focus of the present study.

296 In what refers to the European directives and other texts pertinent to this study, see eg: art 1.2(a) of the Directive on the sale of consumer goods; art 2(e) of the Directive on electronic commerce; art 2(a) of the Unfair Commercial Practices Directive; art 2(1) of the Directive on consumer rigths; see also art 2.4 of the Proposal for a Directive on supply of digital content and art 2(b) of the Proposal for a Directive on online sales of goods.

297 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I Regulation).

298 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1 (recast Brussels I Regulation).

299 art 6.1 Rome I Regulation and art 17.1 recast Brussels I Regulation.

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fessional activities, rather than through a positive list of qualities that a consumer possesses.[300] It is irrelevant whether the consumer is planing to use the product purchased themselves and whether the trader knows for what purpose the consumer is entering the contract with them.[301]

English law follows such pattern, defining consumers negatively. The new CRA 2015 refers to a consumer as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.'[302] In Spanish law, according to the art 3 of TRLDCU, consumer is understood as a natural person acting for purposes which are outside of their commercial activity, business, trade or profession.[303] This definition is completed through s III of the Explanatory Memorandum, which focuses on positive elements of the consumer concept — taking part in consumer transactions with private, personal aims, purchasing goods and services as an end user, without then re-using them, neither directly nor indirectly in production or re-selling or providing services to third parties.[304] The Explanatory Memorandum complements the provisions of the Act, it cannot restrict or limit its application in any way, it provides however indications for interpretation of the Act.[305]

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300 Margus KINGISEPP and Age VARV, 'The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive — a Significant Change of Paradigm?' (2011) XVIII Juridica International 44, 46.

301 However cf HONDIUS, 'The Notion of Consumer: European Union versus Member States' (n 73) 94-95.

302 S 2(3); cf also reg 2(1) UTR 2008; reg 4 of the Consumer Contracts Regulations 2013.

303 This definition in its current form was introduced by the Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias, aprobado por el Real Decreto Legislativo 1/2007, de 16 de noviembre. Boletín Oficial del Estado, 28 de marzo de 2014, núm. 76, p. 26967 (Ley 3/2014 de 27 de marzo) transposing the Directive on consumer rights into Spanish legal system. The provision previously in force requirered a consumer to be acting for purposes outside of a commercial or professional activity -– the indefiinte article 'a' had been used in the definition, which could have implied a more restrictive concept of a consumer, acting not only outside of their professional activity, but outside any (possible) professional activity. This was nevertheless clarified through the transposition of the Directive and introduction of the new definition.

304 It is interesting to note, however, that the Explanatory Memorandum in its s III repeats also the negative consumer definition, this time using the indefinite article 'a' instead of possessive 'their' when denoting commercial or professional activity, cf footnote 303 above.

305 Even more so as the clarification in the Explanatory Memorandum was inspired by the previous

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As with the model of consumer, the definition of the protected party to the transaction is an axiological issue, closely linked to the rationale of the protection. The consumers are in a weaker position *vis-à-vis* traders because of the private purpose of the transaction. It is the transaction therefore that determines the qualification of the parties in each case. As CJEU reminds, 'one and the same person can act as a consumer in certain transactions and as a seller or supplier in others.'[306] The concept of consumer is construed objectively and 'is distinct from the concrete knowledge the person in question may have, or from the information that person actually has.'[307] Such understanding of consumer logically leads to protecting individuals who are professionals, solicitors or sole traders for example, but in a particular transaction are acting for private purposes not related to their professional activity.[308] On the other hand, such objective construction backfires — the European texts in principle exclude the application of the protective measures to inexperienced or weaker parties,[309] who in spite of purchasing products in the course of their profession, know very little or nothing about the product being the object of the transaction.[310] It is even more important in the context of the e-commerce, as many activities that one can set up in the Internet, such as blogging for example, may start to generate income -– when such an individual can be regarded as a 'professional' or 'trader' as

consumer concept established in the previous Ley General para la Defensa de los Consumidores y Usuarios del 1984, and was a starting point for a great quantity of court decisions and academic articles. The legal tradition thus created was therefore incorporated in the new law and combined with the European, negative definition, see Sergio CÁMARA LAPUENTE, 'El Concepto Legal de "Consumidor" en el Derecho Privado Europeo y en el Derecho Español: Aspectos Controvertidos o no Resueltos' (2011) 3 Cuadernos de Derecho Transnacional 84, 96.

[306] Case C-110/14 *Horațiu Ovidiu Costea v SC Volksbank România SA* [2015] ECLI:EU:C:2015:538, para 20.

[307] *Horațiu Ovidiu Costea* para 21.

[308] Ibid; see also eg SAP Barcelona núm. 107/2012 de 13 de marzo.

[309] See however eg ROPPO (n 121) and HONDIUS, 'The Notion of Consumer: European Union versus Member States' (n 73) arguing that some European measures aim at protecting weaker parties to the contract regardless of their qualification as consumers or traders.

[310] For instance a doctor buying an ultrasound device for their private practice; a shopkeeper having a security CCTV installed etc; see STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72) 376 who openly asks: '[s]hould small businesses benefit from the same protection as private consumers?'

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opposed to 'consumer' needing protection?[311] Despite academic criticism,[312] as of now, the definition of consumer needs to be interpreted narrowly as it constitutes an exception to the general contract law rules.

Many contracts concluded in the course of normal life serve both personal and professional purposes -– these are so called mixed or dual purpose contracts.[313] For instance, the Directive on consumer rights openly qualifies the definition of consumer in the recital (17):

> The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer.

This consideration allows to add some flexibility to the definition established in the provisions of the Directive.[314] The problem is that the wording used by the Directive: 'so limited as not to be predominant in the overall context of the contract' is rather unclear. Is it the time, intensity of use or profits obtained from the product that are taken into account? How much is 'not predominant' – just below 50%? The CJEU in the *Gruber* case observed:

> it is already clearly apparent from the purpose of Articles 13 to 15 of the Brussels Convention, namely to properly protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be

[311] RIEFA (n 7) 17-18 refers to 'hybrid consumers' and 'amateur entrepreneurs'; see also MIGUEL ASENSIO (n 2) para 893.

[312] Eg GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 633 notes that often 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 also LUZAK (n 222) 3.

[313] The issue which has always been of interest in the field of consumer protection, see eg STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72) 376.

[314] Cf FERNÁNDEZ ARROYO (n 25) 150 who considers the very criterion of the purpose of the purchase to be allowing for a more 'flexible appreciation of the notional consumer.'

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> relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety[315]

Although this decision concerned Brussels Convention[316] which defined consumers, similarly to recast Brussels I Regulation, as persons concluding contracts 'for a purpose which can be regarded as being outside [their] trade or profession' and did not contain specific rules for mixed contracts, contrary to the Directive on consumer rights and its recital (17), it can be clearly seen that the Court expects the professional purpose of the contract to be importantly restricted, if not -– marginal, in relation to the contract as a whole. Nevertheless, it is unclear whether this judgment can be applicable to other consumer definitions originating in the *aquis communautaire*[317] and if the rules on mixed — dual purpose -– contracts are to be fully recognised by the EU law.[318]

In what refers to the national law, English legislation seems to embrace the concept of the dual purpose contracts. Both CRA 2015 and the Consumer Contracts Regulations 2013 refer to consumer's purpose being 'wholly or mainly outside that individual's trade, business, craft or profession'. In the Explanatory Notes to the CRA 2015 we can read that:

> This means, for example, that a person who buys a kettle for their home,

315 Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00439 para 39.

316 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters. Consolidated version [1972] OJ L299/32 (Brussels Convention).

317 Hans SCHULTE-NOLKE, 'Scope and Role of the Horizontal Directive and its Relationship to the CFR' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009) 37; CÁMARA LAPUENTE, 'El Concepto Legal de "Consumidor" en el Derecho Privado Europeo y en el Derecho Español: Aspectos Controvertidos o no Resueltos' (n 305) 113 argues in favour of the application of this decision to the European consumer substantive law as well.

318 Also DCFR extends consumer definition into the area of mixed contracts: art I. – 1:105 defines a 'consumer' as 'any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession.'

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> works from home one day a week and uses it on the days when working from home would still be a consumer. Conversely a sole trader that operates from a private dwelling who buys a printer of which 95% of the use is for the purposes of the business, is not likely to be held to be a consumer.[319]

Such clarification, however, can be of very little assistance in determining the subjects to whom the Act applies, since one can easily think of other less clear examples.[320]

The position of the Spanish law, on the other hand, is even more unclear. The legislation does not refer to purposes 'mainly' or 'partially' outside one's profession and courts' decisions not only are very inconsistent, but also the subject of consumer's concept and mixed contracts was mainly treated *obiter dicta* by the judges, moreover under the old Act.[321] At the time of implementation of the Directive on consumer rights, Spanish legislator had an opportunity to clarify the situation, including a similar construction to that used by the Directive and English legislation, however this opportunity was missed. Before the adoption of the Directive on consumer rights and its implementation into the Spanish system Cámara Lapuente argued that consumer definition from the art 3 TRLDCU had to be interpreted restrictively, in accordance with the European law, ie CJEU case law, and especially the *Gruber* case.[322] However now, since the Directive on consumer rights has incorporated the concept of mixed contracts in its recitals, it would probably be more appropriate to follow its line and interpret the consumer concept more openly, including situations where the purpose of the transaction was mainly private. Now, it is up to the courts to establish more specific criteria for determining how much time or use is 'mainly' or 'principally' outside of professional activity.

Another criterion used in defining consumers is the distinction between natural

[319] Explanatory note 36

[320] Edwin PEEL, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) 1288; GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' (n 258) 6.

[321] See CÁMARA LAPUENTE, 'El Concepto Legal de "Consumidor" en el Derecho Privado Europeo y en el Derecho Español: Aspectos Controvertidos o no Resueltos' (n 305) 111ff and the judgments and the local legislation that the author refers to.

[322] Ibid 113.

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and legal persons for the purposes of applying protective consumer law provisions.[323] Generally speaking, the trend in the European law is that such matters are left to the discretion of Member States. And so, for example, recast Brussels I Regulations does not refer to the type of the person considered to be a consumer,[324] however it has to be noted that Rome I Regulation limits the application of specific provisions relating to consumer contracts to consumers being natural persons.[325] In what refers to to Directives, domestic legal system can extend protection thus granted to other persons deemed worthy of protection, especially in what refers to minimum harmonisation directives.[326] The Directive on consumer rights, which is characterised by a targeted full harmonisation approach, expressly notes of the possibility of expanding its application to legal persons in the recital (13): '(...) Member States may decide to extend the application of the rules of this Directive to legal persons or to natural persons who are not consumers within the meaning of this Directive, such as non-governmental organisations, start-ups or small and medium-sized enterprises.'[327]

Spanish law extends the consumer protection to legal persons and entities without

[323] FERNÁNDEZ ARROYO (n 25) 149.

[324] Art 17.1 recast Brussels I Regulation.

[325] Art 6.1 Rome I Regulation.

[326] REICH and MICKLITZ (n 77) 50.

[327] The recital (13) demonstrates the inherent weakness of the full harmonisation approach. It starts with the following words: 'Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive. For instance, Member States may decide to extend the application of the rules of this Directive to legal persons (...).' Full harmonisation was designed as a remedy against the legal fragmentation of the consumer protection laws among Member States, the fragmentation being one of the factors if not preventing, then at least making it more difficult for traders to engage in the cross-boarder (especially online) transactions with consumers. Nevertheless, such approach of the Directive, allowing Member States to consider a different range of subjects as consumers, actually contributes to the legal fragmentation. This solution reveals how weak and unstable the foundations for the full harmonisation are; nonetheless the political reasons for which the European legislator decided this way are understandable — various EU Member States considered legal persons under certain circumstances to be consumers and such drastic restriction of the protection granted to them was not acceptable, see KINGISEPP and VARV (n 300) 45.

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legal personality,[328] the fact which the Spanish legislator describes as respecting the specific trait of the Spanish legal order,[329] since already the 1984 Ley General para la Defensa de los Consumidores y Usuarios recognised legal persons as consumers. It seems however that only legal persons which are acting not-for-profit can be considered consumers,[330] and only where the purpose of the transaction stays private — outside of the scope of any professional or commercial activity the person or entity may be carrying out.

Under English law, on the other hand, only natural persons are considered consumers.[331] Both the CRA 2015 and the Consumer Contracts Regulations 2013 use the term 'individual.'[332] The Explanatory Notes to the CRA 2015 insist that the 'the Act's protection for consumers does not apply to small businesses or legally incorporated organisations (eg companies formed by groups of residents).'[333] Such persons or entities have to look to other legislation or common law for protection.

The third characteristic of consumers is their passive economic behaviour. This is the criterion used by the Explanatory Memorandum to the TRLDCU: the consumer being the end user, purchasing goods and services without then re-using them, neither directly nor indirectly in production or re-selling or providing services to third parties. From the economic point of view, it is not the purpose of the transaction that really matters, but the position of the consumer in the marketplace – as Reich and Micklitz put it, a consumer is a passive market citizen, '*homo oeconomicus passivus*' who enters transactions to satisfy their needs without producing

[328] Although previous wording of the art 3 TRLDCU did not include entities without legal personality, there had already been a proliferation of judgments including such entities, especially neighbours committees (*comunidades de propietarios*), see eg Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 152/2014 de 11 de marzo (RJ 2014/2114).

[329] S III Explanatory Memorandum of the TRLDCU.

[330] See CÁMARA LAPUENTE, 'El Concepto Legal de "Consumidor" en el Derecho Privado Europeo y en el Derecho Español: Aspectos Controvertidos o no Resueltos' (n 305) 99-101 who discusses the issue under the previous wording of the art 3 TRLDCU, ie before the adoption of Ley 3/2014, nevertheless the arguments used are still relevant.

[331] PEEL (n 320) 1288; GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' (n 258) 5.

[332] S 2(3) CRA 2015 and reg 4 Consumer Contracts Regulations 2013.

[333] Note 36.

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the product or service themselves.[334] It is this passive position of the consumers that lies at the heart of consumer protection: consumers are weaker economically and less informed because they intervene in markets occasionally in order to satisfy their private, individual needs.

Furthermore, the passivity of consumers can be also understood in a more limited sense — the consumers as individuals who are targeted by marketing and advertising campaigns but are not participating themselves in active pursuit or comparison of available offers.[335] Although, as already discussed above, the contractual protection of consumers is rather directed at active market participants, there are rules eg on marketing, advertising or product safety that often apply irrespectively of the formal qualification as consumer of the addressee targeted by the trader.[336] Also procedural European consumer law tends to protect passive consumers granting them a possibility to raise the claim in their own jurisdiction under the law applicable to their country of domicile, provided it was the trader who actively targeted them in their country of domicile, and not *vice versa*.[337]

The other party of the B2C contract is the business person, also referred to as 'trader', 'seller', 'supplier' or 'professional'.[338] When contracting with consumers, all professional parties: not only big corporations, but also SME and even sole traders are treated as businesses.[339] The European law does not provide for any intermediate

[334] REICH and MICKLITZ (n 77) 53.

[335] FERNÁNDEZ ARROYO (n 25) 149; LUZAK (n 222) 3ff; see also CÁMARA LAPUENTE, 'El Concepto Legal de "Consumidor" en el Derecho Privado Europeo y en el Derecho Español: Aspectos Controvertidos o no Resueltos' (n 305) 113-114, who discusses the extreme case in which consumer is so active, as to actually sell goods or provide services to a professional trader — the so called consumer-to-business, C2B, contracts. It seems that if the activity in question is not a source of income and is not a professional one for the individual, then they might be considered as a consumer.

[336] See STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72) 376; KINGISEPP and VARV (n 300) 45; TONNER and FANGEROW (n 76) 73-74.

[337] Recast Brussels I Regulation; LUZAK (n 222) 7.

[338] cf Directive on electronic commerce which applies to a 'service provider' and an 'established service provider' in its arts 2(b) and 2(c).

[339] HESSELINK, 'Towards a Sharp Distinction between B2B and B2C? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive' (n 108) 32.

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category between consumer — B2C -– contracts and all the other contracts in which special protection is not envisaged.[340] The Directive on consumer rights defines a 'trader' as 'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession (...).'[341] Many European legal texts, like directives covering specific type of contracts, will however use a more specific concept of traders, eg in the Directive on the sale of consumer goods the consumer's counterpart is named 'seller.'[342] It seems that the main characteristic of the business party in the B2C contract is their activity within their area of expertise, aiming at commercial profit;[343] activity which reaches a certain level of organisation, such as for example a website directed at consumers in the context of the e-commerce.[344]

In the English law trader is understood as a 'a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf,'[345] a definition which includes individual persons as well as legal persons — companies, charities and public bodies.[346] Similarly, the Spanish law considers a 'business'[347] to

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340 Ibid, nevertheless it has to be noted that, as already observed, some directives protect the 'user' — as it is the case of the Directive 2015/2302/EU of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1 (Package Travel Directive) where a 'traveller' contracting a 'trader' is given protection. The concept of 'trader' however is very similar in the majority of European acts.

341 Art 2(2); see similar definitions in Unfair Commercial Practices Directive art 2(b).

342 Art 1.2(b), see also art 1.2(c) defining a 'producer'; see also art 2(c) of the Proposal for a Directive on online sale of goods.

343 Cf however DCFR art I. – 1:105(2) defining a 'business' noting that it 'means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person's self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity.'

344 Cf art 2(7) of the Directive on consumer rights referring to an 'organised distance sales scheme.'

345 S 2(2) CRA 2015.

346 PEEL (n 320) 1288.

347 Art 4 TRLDCU refers to a 'business' (*empresario*) while the Spanish *Código de Comercio* (Real decreto de 22 de agosto de 1885 por el que se publica el Código de Comercio, Boletín Oficial del

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be a natural or legal person, of private or public law, acting personally or through another person acting in their name or following their instructions, for purposes relating to their trade, business, craft or profession.[348]

1.1.2.3 Issues relative to information duties in consumer contracts

Party autonomy, freedom of contract and the information duties

Party autonomy, meaning 'freedom of contract, or self-arrangement of legal relations by individuals according to their respective will' is one of the fundamental concepts for both national contract laws of Member States and European private law.[349] Neoclassical trend in economic analysis of law points to the party autonomy, understood as rational individualism, as a tool allowing to identify the optimal allocation of resources in the market, based on the contract being perfect means of efficient resource allocation.[350] In the discussion concerning the place of information duties within the contract law a perspective on information duties that is adopted by some authors considers mandated disclosure as an important and unnecessary intervention into the freedom of contract.[351] It is true that European rules of consumer contract law operate in great majority with mandatory rules restrictive to party autonomy and individual freedom. This *status quo* is criticised from the neoclassical economics standpoint as stemming from European Commission's 'misguided' assumption that to reach legal harmonisation among Member States together with high level of consumer protection, the contract law rules have to be mandatory and not default.[352]

Estado, 16 de octubre de 1885, núm. 289) in its art 1 uses a concept of a 'trader' (*comerciante*), both words denote the same type of a subject, leading to a conclusion that they can be treated as synonyms.

[348] Art 4 TRLDCU.

[349] GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 140) 269.

[350] EIDENMULLER (n 132) 1080.

[351] cf WILHELMSSON and TWIGG-FLESNER (n 113) 449.

[352] EIDENMULLER (n 132) 1080ff; however cf SILBER (n 26) 29 expressing an opposite opinion: '(...) it would be a category mistake to assert based on the obsolescence of consumer protection laws that consumer protection laws themselves are an anachronism (...). Neither the Internet nor

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From this point of view, the legal system as such should be mainly concerned with restoring market balance, eg through competition law measures[353] or in the area of contract law through setting default rules (from which parties can easily derogate) in order to lower the transaction costs for them.[354] Information duties, although arguably less intrusive in the contractual balance than substantive mandatory provisions, still influence freedom of contract and parties' autonomy. In more individualistic systems, as in the English law, they can be therefore difficult to accept.[355] Moreover, restriction of freedom of contract through information duties can bring about a potential undesired effect of welfare loss as a consequence of a disruption of the so-called 'learning process'. In this process 'parties discover the best form of contracting fitting their purposes in the light of their individual preferences,' and the freedom of contract constitutes a necessary condition for the learning process to take place.[356]

Nevertheless, party autonomy and freedom of contract ceased to be the only principles governing the law of contract, especially in its current form in Europe -– the paradigm of protecting a weaker party has gained its place within the private law provisions.[357] The weaker party protection, and especially consumer protection,

other avenues of electronic commerce have narrowed the imbalance between sellers and buyers; purely private and voluntary responses to consumer protection will continue to be inadequate. In fundamental respects, the future of consumer protection should resemble the best aspects of its interventionist past.'

353 PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' (n 132) 1881; GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' (n 132).

354 EIDENMULLER (n 132) 1080.

355 GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 623 confirms: 'English law continues to adhere to freedom of contract principles. Disclosure is perceived as unduly interventionist.'

356 Christian KIRCHNER, 'Justifying Limits to Party Autonomy – Mainly Consumer Protection' in Stefan Grundmann and others (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 170-171.

357 Ewoud HONDIUS, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (2004) 27 Journal of Consumer Policy 245, 246, Hondius further analyses disadvantages of the new paradigm of the weak party protection, noting that one of them is the difficulty in defining the weaker party to the contract. As analysed above (Subsection 1.1.2.2 *The model of consumer in the e-commerce law*) this problem is being addressed within the consumer law through a generic concept of consumers, subjects of B2C transactions, worthy of protective rules; see also

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has become one of the main limits to the party autonomy principle in the European law in its current shape.[358] It seems to be widely accepted, even by authors representing neoclassical approach to law and economics, that an unrestricted rule of party autonomy would not be beneficial in the internal market as 'it [would] generate market failure; it [would] generate inequity.'[359] The justification for consumer protection through information is then twofold: on the one hand, the market functioning is being improved through effective B2C contracting, on the other -– protection of the weaker parties is improved.[360] Logically, both considerations allow for certain restriction of freedom of contract and party autonomy through establishment of information duties. Nevertheless, the former standpoint, emphasising the market role of information duties, calls for limiting public intervention into the law of contract to the minimum, as already mentioned.[361] It is argued that mandatory rules in con-

REICH and MICKLITZ (n 77) 49-50 noting that from the CJEU case law can be deduced 'a general approach to the objectives of EU consumer law (...) framing party autonomy in B2C transactions in favour of the consumer as the typically weaker party in relation to the business or professional partner who is seen to be regularly in a stronger bargaining position.'; cf Notes to art 1:102 PECL: '[i]n modern law considerations of policy, notably the need to protect the weaker party to a contract, have led to a restriction of contractual freedom by statute.' in Ole Lando and Hugh Beale (eds), Principles of European Contract Law, Parts I and II Combined and Revised (The Hague 2000) and Ole Lando and others (eds), Principles of European Contract Law, Part III (The Hague 2003).

[358] GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 140) 271 points out to three types of limits to the party autonomy principle, consumer protection being one of them and other being general clauses and regulation restraining party autonomy for common good, eg stability of the currency which may justify prohibition of index clauses.

[359] WEATHERILL, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' (n 189) 173; see also analysis presented by BROWNSWORD (n 90) 94ff and especially a consideration concerning e-Bay: without contract law framework e-Bay would be able to exist and function, however in a different, probably much more expensive shape, as it would be e-Bay's sole responsibility to guarantee that the contracts would be honoured.

[360] Thomas WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (2006) 7 ERA Forum Journal of the Academy of European Law 16, 17.

[361] Cf PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' (n 132) 1881 and GÓMEZ POMAR, 'EC Consumer Protection Law and EC Competition Law: How related are they? A Law and Economics Perspective' (n 132) who argue that an intervention through competition law restoring correct market functioning should have priority before establishing mandatory contract law provisions; HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) 353; see also BEN-SHAHAR, 'One-Way Contracts: Consumer Protection without Law' (n 163) 223-224 who questions the very necessity and effectiveness of legal intervention, even in the case of market failures.

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tract law, which by definition operates rather in the sphere of free consent, have to be justified as a remedy to very specific market issues.[362] Without a doubt, such justification for establishing mandatory rules in contract law should not be solely based on the fact that one of the contracting parties happens to be a consumer.[363]

The discourse presenting information duties in opposition to substantive mandatory regulation is quite common.[364] Along these lines, information duties are often presented as an intervention into the party autonomy and freedom of contract of a lesser extent, if compared with substantive mandatory regulation, such as in the law relative to unfair contract terms.[365] Mandatory substantive rules are a case of a much more important interference with the parties' agreement and are believed to reduce variety of offers available in the market. Information duties, on the other hand, although mandatory, enable the parties to contract freely in substance, thus preserving the full range of varieties in the market.[366] According to such point of view, mandatory substantive rules can only be justified if an information disclosure rule cannot satisfactorily prevent market failure.[367] Such protection through man-

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362 EIDENMULLER (n 132) 1082-1083 indicate following objectives as pertinent from the point of view of economics: '– safeguarding rational decision-making by the parties in the course of contract formation; – internalizing external costs and preventing the externalization of costs in the first place; – providing incentives for the resolution of informational asymmetries; – avoidance of excessive signalling; – banning or mitigating monopolies and other distortions of competition.'

363 EIDENMULLER (n 132) 1079ff; as discussed above, the European legislator justifies adoption of consumer protection measures as a necessary improvement to the functioning of the internal market; however cf GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 633 who notes that often 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.'

364 WILHELMSSON and TWIGG-FLESNER (n 113) 449.

365 See eg GRUNDMANN (n 143); Stefan GRUNDMANN, 'European Contract Law(s) of What Colour?' (2005) 1 European Review of Contract Law 184, 194ff;LURGER (n 92); Josep Maria BECH SERRAT, *Selling Tourism Services at a Distance: An Analysis of the EU Consumer Acquis* (Springer 2012) 51.

366 WEATHERILL, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' (n 189) 181.

367 See *Cassis de Dijon* case – Case 120/78, *Cassis de Dijon*, [1979] ECR 649 para 13, where the Court observed that establishing information duties is to be preferred to a substantive mandatory rules: '[t]his line of argument cannot be taken so far as to regard the mandatory fixing of minumum alcohol contents [ie, the substantive mandatory rule] as being an essential guarantee of the fairness of commercial transactions, since it is a simple matter to ensure that suitable information

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datory rules, however, needs to be viewed more as a remedy to a concrete market failure, rather than as a general acceptance of restraining party autonomy in the name of generic consumers' weakness.[368] Mandated disclosure as consumer protection measure reduces the roles of legislative intervention to strengthening of the party autonomy and freedom of contract, nevertheless one has to bear in mind it is based on a certain model of an active, savvy and circumspect consumer, as already discussed.[369]

In conclusion, in its present state, the European contract law imposes certain restrictions on party autonomy, such as mandated disclosure, right of withdrawal or control of fairness of contractual terms. Moreover, current consumer protection rules within the European internal market are mandatory, ie parties to the contract cannot exclude their application through an agreement.[370] Information duties are one of the most important, if not the most important, mandatory protective rules in the current European contract law. It is also accepted that an unlimited freedom of contract may not be the best legislative solution,[371] moreover its restrictions can be viewed as measures improving party autonomy through allowing the other party — the consumer — to participate in a more informed, efficient and safe manner in the market.[372] As Weatherill puts it:

> One scarcely needs to mention the huge and sophisticated literature that shows how preserving freedom of contract by blocking State intervention

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is conveyed to the purchaser [ie, the information disclosure rule].'; GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (n 140) 280-282; see also RISCHKOWSKY and DORING (n 132) 290 who observe: '[f]rom the perspective of Economics of Information (...) Governmental intervention is only justified if market mechanisms fail.'

368 EIDENMULLER (n 132) 1082

369 See Subsection 1.1.2.2 *The model of consumer in the e-commerce law* above.

370 Especially because in the B2C standard form contracts it would probably become a common practice to exclude the protection rules, which in turn could lead to a 'market for lemons' type of situation and consequently market failure, cf RISCHKOWSKY and DORING (n 132) 306ff.

371 Filomena CHIRICO and others, 'A Giant with Feet of Clay: A First Law and Economics Analysis of the Draft Common Frame of Reference (DCFR)' [2010] TILEC Discussion Paper 2010-025 <http://ssrn.com/abstract=1628558> acessed 27 April 2016, 3.

372 WEATHERILL, 'Justifying Limits to Party Autonomy in the Internal Market – EC Legislation in the Field of Consumer Protection' (n 189) 180, who notes that '[o]ne party's restricted autonomy (that of the trader) is the other — the consumer's — enhanced autonomy'.

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> in, for example, cases of sale and supply to consumers (...) consolidates and strengthens existing imbalances in a way that makes a mockery of any notion of true freedom in practice.[373]

Controversies surrounding information duties

There is a growing criticism towards information duties as main means of consumer protection within the EU.[374] The list of concerns regarding the proliferation of information requirements is extensive, the main being the effectiveness of mandated disclosure in consumer protection. The issue also raises a considerable amount of rather emotionally expressed opinions, for instance Carrasco Perera considers the lists of information duties to be a cancer in the body of consumer law.[375]

Information duties are being criticised from various angles; first of all authors representing neoclassical school of economic analysis of law regard information duties as an unnecessary interference with contractual freedom, as noted above. Although 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,[376] 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.[377] It should be noted that markets can autoregulate up to certain extent,

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[373] WEATHERILL, 'Case Note: Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract". Judgment of the Court of 18 July 2013: Case C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*' (n 173) 172.

[374] Cf eg CÁMARA LAPUENTE and TERRYN (n 196) para 3.43 (EU); LUZAK (n 222) 1; HOWELLS and WILHELMSSON (n 220) 380-381.

[375] CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 46) 314; see also WEATHERILL, *EU Consumer Law and Policy* (n 73) 316 who calls consumer protection through information duties 'a sham.'

[376] WEATHERILL, *EU Consumer Law and Policy* (n 73) 92.

[377] The classical and neoclassical trends in economics of contract law oppose any intervention in the market, see Alan SCHWARTZ and Louis L WILDE, 'Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis' (1978) 127 University of Pennsylvania Law Review 630, 631; Richard A EPSTEIN, 'The Neoclassical Economics of Consumer Contracts' (2007) 92 Minnesota Law Review 803, 804ff.

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since traders do have economic incentives to share information with consumers — sellers would want to disclose the quality features of their products and brands so that consumers could distinguish them from their competitors. Voluntary warranties granted by manufacturers can constitute an example of such autoregulation.[378]

Information requirements on the other hand, constitute a significant, yet not always necessary, intervention into the contractual balance — even though they are designed to reduce transaction costs of a supposedly weaker, less informed party, in our case -– a consumer, they will almost certainly increase the costs for the other party.[379] For rational parties to contract, the transaction costs must be smaller than the benefit expected from the contractual relationship.[380] In what refers to mandatory rules governing the contract, the test is whether rational parties would want to apply those rules.[381] The traders try to compensate the costs resulting from mandatory rules through an increase of the prices of their products, so consumers end up paying for their own protection.[382] The risk of putting too much burden on traders, and this is especially true for SME, is also that they could decide to remove 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.[383] Moreover, often the market itself creates relevant incentives for traders to transfer the information to their contracting parties. In such situations, it is argued, information duties may cause more harm than good, as any excessive duty contributes to

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378 RISCHKOWSKY and DORING (n 132) 289.

379 Goods and services are cheaper when there are fewer mandatory duties imposed on traders, see eg Hugh COLLINS, 'Good faith in European Contract Law' (1994) 14 Oxford Journal of Legal Studies 229, 231-232.

380 Carl J DAHLMAN, 'The Problem of Externality' (1979) 22 Journal of Law and Economics 141, 141-142.

381 EIDENMULLER (n 132) 1088-1089.

382 Ibid; however HONDIUS, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (n 357) 247 points to empirical research suggesting that the rise of prices of the products offered by traders is very low, almost negligible.

383 GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 636-637.

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eventual raise of transaction costs for both parties.[384]

Another line of criticism towards information duties in the B2C contracts originates in the behavioural trend in economic analysis of law. Behavioural law and economics, basing its findings on empirical research, questions the premise of rationality, arguing that consumers do not always behave rationally.[385] As already mentioned above,[386] rationality of market players is viewed as having two constituents: the intention of becoming better off complemented by the ability of correct evaluation of such outcome.[387] It is suggested that consumers are not always rational in the second sense, and that individuals often make mistakes in deciding whether a certain contract is profitable for them or not.[388] Consumers that contract with traders on disadvantageous terms believing that they are profitable are rational in the sense of wanting to improve their situation, but are naïve in what refers to evaluating correctly the prospects of such a positive outcome. In what refers to information duties, they will be of little assistance to irrational consumers — information paradigm assumes rationality as its basic premise.

Consumers whose rationality is bounded, even when provided with information,

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384 EIDENMULLER (n 132) 1115.

385 For more on bounded rationality see: KERKMEESTER (n 247) 75; HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) 358ff; Fernando GÓMEZ POMAR, 'The Empirical Missing Links in the Draft Common Frame of Reference' in Hans-W Micklitz and Fabrizio Cafaggi (eds), *European Private Law after the Common Frame of Reference* (Edward Elgar Publishing 2010) 104ff; cf also Martijn W HESSELINK, 'CFR & Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of Reference for European Private Law - what Roles for Fairness and Social Justice?' [2008] Centre for the Study of European Contract Law Working Paper Series No. 2008/08 <http://ssrn.com/abstract=1270575> accessed 15 May 2016, 20, demonstrating that an assumption on consumers' rationality is unfounded: '(...) the economic analysis of law (...) as is well known, is based on controversial normative assumptions (the utilitarian idea that the law should aim mainly or even exclusively at welfare maximisation) and needs empirical data (the "preferences" of individuals and their relative importance) that are simply not available (and therefore are very often substituted with the normatively biased empirical assumption that most of the time individuals are actually rationally pursuing the increase of their own wealth).

386 Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

387 HERMALIN (n 138) 40ff.

388 Oren BAR-GILL, 'The Behavioral Economics of Consumer Contracts' (2007) 92 Minnesota Law Review 749, 749.

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will not be able to exercise choice in a desired manner.[389] Providing pre-contractual information cannot really improve consumers' rationality, as even if consumers effectively receive and understand certain information, it still does not necessarily mean they are able to process it and act upon it when contracting with traders.[390]

Furthermore, B2C electronic contracts 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.[391] 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,[392] which is especially concerning precisely in the digital environment.[393]

[389] HOWELLS and WILHELMSSON (n 220) 381.

[390] WILHELMSSON and TWIGG-FLESNER (n 113) 454 provide an example: 'a trader who draws a particular fault in goods about to be purchased to the attention of the consumer can usually rely on a provision which will remove his liability in sales law for that defect. But does the mere fact that the consumer now knows of a defect mean that he understands the implications of that defect, e.g., in terms of lost functionality or reduction in value?'

[391] As Omri BEN-SHAHAR, 'The Myth of the Opportunity to Read in Contract Law' (2009) 5 European Review of Contract Law 1, 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.'; LUZAK (n 222) 14ff gives 'five main reasons why consumers do not notice or do not pay attention to disclosures: when the disclosure is not personally relevant; when the consumer was already familiar with the disclosure; when the consumer was distracted from the disclosure; when the trader did not ensure to capture sufficient attention of the consumer; when the consumer has become desensitized to the disclosure after repeated exposure to it.'

[392] Fernando GÓMEZ POMAR and Juan José GANUZA, 'The Role of Choice in the Legal Regulation of Consumer Markets: A Law and Economic Analysis' [2014] InDret: Revista para el Análisis del Derecho 1, 6. In psychology it has been even established that too much choice available to consumers induces unhappiness and misery, see for instance SCHWARTZ and WARD (n 30) 86ff; see also NORDHAUSEN SCHOLES (n 195) 214 describing consequences of information overload in this way: '[i]f consumers are overloaded with information, the information obligations may achieve the exact opposite of what they are intended to achieve: rather than a consumer basing decisions on rational facts, information overload4 can result in consumers basing decisions on completely irrational grounds, while possibly even being under the impression that the decision was based on rational grounds (while in other cases, the consumer may realise he is being overwhelmed with information and is unable to process the amount of information properly and may then give up even trying to come to a rational decision).

[393] RIEFA (n 7) 38 notes: '(...) this policy drive for consumer information is creating perverse effects transported into an online environment. Many website are suffering from an overdose of contractual term and information about the transaction which creates confusion and make consumers feel overwhelmed about the information they receive.'

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Even the Commission admits that:

> In today's fast changing world, consumers are often overloaded with information but they do not necessarily always have the information they need. Faced with increasingly complex information and choices, consumers more and more often rely on labels or turn to intermediaries and filters such as comparison websites. There is cause for some concern as to their reliability and accuracy, however.[394]

Too much information causes adverse effects as consumers are not able to understand and process it.[395] Especially under pressure, which may occur if time available to 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.[396] Moreover, online environment is full of distractions and consumers' exposure to advertising is also greater than in traditional, physical trade, which makes it even less likely for the consumers to read the pre-contractual information when shopping over the Internet.[397] 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.[398]

394 COM(2012) 225 final pt 3.3.

395 EIDENMULLER (n 132) 1114-1115 observe: 'these benefits [of receiving free information] may be significantly reduced if the obligees receive information they do not need: they have to process the information, especially in order to determine what pieces of information are important to them. If they receive much information that is of no relevance to them, the amount of time and energy required for this selection may be considerable, and therefore obligees may be induced to disregard the information altogether, even those pieces that are important for their decision (information overload).'

396 RISCHKOWSKY and DORING (n 132) 293-294.

397 LUZAK (n 222) 14ff.

398 Omri BEN-SHAHAR and Carl E SCHNEIDER, 'The Failure of Mandated Disclosure' (2011) 159 University of Pennsylvania Law Review 647, 705 note: '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.'

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Therefore, an informed consent is a myth in B2C online contracts.[399] The problem of consumers not reading their contract terms results in market conditions being deformed,[400] as the traders cannot compete offering better contract terms, if consumers are simply unaware of their existence. In addition, as Carrasco Perera points out, consumers do not read, do not need and do not even want the information provided to them by traders under disclosure duties established in European directives, however in the meantime such information increases the costs for businesses and therefore the price of the products offered.[401] The consumers end up paying for a service that is of no use to them.

Also, the sensitivity of consumers to information provided differs among Member States, as comparative studies show.[402] Full harmonisation of information requirements, as established in the Directive on consumer rights for example, does not take into account the fact that in the national markets where consumers expect high honesty, the influence of the information provided to them on their contracting decision can be even less significant, and *vice versa*.[403]

Moreover, and somewhat paradoxically, information duties designed to protect consumers who are less rational and even sometimes naïve in their choices make individuals' lives even more complicated.[404] Too detailed information duties tend to become exemption clauses — it is a well-known fact that traders, especially in the context of the electronic transactions, produce very long lists of pre-contractual information, used as disclaimers, aiming at excluding or limiting their liability. During

[399] Shmuel I BECHER, 'Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met' (2008) 45 American Business Law Journal 723, 274.

[400] See for instance BEN-SHAHAR and SCHNEIDER (n 398) 705, where 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.

[401] CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 46) 314.

[402] See eg HOWELLS and WILHELMSSON (n 220) 382; WEATHERILL, '19. Consumer Protection' (n 99) 240-241.

[403] HOWELLS and WILHELMSSON (n 220) 382.

[404] Legislators try to remedy information asymmetries through information supply, which again is based on purely impracticable assumptions, see BEN-SHAHAR, 'The Myth of the Opportunity to Read in Contract Law' (n 391) 3.

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the contracting process consumers have to tick a box saying something like 'I have read and I accept the terms and conditions of this contract' in order to proceed further to order the product. Those terms and conditions are often extremely long and barely intelligible, reading them therefore is practically impossible.[405] This way traders bury pieces of information that might influence consumers' contracting decisions, thus making sure they will not pay attention to potential return costs or the costs of supply of digital content.[406] In consequence, information duties are evolving from consumer protection measures into an instrument limiting traders' liability, which is the exact contrary of what they were designed for.[407]

It is then often argued that not only do information duties not fulfil their role as consumer protection measure, but also that the very foundations of economics of information are inaccurate. Consumer policy should not exhaust itself in eliminating the information asymmetry and transaction costs thus resulting. What should be taken into account is the totality of transaction costs, including those that arise from the arrangement, conclusion, and implementation of contracts, which cannot be satisfactorily lowered through information duties alone.[408] This issue, raised by institutional economics, seems to have been — at least partially — considered by the European legislator, hence for instance the control of fairness of the terms in consumer contracts. Nevertheless, as information requirements are much less intrusive into the contractual freedom and contract contents, it seems that they will continue to prevail as widespread protective measures.[409]

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405 For a real life story on how difficult it is to read and understand the terms and conditions, especially in the e-commerce see eg Alex HERN, 'I read all the small print on the internet and it made me want to die' *The Guardian* (London, 15 June 2015) <www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet> accessed 15 November 2015.

406 CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 46) 135; cf arts 14(1) and 14(4) of the Directive on consumer rights, which enable the trader to avoid bearing certain costs (eg those of return of the good in the case of consumer's withdrawal or those of supply of digital content) provided that they inform the consumer about those.

407 MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (n 73) 269.

408 RISCHKOWSKY and DORING (n 132) 297.

409 WILHELMSSON and TWIGG-FLESNER (n 113) 455.

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1.1.2.4 Finding a balance: optimal information duties in the B2C e-commerce

A critical approach to the consumer protection policies in place is definitely needed — the laws can be improved only when the shortcomings are identified.[410] Consumer protection through information duties is a fact; another fact is that consumer protection, especially in the digital environment is needed.[411] Therefore, solutions improving effectiveness of the information duties in consumer protection, aiming also at increasing consumers' confidence in the e-commerce should be explored, together with measures of legal and non-legal nature that could complement protection through mandated disclosure.

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.[412] 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.[413] The regulation is only justified when market fails to achieve adequate consumers and users protection, since an excessive regulation will only slow down the desired development of the e-commerce. The legislator should find a balance between an excessive regulation which hinders the development of the e-commerce on the one hand, and the absence of adequate legislation aiming at

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[410] There are academics pointing out that criticising consumer protection based on information duties became recently somewhat fashionable, whilst no better and more efficient solutions are proposed, see eg SILBER (n 26) 23.

[411] SILBER (n 26) 23 notes: '[t]here is (...) solid evidence to support the continuing beneficial impact of legitimate and well conceived consumer protection rules adopted by courts, legislatures, and independent agencies.'

[412] WEATHERILL, *EU Consumer Law and Policy* (n 73) 316.

[413] For more on optimal information requirements level see HAUPT (n 124) 1143.

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improving consumers' trust and promoting the use of the e-commerce on the daily basis on the other.[414]

Furthermore, especially in the context of new technologies, which evolve at a rapid pace, one of the problems of casuistic information requirements lists established in various directives and implemented in national laws is they inflexibility and the need to add new pieces of information to the lists by legislators.[415] In addition, the lack of compliance mentioned above means that maybe adding more (in quantity) information requirements is not what is needed, and enforcing sufficient compliance with previously existing duties would be of more sense.[416] Also, more flexibility could be achieved through less strict approach to correcting deviations from the perfect information and use of more general clauses instead of casuistic lists.[417] Eidenmuller and others propose to assess the existence of a duty to disclose in each individual case, taking into account various criteria, such as the cost of transmission of the information or its availability.[418] In the context of the B2C standard terms contracts, such an individual approach seems nevertheless to be rather impractical. What could be aimed for is more flexibility, and the criteria mentioned would be of assistance in a case of a conflict between a trader and his counterpart over the provision of information.

Information duties utility in contract law as an instrument of consumer pro-

[414] HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 427ff.

[415] KIRCHNER (n 356) 171.

[416] RIEFA (n 7) 37.

[417] RISCHKOWSKY and DORING (n 132) 289.

[418] EIDENMULLER (n 132) 1115 state: '[t]he general rule should provide a non-exhaustive list of criteria to be taken into account in deciding whether or not there is a duty of disclosure in an individual case. Such criteria are: – whether or not the obligor already possesses the information and, if not, at what cost he may acquire it; – the costs of transmitting the information to the obligee; – whether or not the obligor has a legitimate interest in keeping the information secret, either because the information relates to the obligor's private sphere or because a duty to disclose would frustrate the obligor's investment made in acquiring the information; – how important the information is for the obligee's decision whether or not to conclude the contract, and whether or not the obligor should be aware of this importance; – whether or not the obligee is aware of the information's importance for his or her decision whether or not to conclude the contract; – whether or not, and at what cost, the obligee can acquire the information him- or herself, e.g. by asking the obligor; – the parties' expertise; – whether or not there are other incentives for the obligor to transmit the information.'

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tection and market regulation, however, does not only stem from the influence the pre-contractual information has on consumer's contracting decision.[419] What is of equal, if not greater importance nowadays, given all the weaknesses of mandated disclosure presented above, is the utility of the information provided in the case of breach or partial breach of contract combined with effective system of remedies, including private law means of individual redress for consumers.[420] Mandated disclosure from such a perspective serves market transparency and honesty, not because the information is read carefully and taken on board by consumers before they enter a given contract, but due to the fact that they receive the pre-contractual information together with contract terms on a durable medium and trader's compliance with it is secured thanks to effective remedies for breach in place. Consumers' transaction costs are lowered, since they do not need to read the whole list of information provided to them, they can only focus on a few variables of special importance, such as price for example, to compare offers available on the market an choose the optimal one. Although it is true that to claim their rights after a breach occurred would require a significant effort and a certain level of knowledge, not only the most active consumers will be protected this way. The general market transparency and honesty improvement will guarantee the protection to weaker and less knowledgable consumers as well. Furthermore, the main criticism regarding information duties — the information overload and the no-reading problem, become of lesser significance in the scenario presented.

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.[421] The key aspect of such approach would be to draw consumers' atten-

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419 WILHELMSSON and TWIGG-FLESNER (n 113) 454.

420 See more in Chapter II Subsection 2.2.1 *Importance of the remedies for breach of information duties* below.

421 See Ian AYRES and Alan SCHWARTZ, 'The No-Reading Problem in Consumer Contract Law' (2014) 66 Stanford Law Review 545, 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 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

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tion to the pieces of information of special importance to them,[422] and to help them understand those. For instance, consumers' attention could be brought to those particular aspects of the disclosed information that they do not expect or which they might believe to be more favourable than they actually are. Along these lines states an OECD document: 'With a view towards providing consumers with relevant information that enables them to make informed decisions in e-commerce, work could be conducted on enhancing consumer access and understanding of such information.'[423]

A shift from quantity to quality of information provision is proposed, for instance through the the way in which the information is presented. The presentation influences a lot consumers' understanding of the information provided, and the fact whether they notice the disclosure at all in the fist place.[424] The electronic environment is particularly complex in this context — it provides traders with practically infinite options in what refers to information display, which can result both in making it easier for consumers to notice and take up the disclosure[425] or on the contrary, to hide the information offering it in an unattractive manner.[426]

The digital environment also opens new possibilities for consumers who are willing to search for the information for themselves. Nowadays, they do not have to rely only on traders' information and product testing, but also, and even more importantly in the context of e-commerce, on the intermediaries — price and quality comparison websites, websites gathering consumer feedback and opinions on certain products, even expert, journalists and bloggers posts, which is of special importance in relation to credence goods for example.[427]

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of standard-form contracts.

[422] OECD (n 68) 23.

[423] Ibid 6.

[424] RISCHKOWSKY and DORING (n 132) 306 propose to use symbolic information instead of textual.

[425] LUZAK (n 222) 14 observes: 'For example, online traders may play around with the disclosure's design, position, colour, font, etc. in order to increase the internet users' chance of actually noticing and reading [the disclosure].'

[426] Such as a button opening a new window full of text that no-one can read or understand, see eg HERN (n 405).

[427] RISCHKOWSKY and DORING (n 132) 289-290.

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A duty to advise, looked at in Chapter II Subsection 2.1.1 *Content and scope of the information duties* below, may complement plain information requirements, flawed especially from the behavioural perspective, giving consumers more personalised access to information, thus increasing the chances of it being processed and understood by recipients and used correctly during the contracting process. Duty to advise could complement information duties in their current form, however as requiring personal contract with consumer might result problematic in the context of the electronic adhesion contracts.

Also, non-legal mechanisms, probably the most adequate in the context of e-commerce, are being proposed.[428] They are already functioning in various contexts,[429] 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 in a possible instance of a breach of contract — an already discussed issue of information utility in the B2C contracts.

Also, competition law measures can be seen as means to decrease the use of unnecessary information requirements. From the behavioural point of view, the mechanisms of competition may promote traders who take advantage of consumers' lack of rationality.[430] Therefore, dealing with the issue at the level of competition law through balancing competition and promoting healthy mechanisms therein could contribute to limiting the necessity to turn to the information requirements. Similarly, public enforcement, as for example the new enhanced consumer measures introduced in the CRA 2015,[431] also shifts focus from information requirements to public enforcement of consumer rights.

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[428] BEN-SHAHAR, 'The Myth of the Opportunity to Read in Contract Law' (n 391) 21ff; see also RIEFA (n 7) 39.

[429] For example rating of buyers, sellers and products on webpages such as e-Bay.

[430] Oren BAR-GILL, *Seduction by Contract: Law, Economics and Psychology in Consumer Markets* (Oxford University Press 2012) 2.

[431] As set out in s 219A Enterprise Act 2002, the enhanced consumer measures are: redress, compliance and consumer information measures.

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1.2 Information requirements — the law applicable

1.2.1 Constitutional foundations

The existence of information duties in the B2C e-commerce within the European internal market is an undisputed fact; they are introduced by numerous legal rules, both at European and national level. The laws establishing disclosure duties and the duties themselves are of varied character: generally applicable to all contracts or specific only to consumer contracts, directly imposing detailed lists of pre-contractual information requirements or introducing an indirect obligation of certain behaviour in the contracting process.

At the European Union level, '[t]he Treaties establish the overarching framework for the constitutional assessment of European contract law.'[432] The primary role of information in the area of consumer protection at the constitutional level in the EU[433] is guaranteed by the Article 169 TFEU:[434] 'the Union shall contribute to (...) promoting [consumers'] right to information.' The objective which is being attained through: 'measures adopted pursuant to Article 114 in the context of the completion of the internal market; [and] measures which support, supplement and monitor the policy pursued by the Member States.'[435]

These are the secondary provisions, such as consumer contract law directives,

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[432] Kathleen GUTMAN, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014) 280.

[433] See eg FERNÁNDEZ ARROYO (n 25) 145 who confirms that '[d]espite the failure of the so-called "European Constitution" and its ensuing criticism, it is obvious that the regulations concerning the EU's treaties, as a "super State", fulfill a constitutional function inasmuch as they guide and limit for all the regulations and decisions of the EU and its member States.'

[434] For a detailed history of development of consumer protection, also through information, at the level of European Treaties see eg STUYCK, 'European Consumer Law after the Treaty of Amsterdam: Consumer Policy in or beyond the Internal Market?' (n 72); Leire ESCAJEDO SAN EPIFANIO, 'La Base Jurídico-Constitucional de la Protección de los Consumidores en la Unión Europea' (2007) 70 Revista de Derecho Político 225.

[435] Article 169.2 (a) and (b); see also Subsection 1.1.2.1 *The role of pre-contractual information in the European consumer policy* above.

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together with the CJEU judgments[436] that detail the contents of the consumer's right to information.[437] Especially in the area of the contract law, which is the focus of the present study, consumer's right to information translates into trader's respective duty to provide this information in the pre-contractual phase of their relationship.[438] The main activity of the EU in the area of protecting consumers within the contract law provisions concentrates on the establishment of information duties weighing on traders contracting with consumers.

It is can be noted that the concept of constitutional foundations in the context of the European contract law serves to denote EU's competence, its existence and extent, in this area.[439] Principles of conferral,[440] subsidiarity,[441] proportionality[442] and sincere cooperation[443] regulate the exercise of Union's competences. The European contract law evolves currently around the *acquis communautaire* relating to consumer protection,[444] as the initiatives such as PECL and DCFR remain in the sphere of soft law provisions.[445] Consequently, the European contract law is mainly

436 See eg Case *GB-INNO-BM* para 689; see also HOWELLS and WILHELMSSON (n 220) 380.

437 MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101.

438 See eg ZURILLA CARIÑANA (n 124) 2; MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101.

439 GUTMAN (n 432) 14-15.

440 Article 5(2) TEU states: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.'

441 Article 5(3) TEU states: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.'

442 Article 5(4) TEU: 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.'

443 Article 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.'

444 See eg STAUDENMAYER (n 56); Gema TOMÁS, 'Harmonisation of European Contract Law: Slowly but Surely?' (2013) 20 Lex et Scientia International Journal 7.

445 GUTMAN (n 432) 277ff.

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concerned with information duties, given the prevalence of information paradigm in consumer protection.

In what refers to the national constitutional law, these are the most modern constitutions that establish rules specifically applicable to consumers, guaranteeing their protection and the right to information.[446] British constitution, an unwritten constitution, is an uncodified, flexible set of different documents[447] that contain 'the most important rules that regulate the relations among the different parts of the government (...) and also the relations between the different parts of the government and the people of the country.'[448] It will be right to say, however, that none of those documents explicitly deals with consumer contractual right to information. But since European Union and Community laws also form part of the English constitutional law, therefore consumer protection and especially consumer contractual rights, including the right to information, can be understood to belong therein. That is not to say, however, that the consumer protection in the area of contract law originated in England solely as a consequence of the European influence; one can identify consumer protection in common law decisions such as *Donoghue v Stevenson*,[449] decided already in 1932.[450]

In what refers to the Spanish legal order, contrary to the English one, it is based on the principle of the hierarchy of norms with the 1978 Constitution being the supreme law, which determines the rest of the norms in Spain that have to be compatible with the Constitution. Therefore, the Article 51 of the Constitution is the

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446 FERNÁNDEZ ARROYO (n 25) 145.

447 Anthony KING, *Does the United Kingdom still have a constitution?* (The Hamlyn Lectures, Sweet & Maxwell 2001); the documents forming the UK constitution are for example: Magna Carta 1297, Bill of Rights 1688, Crown and Parliament Recognition Act 1689 or Supreme Court Act 1981, Human Rights Act 1998 and Northern Ireland Act 1998, to cite a few — see eg Joint Committee on Draft Civil Contingencies Bill – First Report, HL 184 HC 1074, 28 November 2003, para 183 <www.publications.parliament.uk/pa/jt200203/jtselect/jtdcc/184/18402.htm> accessed 16 June 2016.

448 KING (n 447) 1.

449 [1932] UKHL 100, the case where a duty of care of the manufacturer of not dangerous goods towards a consumer was established.

450 BORRIE (n 73) 8ff.

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superior law within the Spanish system of consumer law.[451] The 1978 Constitution is historically the first piece of legislation in Spain that expressly mentions consumer protection.[452]

The Article 51 is placed within the Chapter Three of the Constitution entitled *Governing Principles of Economic and Social Policy* and it is considered to be one of the real principles governing the economic model of the State adopted by the Constitution.[453] The Spain's economic model is based on the freedom of enterprise, recognised in Article 38, which nevertheless is not absolute, consumer protection being one of the principles limiting its exercise.[454]

No fundamental right can be construed as arising from the Article 51,[455] consumer protection should rather be qualified as a policy principle – necessary feature of a social and democratic State, which in turn is a basic concept on which Spanish legal order and political system is founded, according to the Article 1.1 of the Constitution. Consumer protection through information is expressly established in the Article 51.2 of the Constitution, which reads:

> The public authorities shall make means available to inform and educate consumers and users, shall foster their organisations, and shall provide hearings for such organisations on all matters affecting their members, under the terms to be established by law.[456]

This provision belongs to the Chapter Three of the Constitution and Article

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[451] Jordi FAUS SANTASUSANA, 'Spain' in Dennis Campbell (ed), *International Consumer Protection, Vol. 2* (Center for International Legal Studies, Springer Science + Business Media 1995) SPA-II-1.

[452] Carlos LASARTE ÁLVAREZ, 'La Protección del Consumidor como Principio General del Derecho' in Antonio Monserrat Quintana (ed), *Nuevos Derechos Fundamentales en el Ámbito del Derecho Privado* (Cuadernos de Derecho Judicial VI – 2007, Consejo General del Poder Judicial 2007) 64.

[453] Asunción GARCÍA MARTÍNEZ, 'Constitución Española: Sinopsis Artículo 51' (Congreso de los Diputados 2003, updated by Sieira S 2011) <www.congreso.es/consti/constitucion/indice/imprimir/sinopsis_pr.jsp?art=51&tipo=2> accessed 1 February 2016.

[454] PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' (n 132) 1879.

[455] Ibid 1877, where various judgements of the Constitutional Court of Spain are quoted confirming this point of view.

[456] The Spanish Constitution, Agencia Estatal Boletín Oficial del Estado (translated into English) <www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf> accessed 1 July 2016.

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53.3 states clearly that it can be invoked in courts only when developed by ordinary legislation. This matter has never been looked at in practice given numerous provisions guaranteeing consumer rights in Spanish law, nevertheless the theoretical question concerning direct applicability of the Article 51 of the Constitution divides Spanish academics. The discussion evolves around the notion of the general principles of law, which according to the art 1 of the Spanish *Código Civil* (Civil Code) constitute sources of law and should be directly applicable in the absence of relevant legislation (statute) or custom.[457] Some authors consider the Article 51 of the Constitution and consumer protection as such to be one of the general principles of law and consequently assert its direct applicability in ordinary courts.[458] Nonetheless, this point of view seems to be rather far-fetched, as Article 53.3 of the Constitution treats consumer protection as a governing principle of economic and social policy, which clearly does not lead to its recognition as a general principle of law. Furthermore, Article 53.3 expressly limits its applicability to only where and when it is developed by ordinary legislation.[459]

The Act of Parliament primarily dealing with consumer protection and developing constitutional provisions, TRLDCU, recognises fundamental consumer rights in its art 8. Right to information is one of them, consumers are entitled to receive

457 Article 1.4 of the Spanish Civil Code — Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil. Boletín Oficial del Estado, 16 de agosto de 1889, núm. 206, p. 249 (*Código Civil*) -– establishes that general legal principles shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system.

458 See eg LASARTE ÁLVAREZ (n 452) 68ff, where the direct applicability of the Art 51 of the Constitution is argued on a basis mainly of the wording of the art 1 TRLDCU, which states that consumer protection shall take place within the context of the economic system designed in the Articles 38 and 128 of the Constitution and be subject to the provisions established under Article 139; see also Alberto BERCOVITZ RODRÍGUEZ-CANO, 'La Protección de los Consumidores, la Constitución Española y el Derecho Mercantil' in Tomás R Fernández Rodríguez (ed), *Lecturas Sobre la Constitución Española, Vol. 2* (Universidad Nacional de Educación a Distancia 1978) 18ff, who considers that the first part of the Article 53.3 stating that '[t]he substantive legislation, judicial practice and actions of the public authorities shall be based on the recognition, respect and protection of the principles recognised in Chapter Three.' indicates that consumer protection is a principle that can be invoked directly in courts, and therefore the second part of this provision, which requires the principles to be developed by the ordinary legislation in order to be directly applicable, is merely an unfortunate wording, as the first sentence of the Article 53.3 implies that judicial practice has to take into account the principles of Chapter Three, regardless of the fact that they are or not actually developed by the ordinary legislation.

459 PEINADO GRACIA, 'El Derecho a la Protección de los Consumidores' (n 132) 1892.

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correct information on various goods or services, as well as education and other measures that promote knowledge about the appropriate use, consumption or enjoyment of the goods and services.[460]

Constitutional right to receive information translates into an aforementioned obligation to provide consumers with appropriate information, which rests on the one hand on public bodies, State administration and consumer associations, and on the other on the manufacturer, as well as on the consumer's contractor, the businessperson.[461]

In the Spanish legal order the central government of the State shares with autonomous communities competences regarding consumer protection. According to the Article 149.3 of the Constitution, '[m]atters not expressly assigned to the State by virtue of the present Constitution may fall under the jurisdiction of the Autonomous Communities by virtue of their respective Statutes', and since consumer protection is not mentioned as the State's exclusive competence, practically all Spanish autonomous communities have established their own consumer protection laws.[462] Nonetheless, the Spanish State holds exclusive competence over contract law.[463] Therefore all the provisions dealing with contracting parties' rights and obligations, even though they might belong to the branch of consumer protection law, will constitute Spanish State's exclusive competence. Legislation establishing and shaping the features of the pre-contractual duty to inform, which rests on a businessperson entering a contract with a consumer, can be consequently only adopted at the level of the State.[464] More importantly, the Constitutional Court of Spain confirms that if the contract is formed between a consumer and a trader, and if damage due to misinformation occurs, the issue will be dealt with according to the general law of the State and remedies established in the general Spanish law will

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460 Art 8.d) TRLDCU.

461 Tribunal Constitucional (Pleno), Sentencia núm. 71/1982 de 30 de noviembre, Fundamento jurídico 18.

462 Benjamin PEÑAS MOYANO, 'El Derecho Protector de los Consumidores y Usuarios en la Comunidad Autónoma de Castilla y León' (2006) 9 Revista Jurídica de Castilla y León 43, 47.

463 Article 149.1 viii).

464 See STC 71/1982 de 30 de noviembre, Fundamento jurídico 18.

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be applicable.[465]

Information duties as an instrument of consumer protection are established at the constitutional level both in England and in Spain -– in England through the European Treaties and in Spain in the written Constitution. Nevertheless, consumer's constitutional right to information needs to be developed, specifically determined and interpreted by the national legislation and courts in order to translate into an effective trader's duty to provide information. The applicable legislation exists both in England and in Spain, and in its great majority, due to the European harmonisation measures, is quite similar. Nevertheless, some profound differences between those two legal systems exist, especially in what refers to the general private law, applicable to the B2C contracts, as I am arguing below.

1.2.2 General duty to disclose and its breach in national private law

1.2.2.1 Good faith, fair dealing and pre-contractual duties of disclosure

Another issue, apart from formal regulation of consumer protection through information requirements at the constitutional level, is the existence of general principles of private law relative to the information duties, and especially the duty to act in good faith, as the pre-contractual good faith, referred to in Spanish as *buena fe precontractual*, is closely linked to the duties of disclosure, as we shall see below. Such general rules are of primary significance, as they determine not only the way in which the specific information duties are applied and what remedies are available for their breach in each national system, but also, even more importantly, they provide guidance to the European legislator about the existing laws and the necessity — or lack thereof — to establish specific information duties together with remedies for their breach in the consumer *acquis*.[466]

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465 STC 71/1982 de 30 de noviembre, para 7, where the Court confirms that if the contract was formed and damage occurred due to either lack of information or defective information that was provided, the general law of the State and the remedies that it establishes will be applicable.

466 Cf DCFR Outline edition para 72 note that the European legislator 'needs information about what is in the existing laws and what can be omitted from the acquis because, in one form or another,

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The notion of good faith is present in the majority of the continental European private law systems.[467] The contractual good faith — the duty to act in good faith when forming a contract, but also when performing it, might seem to be nevertheless a rather vague and imprecise concept.[468] Nevertheless, one has to remember that in both civil and common law such concepts are abundant, and can be specified through practice.[469]

First of all, good faith has two aspects — a subjective one and an objective one. Subjectively, it refers to the state of mind of the contracting party, their internal intentions and thoughts; objectively good faith describes the behaviour of the parties, their conduct observable from outside.[470] Hence sometimes a distinction between 'good faith' and 'fair dealing' is made: the former meaning honesty and fairness in mind, the latter – observance of fairness in conduct.[471] In many systems, however, only the notion of 'good faith' is used, and it then covers both dimensions. Nevertheless, even the subjective aspect of good faith is a certain standard that is externalised through party's actions. If a party does not have any other interest in exercising a remedy, but to harm the other party, then they should not be entitled to do so. Yet, the law can only regulate the way we act — the duty of good faith is no exception, it is a certain standard that allows us to evaluate parties' external behaviour.[472] The said standard being an abstract concept, it needs specification in

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all Member States already have it.'

[467] Martijn W HESSELINK, 'The Concept of Good Faith' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 619.

[468] Ewan MCKENDRICK, *Contract law* (11th edn, Palgrave 2015) 214 points to English law being 'reluctant to embrace broad general principles'.

[469] See BROWNSWORD (n 90) 89 stating: '[i]f good faith and fair dealing is a bit hazy as a general unspecified requirement, regulators can ease that concern by giving more particular guidance -– after all, we get along perfectly well with a tort regime that hinges on a test (for a duty of care) of what would be fair, just and reasonable.

[470] HESSELINK, 'The Concept of Good Faith' (n 467) 619-620.

[471] See Comment to Article 1:201: Good Faith and Fair Dealing of PECL.

[472] See Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 37/2003 de 30 de enero (RJ 2003/2024), Fundamentos de Derecho, Cuarto, where the court state that good faith is an objective concept; see also Pablo VALÉS DUQUE, *La Responsabilidad Precontractual* (Editorial Reus 2012) 110-112.

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order to be applied to a concrete singular situation.[473] What should be taken into consideration is therefore for instance the inequality of bargaining power between the contracting parties, their relationship and the professional character of one of the parties.

Is there a good faith principle in the European law? European contract law can be understood in various ways – it may refer to contract law of Member States of the European Union, and more specifically to some common rules and values shared by those legal systems.[474] European contract law is also used to describe soft law instruments, such as PECL or DCFR.[475] Finally, there are provisions, especially concerning consumer contracts, that established in the European directives and implemented in national contract law of Member States form the *acquis communautaire*. Both PECL[476] and DCFR contain provisions relative to good faith, as do international instruments, such as United Nations Convention on Contracts for the International Sale of Goods (CISG).[477]

Article 1:102 PECL establishes the principle of freedom of contract. Parties are free to enter a contract on whatever terms they please, they can shape their contractual relationship freely as well. However, this is true only to a certain extent – the PECL clearly state that there are provisions which are mandatory and parties can never exclude their application. The duty of good faith and fair dealing is considered to be of such importance as to be mandatory in character, art 1:201(2) says that '[t]he parties may not exclude or limit this duty' when referring to the duty to act in accordance with good faith and fair dealing. Freedom of contract is

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473 HESSELINK, 'The Concept of Good Faith' (n 467) 623.

474 JHM van ERP, 'The Pre-contractual Stage' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 494. Rules on the general duty to disclose in national law are the focus of the Subsection 1.2.2.2 *General duty to disclose in national private law* below.

475 Jan SMITS, 'The Principles of European Contract Law' in Antoni Vaquer Aloy (ed), *La Tercera Parte de Los Principios de Derecho Contractual Europeo* (Tirant lo Blanch 2005) 567ff.

476 Although it is worth remembering that PECL are designed as model rules for international commercial contracts, not purely domestic and not consumer contracts, see ERP (n 474) 498.

477 Vienna, 1980, in its art 7(1) refers to the observance of good faith in international trade. Nevertheless, the CISG is concerned strictly with business contracts, consumer contracts being excluded from its scope of application, see arts 1, 2.

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definitely one of the core concepts of the PECL, but the approach adopted in the provisions is encouraging the co-operation of the parties[478] and their acting in good faith. The concept of good faith is prevalent in the whole instrument, art 1:106(1) establishes that promoting good faith and fair dealing is of particular importance when interpreting the Principles. Remedies for mistake, incorrect information and non-performance can only be excluded or restricted when doing so would not be not contrary to good faith and fair dealing.[479]

One of the fundamental principles of the DCFR is that of good faith and fair dealing – art I. — 1:102(3)(b) states that '[i]n [the] interpretation and development [of the model provisions] regard should be had to the need to promote (...) good faith and fair dealing (...).' The instrument explains how 'good faith and fair dealing' should be understood in its art I. — 1:103:

> (1) The expression "good faith and fair dealing" refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.
>
> (2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party's prior statements or conduct when the other party has reasonably relied on them to that other party's detriment.

There can be no doubt that European soft law instruments recognise the good faith principle. Nevertheless, those sets of rules are designed not only as model rules, but also as a recapitulation of principles common to laws of European states. The pertinent question is then whether the good faith provisions are a real principle forming part of the common core of European contract law, or are they only found in national systems of private law of some Member States but not in others?[480] It seems that the philosophy of the European contract law is strongly influenced, at

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[478] See art 1:202: Duty to co-operate.

[479] See arts 4:118 and 8:109.

[480] Simon WHITTAKER and Reinhard ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape'' in Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (The Common Core of European Private Law, Cambridge studies in international and comparative law, Cambridge University Press 2008) 14.

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least in some of its aspects, by civilian law systems to which points the inclusion of good faith principle in its current shape.[481]

Also in the *acquis communautaire* examples of the use of the good faith principle can be found. The Directive on unfair terms[482] introduced the notion of good faith in all Member States, including those that did not have this concept in their national law. Although it was not the first directive to use the standard of good faith,[483] it was the first on such importance for the contract law in general and consumer law specifically.

Introduction to the DCFR Outline edition describes the current position of the good faith principle in the European contract law:

> In many laws the principle is accepted as fundamental, but it is not accorded the same recognition in the laws of all the Member States. In some systems it is not recognised as a general rule of direct application. It is true that such systems contain many particular rules which perform the same function as a requirement of good faith, in the sense that they are aimed at preventing the parties from acting in ways that are incompatible with good faith, but there is no general rule.[484]

The position of English and Spanish law towards the good faith as a standard of behaviour of contracting parties needs to be looked at when the information duties are analysed. The pre-contractual duty to disclose is closely related to the philosophy underlying national contract law[485] and especially to the duty to act in good faith.

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481 That is not to say, however, that the common law has no representation in the European contract law -– the definitions clarified as one of the first rules in a legal instrument are characteristic feature of the English law legislation, which has been adopted by the European contract law, including the *acquis communautaire*.

482 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L095/29 (Directive on unfair terms).

483 WHITTAKER and ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape" (n 480) 13.

484 para 72.

485 'An investigation of the "duty to disclose" on a comparative law basis is most rewarding; it leads us straight to the philosophy underlying the law of contracts' -– Friedrich KESSLER and Edith FINE, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 Harvard Law Review 401, 438; see also GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 623; WILHELMSSON and TWIGG-FLESNER (n 113) 446.

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This is where the divide between civil and common law systems becomes apparent.[486] It also shows how traditional perception of contract law, including especially contract formation process,[487]

In what refers to English law, it is often said that the concept of the duty to act in good faith is foreign to English system,[488] which is mainly concerned with freedom of contract.[489] An English judge, Bingham LJ observed: 'In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith.' and continued 'English law has, characteristically, committed itself to no such overriding principle (...).'[490]

The consumer's right to be informed and corresponding information duties in Spanish legal system reach beyond the contract law as already discussed – they are established in the supreme set of norms, the Spanish Constitution. Moreover, the Spanish law is generally based on the principle of good faith – the art 7.1 of the *Código civil* states that rights must be exercised in conformity with the requirements of good faith.[491] In what refers specifically to contract law, in article 1258 of the *Código civil* we can find another provision saying that contracts bind the parties not

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486 WHITTAKER and ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape" (n 480) 15.

487 ERP (n 474) 495.

488 Despite the concept of good faith introduced into English contract law for example through the Directive on unfair terms; it was called a 'legal irritant' for English law, and the House of Lords twice refused to make reference to the CJEU for clarification of this concept — see Hans-W MICKLITZ and Norbert REICH, 'The Court and Sleeping Beauty: the Revival of the Unfair Contract Terms Directive (UCTD)' (2014) 51 Common Market Law Review 771, 785.

489 See WHITTAKER and ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape" (n 480) 15, who quote Niall Whitty saying '[Scots law] has not accepted the civilian doctrine that the exercise of contractual rights is subject to the principles of good faith. The better view is that like English law it requires strict adherence to contracts'.

490 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[1989] QB 433, 439; a position which has been confirmed recently eg in *Monde Petroleum SA v WesternZagros Ltd* [2016] EWHC 1472 (Comm), 249ff and *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789, 45.

491 Note, nevertheless, that Article 7 of the *Código civil* was introduced in the early 1970s, much later than the subsequent article 1258 which establishes the duty to act in good faith within the realm of contract law.

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only to fulfil what they have expressly agreed upon, but also to comply with all the consequences that, according to their nature, result from good faith, custom and the law. Although there is no specific provision requiring the parties to act according to the principle of good faith during the pre-contractual negotiations, Spanish courts do accept the existence of such a duty.[492] According to the *Tribunal Supremo* good faith mentioned in the article 1258 of the *Código civil* is an objective duty to act honestly, justly and loyally. Good faith implies a coherent conduct of the parties protecting the trust of others.[493]

The duty to act in good faith at the pre-contractual stage is a twofold concept – on the one hand, parties should not behave contrary to the good faith and therefore it is forbidden to deceive the other party, on the other hand there is a positive duty to act in good faith. Under Spanish law the parties are therefore bound to disclose material information to each other -– to omit information that should be disclosed in good faith can amount to misrepresentation (fraud or induced mistake).[494] As observed by Bingham LJ, acting in good faith at the pre-contractual stage:

> This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair and open dealing.[495]

The duty to disclose arising from the good faith principle emphasizes the role of informed consent in the contract formation process.[496] The freedom of contract principle is based on the assumption that each party decides for themselves whether to enter or not a contractual relationship and become bound by an enforceable agreement. Nevertheless, surrendering this freedom by both parties acting in good

[492] See for instance Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 263/2009 de 24 de abril (RJ 2009/3167), Fundamentos de Derecho, Tercero, Cuarto.

[493] STS núm. 37/2003 de 30 de enero, Fundamentos de Derecho, Cuarto.

[494] Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 747/2007 de 3 de julio (RJ 2007/747), Fundamentos de Derecho, Quinto; STS núm. 263/2009 de 24 de abril, Fundamentos de Derecho, Cuarto.

[495] *Interfoto Picture Library* 439.

[496] ERP (n 474) 497.

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faith has to be conscious, hence the duty of disclosure. On the other hand, in some contracts information may potentially have financial value, and when contracting process is regarded as adversarial rather than co-operative, disclosure is not mandatory.[497] Hesselink observes that European legal systems that contain a good faith provision will usually recognise various functions of it, such as: supplementation of duties, limitation of rights, interpretation of law and contracts. The duty of good faith in those systems translates into various more specific sub-duties.[498] In Spanish law, the duty to inform is arguably the most important one. The principle of good faith is interpreted in this way that it gives rise to a duty to disclose material information before the conclusion of a contract.[499] The Spanish *Tribunal Supremo* highlights the need of the pre-contractual conduct of the parties to be coherent with the requirements of good faith, closely linked to the protection of the trust in relationship of the contracting parties.[500]

Not only does the principle of good faith in Spanish law gives rise to a duty to disclose material information before the conclusion of a contract, but also Spanish courts recognise a concept of a fraud by non-disclosure – negative fraud due to omission[501] – when good faith requires the parties to provide such piece of information to

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497 See GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 629.

498 HESSELINK, 'The Concept of Good Faith' (n 467) 624, in the context of the French system sub-duties such as duty of loyalty and duty to cooperate are identified; duty to inform being a sub-duty of the duty to cooperate.

499 See Julio PICATOSTE BOBILLO, 'El Derecho de Información en la Contratación con Consumidores' [2011] Actualidad Civil 372, 392 who considers that the pre-contractual duty to inform was implicitly included in the Civil code, long before the adoption of information duties from the EC directives, in the theory of the vices of consent and as an obligation to act accordingly to the principle of good faith; see also Raquel GUILLÉN CATALÁN, *El Regimén Jurídico de la Oferta Contractual Dirigida a los Consumidores (Adaptada al Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el TRLGDCU)* (Colegio de Registradores de la Propiedad y Mercantiles de España, Centro de Estudios 2010) 28ff; along the same lines ZURILLA CARIÑANA (n 124) 1ff.

500 Tribunal Supremo (Sala de lo Civil), Sentencia de 16 de noviembre de 1979 (RJ 1979/3850) 4.

501 Francisca SANCHEZ HERNANZ, 'Discussions - Spain - Case 2: Celimene v. Damien' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2005) 157-158.

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the other side.[502] In this context the information duties established in the Spanish legislation implementing European directives can be seen as a specific application of general principles — that of the good faith and of the theory of the vices of consent.[503] The wording of the art 65 TRLDCU seems to confirm such consideration.[504] Interestingly however, Spanish courts are reluctant to award damages for breach of the general duty of pre-contractual good faith, instead it is often found that an oral contract made by the parties was breached.[505]

Those differences in existence and application of the good faith principles among Member States have important implications for the European consumer contract law. The European legislator cannot rely on a general requirement of good faith in parties pre-contractual behaviour to supplement the protective measures, such as information duties, established in the directives – the good faith principle has to be incorporated expressly in a directive, as in the Directive on unfair terms, to be applicable in all jurisdictions.[506]

1.2.2.2 General duty to disclose in national private law

The requirement of acting in good faith in the process of forming a contract is closely linked to the existence of the duty to disclose material information to the other party. As Wilhelmsson and Twigg-Flesner observe, the correct approach when analysing the information duty is not whether or not it does exist in the legal system,

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[502] STS núm. 263/2009 de 24 de abril (RJ 2009/3167), Fundamentos de Derecho, Cuarto where the words '*reticencia dolosa por ocultación de una información que la buena fe le impone suministrar(...)*' are used; see also art 65 TRLDCU: consumer contracts shall be complemented by requirements resulting from the principle of the objective good faith to consumer's benefit, also in the cases of the omission of the relevant pre-contractual information, says the legislation expressly invoking good faith principle in the case of information omission.

[503] PICATOSTE BOBILLO (n 499) 392.

[504] The art 65 reads: '*Los contratos con los consumidores y usuarios se integrarán, en beneficio del consumidor, conforme al principio de buena fe objetiva, también en los supuestos de omisión de información precontractual relevante.*'

[505] Ángel CARRASCO PERERA, 'Case 3: Breaking off Negotiations. SPAIN' in Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (The Common Core of European Private Law, Cambridge studies in international and comparative law, Cambridge University Press 2008) 244-245; see also eg STS núm. 263/2009 de 24 de abril (RJ 2009/3167).

[506] DCFR Outline edition, Introduction para 72.

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but rather when and how it is used, as all the European systems do recognise a duty to disclose information to the other party, however to different extents.[507] The spectrum is broad -– from a general duty to honestly inform the other party about all material facts they might find useful when taking their contractual decision, to the requirement of not lying — ie of not providing false information spontaneously in order to induce the other party to enter the contract.

Eidenmuller and others note that it is

> essential to distinguish two categories [of information duties]: (i) a general standard which must be specified according to the circumstances of the case at hand (general duty of disclosure), and (ii) statutory regulations that define the information to be disclosed with regard to a certain transaction (specified duties of disclosure). While a general standard leaves the courts a wide discretion to define the duty in a given case, the specified duties are more foreseeable and can usually be fulfilled in a standardized manner.[508]

It is also of crucial importance in what refers to the breach of information requirements, precisely for the reasons the quoted authors point to. Firstly, I will look at the general information duty, and then in the following section at more specific duties, which can be further divided into indirect, wider in scope obligations introduced rather through the consequences of breach, and direct ones, established in long lists of detailed requirements present both in European and national law.

In what refers to the soft law provisions for consumer contracts, the DCFR does not contain a general disclosure duty, although s I (Information duties) of Ch 3, Book II, arts II.–3:101ff establish rather detailed and comprehensive information requirements, especially in the context of consumer contracts. However, rules relative to mistake in art II.–7:201 -– especially II.–7:201(1)(b)(ii) and (iii) allow for a possibility to avoid a contract on the grounds of mistake, if the other party:

> (...) (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known

507 WILHELMSSON and TWIGG-FLESNER (n 113) 455.

508 EIDENMULLER (n 132) 1113.

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> of the mistake; (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors (...).

Similarly, provisions on fraud (art II.–7:205) read:

> (1) A party may avoid a contract when the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose (...).

Those provisions actually establish a general disclosure duty, categorising a breach of such duty as a mistake or fraud.[509] As already mentioned in the context of the adoption of the good faith principle, the DCFR provisions seem to represent rather civil law vision on the legal nature of the pre-contractual information duties, taking into consideration the common law one only up to a limited extent.[510]

Apart from the DCFR provisions discussed above, which at least theoretically represent the European common core laws, other model rules also consider disclosure duties.[511] In the context of B2C online contracts, in addition to specific information requirements, general duty to disclose information is also introduced in an indirect way in the OECD Guidelines — Part Two, s II. concerning fair business, advertising and marketing practices: '(...) Businesses should not make any representation, or omission, or engage in any practice that is likely to be deceptive, misleading, fraudulent or unfair.' The duty not to make a misleading omission can be understood as

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[509] EIDENMULLER (n 132) 1113.

[510] The differences between common and civil law positions regarding information duties in general are presented below in the current section of the present study; cf also ERP (n 474) 513 who suggests to adopt an approach focusing on avoidance of bad faith, which is common (up to certain extent) to both legal traditions, as is discussed in more detail below and in Chapter 3 Section 3.2 *General private law and remedies it offers.*

[511] See eg PECL art 4.107(3) which under the head of fraud considers disclosure duties: (3) In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including: '(a) whether the party had special expertise; (b) the cost to it of acquiring the relevant information; (c) whether the other party could reasonably acquire the information for itself; and (d) the apparent importance of the information to the other party.'

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a duty to provide clear, relevant and material information to the consumer before the contract is formed.[512] Such provision is similar to the DCFR rule introducing the general disclosure duty via mistake and fraud concepts.[513]

The consumer *acquis communautaire* focuses on various specific issues through different directives, information duties there imposed form a lengthy list of casuistic requirements. As there is no comprehensive set of rules for all contracts in the *acquis*, there neither is a general disclosure duty.[514] The directives aim only at regulating certain aspects of contracting, and usually are without prejudice to the national general contract law, which is why the remedies for breach of the pre-contractual information duties have to be sought in the national law when directives fail to impose harmonised ones. Furthermore, the lack of overarching disclosure principle in the *acquis*, which cannot be generalised from casuistic duties,[515] also means that the duties established in the directives cannot be seen as specific applications of a general principle at the European level. However within the national law, where a general duty to disclose exists, specific duties implemented in the national law are regarded as coherent with that principle, benefit from the remedies thus resulting and courts' interpretation, often favourable for the existence and extent of the duties.

The spectrum of possible different approaches to the general disclosure duty in

[512] See MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101-103; WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (n 360) 22.

[513] The relationship between direct disclosure duty and indirect duties resulting from other provisions, eg on mistake or fraud, will be discussed in more detail further in Subsection 1.2.3.1 *More general and indirect information duties* below.

[514] WILHELMSSON and TWIGG-FLESNER (n 113) 456; cf however MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101 considering that '[t]he Directive on unfair commercial practices pushes the development into the direction of a general information duty.' and WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (n 360) 22 stating, also in the context of the Unfair Commercial Practices Directive, 'Article 7 of the Unfair Commercial Practices Directive 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. 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.'

[515] EIDENMULLER (n 132) 1113; cf however WILHELMSSON and TWIGG-FLESNER (n 113) 456 noting that '[w]hat we can do, therefore, is to identify a number of circumstances where the *acquis* imposes an obligation to provide information before a contract is concluded, and consider whether there are particular principles which could be said to underpin the imposition of such duties in specific contexts.'

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the general contract law is determined by balancing potentially conflicting values -– freedom of contract and social protection, similarly to the rationale and shape of consumer protection, as discussed above in Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts*. Common and civil law concerns are different.[516] Pre-contractual disclosure constitutes a field in which the difference between civil and common law is particularly evident.[517] English and Spanish law are situated on the opposite ends of the spectrum of possible attitudes towards pre-contractual information duties.[518] Generally speaking, English law approaches information duties with scepticism,[519] whilst Spanish private law provides for exchange of essential information by the contracting parties at the pre-contractual stage.

The analysis of the information duties in English law should start from the basic premise that English law, in contrary to Spanish system, recognises no general duty to disclose.[520] Mandated disclosure is regarded as an interventionist approach that cannot be easily reconciled with *caveat emptor* principle, insisting on both parties protecting their own interests in the contracting process, and other general rules governing English contract formation process.[521]

[516] Cf GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 636 who observes that the art 4.107(3) PECL -– quoted above in footnote 511 tries to reconcile common and civil law concerns through the factors that influence the existence of the disclosure duty.

[517] Along these lines WILHELMSSON, 'Private Law Remedies against the Breach of Information Requirements of EC Law' (n 229) 247.

[518] See GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 623 where the author compares English and French law, noting that German and Italian system are situated somewhere in the middle of the spectrum, not as hostile to the concept of pre-contractual disclosure as the English law is, but not as enthusiastic as the French law is either; see also WILHELMSSON and TWIGG-FLESNER (n 113) 455 who observe that '(...) there is a fairly broad variation in the attitudes towards the duty to disclose in the European legal systems. What is more important in this context, however, is the fact that European legal systems can be placed on a spectrum rather than within a strict dichotomy. No legal system lacks a duty of disclosure altogether, and in all systems there are limits to the duty as well.'

[519] Or even hostility, WILHELMSSON and TWIGG-FLESNER (n 113) 455.

[520] GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 303.

[521] GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 623; from the law and economics point of view mandated disclosure 'dilutes incentives to acquire information, which can be socially undesirable' – see Steven SHAVELL, 'Economic

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In the pre-contractual phase, contracting parties are regarded as being in adversarial positions and there is no obligation on them to disclose any information to the other party. The fact that non-disclosure is not viewed negatively does not mean however, that the parties can mislead each other providing false information.[522] In *Walford v Miles*[523] the court clearly stated that:

> (...) the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations.[524]

In *Keates v Cadogan*[525] Maule J illustrates this common law rule with an example:

> If a horse-dealer contracts to sell a gentleman a horse fit to carry him, and he sells him one which he knows to be unfit for the purpose, he does not perform his contract. But, if a man buys a horse generally, the seller will not be responsible, although, knowing that his customer wanted the horse for his own riding, he sells him one which will not carry him.[526]

Parties in English law are allowed to protect their own position, providing they do not actively mislead the other party — the law stays indifferent towards a fault

Analysis of Contract Law' [2002] National Bureau of Economic Research Working Papers 9696 <www.nber.org/papers/w9696> accessed 15 January 2016, 4; WILHELMSSON and TWIGG-FLESNER (n 113) 446 note that 'the issue [of pre-contractual information duties] 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 and those differences seem to reflect deeper differences in the understandings of the institution of contract.'

522 See GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 624 who clarifies that '[t]he courts will not permit statements which actively mislead the other party, but this does not extend to a duty to disclose information which would influence the other party's position.'

523 [1992] 2 AC 128.

524 *Walford v Miles* at 138.

525 (1851) 10 CB 591.

526 *Keates v Cadogan* at 596.

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of omission, it is only the commission, active conduct aimed at misleading the other, that may be actionable.[527]

Spanish law views pre-contractual stage rather differently -– the active co-operation between the contracting parties is promoted. Both parties are bound to communicate to each other all the circumstances known to them — or even more broadly, that should be known to them — that, if were known to the other party as well, would influence their decision as to the contract itself or at least as to some of its terms.[528] In any contractual relationship, as the *Tribunal Supremo* states, it is fundamental to protect the trust the parties have in each other's conduct. The parties shall not take advantage of each other, conduct going against the good faith and trust between the parties is inadmissible.[529] Such conduct might comprise 'encouraging misplaced reliance' or 'securing an unduly advantageous transaction.'[530]

English law admits that in some specific situations the duty to disclose might exist. Nevertheless, as Fry J stated in *Davies v London & Provincial Marine Insurance Co*:[531]

> Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed.[532]

The *caveat emptor* principle operates therefore as a general rule to which exceptions are rare and must be established in law.[533] The judgement in *Sykes v*

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527 John CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University PRess 2002) 157.

528 Ester GÓMEZ CALLE, *Los Deberes Precontractuales de Información* (La Ley 1994) 11.

529 STS de 16 de noviembre de 1979 (RJ 1979/3850), 4.

530 COLLINS, 'Good faith in European Contract Law' (n 379) 250.

531 (1878) 8 Ch D 469.

532 *Davies v London & Provincial Marine Insurance Co* at 474.

533 However, there is a growing number of exceptions, as GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 303 puts it: '[t]he English position thus lies as much with the exceptions as the basic rule.', major exceptions in the field of information duties are introduced into the English law through consumer law.

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Taylor-Rose[534] confirmed that when asked for opinion before contracting, parties are not under duty to disclose any more information than legally required.[535] In contrast, in theory pre-contractual duty to act in good faith recognised in Spanish law requires the parties to disclose all material information. Would the case of *Sykes v Taylor-Rose* have been decided differently, had it happened in Spain? The facts of this case were following: a couple purchased a property, on which a horrible murder had been committed some 20 years earlier. They sold the house less than two years after learning about the murder. When selling the house they were asked by the buyers if there was any other information (apart from all legal and technical things previously discussed by the parties) which they thought the buyer might have a right to know. And their answer was 'no,' they did not tell the buyers about the murder that had taken place on the property. A year after the property transfer, the new owners saw a documentary on TV detailing all the circumstances of the horrible crime, including the fact the victims body had been dismembered and body parts might have still existed within the property. After seeing that documentary, the couple moved out of the house and put it on sale. They disclosed the information on the murder to prospective buyers and subsequently sold the property for 25,000 less than its market value. They sued the previous vendors (that had sold the house to them) for not informing them about property's history, and more importantly for responding 'no' to the question about any other possibly important information. The English court, as we know, decided that there was no duty to disclose that particular piece of information to the other party.[536] On the other hand, the Spanish *Tribunal Supremo* notes that 'malicious conduct' of contracting parties is contrary to the requirements of good faith, the 'malicious conduct' being non-disclosing or omitting certain pieces of information that would influence the will of the other party to enter the contract.[537] Such a point of view might in this case translate into an obligation to mention the fact of the murder having been committed at the

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534 [2004] EWCA Civ 299.

535 See *Sykes v Taylor-Rose* at 584-585.

536 As GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 305 notes, an issue of a general disclosure duty was not even argued in the court at this instance, it had been raised at first instance and was rejected.

537 STS núm. 747/2007 de 3 de julio (RJ 2007/747), Fundamentos de Derecho, Quinto.

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property, especially when specifically asked about any other relevant information concerning the property.

Not only does English law not require parties to disclose material information,[538] but also there is no duty to tell the other party they are mistaken. The authority can be found in the classic case *Smith v Hughes*[539] where Blackburn J explained that 'there is no legal obligation on the vendor to inform the purchaser that he is under mistake, not induced by the act of vendor'.[540] Nevertheless, this position is not as strict as it may seem — if buyer's mistake concerns terms of the vendor's offer, then the latter is bound to inform the buyer of the true nature of his offer.[541] Spanish law is neither that strict on the duty to correct the mistaken party assumptions as it might seem, the *Tribunal Supremo* has emphasized that in some circumstances there is no obligation to reveal to the other party their mistake consisting in their lack of awareness concerning some qualities of the good.[542]

There are various reasons for rejection of the general duty to disclose by English law. Beale points to the 'the fact that English law is very heavily influenced by the heavy diet of commercial cases that are heard in English courts.'[543] The potential financial value of the information is definitely one of them,[544] especially important in B2B contracts, as companies invest their resources in order to acquire information. Secondly, the vagueness of the general disclosure duty would make it hard to determine in each case what is the exact scope of the duty,[545] which in

[538] Apart from the case law mentioned above, see also *Bell v Lever Bros Ltd* [1932] AC 161.

[539] [1871] LR 6 QB 597.

[540] *Smith v Hughes* at 597.

[541] See MCKENDRICK, *Contract law* (n 468) 214, who points out to a more recent case confirming the proposition in law from *Smith v Hughes -– Statoil ASA v Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm).

[542] See STS núm. 263/2009 de 24 de abril (RJ 2009/3167), Fundamentos de Derecho, Cuarto.

[543] Hugh BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (2008) XIV Juridica International 42, 47.

[544] See GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 302; MCKENDRICK, *Contract law* (n 468) 213.

[545] GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 629.

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turn could undermine transactional certainty.[546] Finally, contractual obligations are voluntarily assumed by the parties, hey are said to be 'seeking to make the best bargain they can,' which according to McKendrick explains why they are not expected to share information with each other.[547] Nevertheless, although Spanish companies and individuals are also looking for the best possible bargain and invest into obtaining information, the Spanish law sees the solution rather differently. It is the co-operation of the parties at the pre-contractual stage that is supposed to guarantee the best outcome. Their consent should be as informed as possible, so that neither party could take unfair advantage of the concealed information that would be of importance to the other. Also, traditionally, the Spanish contract law is based on the freedom of contract principle,[548] the parties enter the contract surrendering their freedom, therefore they should be fully aware of all the circumstances. Spanish law aims at limiting litigation and increasing general welfare through encouraging information exchange, as parties conclude contracts knowing all the relevant circumstances and therefore, at least theoretically, only exchanges beneficial for both parties take place. The good faith principle is understood as an objective criterion used to evaluate the behaviour of the contracting parties.[549] However, this very general statement will need to be specifically applied in each situation,[550] and this is when concrete information duties will receive precise scope and meaning.

As mentioned above, in some specific situations, such as some special contracts or duties imposed by legislation, English law recognises various information duties of different types.[551] *Uberrimae fidei* contracts, contracts of 'utmost good faith,' can

546 See GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 301 observing that 'a desire for certainty (...) plays a significant role, requiring security of transactions and clear and predictable rules which the courts are able to apply.'

547 MCKENDRICK, *Contract law* (n 468) 214.

548 Luis DÍEZ-PICAZO, 'La Propuesta de Modernización del Derecho de Obligaciones y Contratos (una Presentación)' (2011) 2130 Boletín del Ministerio de Justicia 1, 2-3.

549 VALÉS DUQUE (n 472) 114.

550 HESSELINK, 'The Concept of Good Faith' (n 467) 623.

551 GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 306 points to six main heads under which pre-contractual disclosure is recognised in English law: '(1) contractual warranties; (2) misrepresentation; (3) tort law; (4) special types of contract which require disclosure; (5) custom; and (6) statute.'

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constitute a good example. In an insurance contracts the parties, and especially the insured, are bound to disclose all facts material to the risk before the contract is made.[552] As observed in this context in *Carter v Boehm*:[553] '[t]he governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.'[554]

Disclosure duties that are introduced in consumer contracts are not directly based on the notion of good faith, nevertheless they also constitute an exception to the general rule of non-disclosure. Those exceptions have different rationales — mandated disclosure is sometimes necessary when one of the parties cannot access relevant information, in other cases it is the protection of a weaker, underinformed party.[555] Still, these are exceptions — apart from specific applications the general duty of disclosure is not accepted. This position was confirmed in a relatively recent case *National Westminster Bank v Utrecht — America Finance Co.*,[556] where it was stated again that 'in England a contract like TOA is not a contract *uberrimae fidei* and neither party owes a duty to disclose material facts to the other.'[557]

However, is English law really that distant from continental systems, such as the Spanish? There are various indications which show that although the pre-contractual duty to inform and more generally to act in good faith is not operative under English law, the result of application of different rules and principles may be similar to that of good faith in Spanish law.[558]

Whittaker and Zimmermann present four solutions that English law offers in

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552 WHITTAKER and ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape" (n 480) 42.

553 (1766) 3 Burr 1905.

554 At 1910.

555 GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 629.

556 [2001] EWCA Civ 658.

557 At 51.

558 MCKENDRICK, *Contract law* (n 468) 219 observes that '(...) civilian lawyers may well use the doctrine of good faith to reach results which English law would reach by a more narrowly defined doctrine. (...) The difference may be more one of technique than result.'; see also BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 543) 44ff.

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response to the consequences of contractual unfairness.[559] First, contract terms and parties' intentions can be interpreted in a manner leading to results comparable to good faith. Potter LJ in *Cargill International SA v Bangladesh Sugar and Food Industries Corp.*[560] confirmed that:

> (...) modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result.[561]

Secondly, some specific contracts, such as above mentioned *uberrimae fidei*, impose on the contracting parties various duties linked to fairness and good faith.[562] Thirdly, Whittaker and Zimmermann point to statutory intervention introducing control on the exercise of contractual rights. In what refers to the duty to disclose material information, this is especially relevant in the case of consumer contracts and numerous information duties established in the directives implemented in the national law. Where there was no general duty to inform, now various specific provisions exist, listing endless information requirements that traders have to comply with in consumer contracts. Finally, English courts adopted various doctrines, such as that of economic duress or of frustration, which also govern the behaviour of contracting parties.[563] Along these lines Bingham LJ noted:

> English law has, characteristically, committed itself to no such overriding principle [that of good faith] but has developed piecemeal solutions in response to demonstrated problems of unfairness. Many examples could

559 WHITTAKER and ZIMMERMANN, 'Good Faith in European Contract Law: Surveying the Legal Landscape" (n 480) 45ff.

560 [1998] 1 WLR 461.

561 At 468.

562 See GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 306ff for other instances of disclosure duties in English law.

563 As to economic duress see *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd* [1979] QB 705; in what refers to the doctrine of frustration see *Davis Contractors Ltd v Fareham U.D.C.* [1956] AC 696.

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> be given. Thus equity has intervened to strike down unconscionable bargains. Parliament has stepped in to regulate the imposition of exemption clauses and the form of certain hire-purchase agreements. The common law also has made its contribution, by holding that certain classes of contract require the utmost good faith, by treating as irrecoverable what purport to be agreed estimates of damage but are in truth a disguised penalty for breach, and in many other ways.[564]

The very concept of acting in good faith may not be as alien to the English law as we are used to thinking. In *Yam Seng Pte Ltd v International Trade Corporation Ltd*[565] Leggatt J gave various reasons for which he believes that the duty of good faith and fair dealing can actually be compatible with the English system. In particular, he observed that:

> (...) in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the Interfoto case as 'playing fair,' 'coming clean' or 'putting one's cards face upwards on the table,' this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual contexts rather than a refusal to recognise that good faith and fair dealing are required.[566]

Nevertheless, the attempts to combine all the above mentioned exceptions and form a general duty of fairness in contracts where there is a significant inequality of bargaining power and the contract cannot be struck down for fraud, misrepresentation or mistake,[567] were unsuccessful so far.

English law does not recognise a duty to disclose acting in good faith, whilst Spanish law, together with other civil law systems, contain such provisions. Nevertheless, there is a common rule for both legal traditions — active deception is

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[564] *Interfoto Picture Library* at 439.

[565] [2013] EWHC 111 (QB).

[566] At 151.

[567] See *Lloyds Bank Ltd v Bundy* [1974] EWCA Civ 8 at 337 per Denning LJ; see also GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 314-315 observing that '(...) in the absence of a contractual warranty or misrepresentation, a pure obligation to disclose will arise only rarely in English law.'

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regarded equally negatively and party acting in bad faith, actively deceiving the other party will not receive any legal protection.[568] In certain situations it might be desirable to let the parties not disclose information, creating socially desirable incentives for the parties to acquire information themselves or when the information is of private value. Common law and civil law systems may, however, understand the desirable effects of disclosure differently, hence different approaches discussed above. Nevertheless, it is common for both legal traditions not to allow non-disclosure in the context of mistake or fraud, since this would only lead to undesirable consequences, such as attempts to carry out fraud on the one hand, and unnecessary costs focused on avoiding being cheated on the other.[569]

1.2.3 Relevant legislation establishing more specific information duties

1.2.3.1 More general and indirect information duties

It is important to distinguish between direct information duties, which I will return to below,[570] usually introduced in lists starting with phrases such as '[b]efore the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer with the following information in a clear and comprehensible manner (...)'[571] followed by various specific pieces of information, and indirect information requirements. The latter are obligations arising from vaguer terms, not laid down as positive, clearly specified duties.[572] Often, the indir-

[568] GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 66) 626.

[569] SHAVELL (n 521) 7.

[570] In Subsection 1.2.3.2 *Overview of concrete information requirements in B2C electronic contracts.*

[571] Art 6.1 Directive on consumer rights.

[572] Cf WILHELMSSON and TWIGG-FLESNER (n 113) 446-447, who give an example of a standard quality requirement in the sales contract, which '[t]o some (...) may appear to be a clear obligation to disclose information, whereas others might prefer to describe it merely as an "indirect information requirement" or a simple "encouragement to provide information".'; see also WEATHERILL, '19. Consumer Protection' (n 99) 240 noting that '[i]nformation disclosure may also be achieved in indirect fashion. For example, a requirement that traders acquire a licence before they may parti-

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ect information duties will arise from the legal rules that establish some negative consequences of the non-disclosure, thus encouraging information disclosure.[573]

As mentioned previously, there is no clearly identifiable general disclosure duty in the *acquis communautaire*. However, there is one directive — not even a contract law one — pushing the development of the information paradigm in the EU law towards such duty: the Unfair Commercial Practices Directive.[574] The Directive is 'without prejudice to contract law' according to its art 3.2 — nevertheless 'it seems obvious that it will have an indirect impact on contract law in various ways,'[575] for instance Member States are free to establish private right of redress, based on a contract law action, for violations of the prohibitions of unfair practices laid down by the Directive.[576] Moreover, the detailed information requirements resulting from other specific directives are complemented by an almost general one stemming from the Unfair Commercial Practices Directive — in its arts 6 and 7, misleading commercial practices are prohibited. The relationship between misleading advertising and the need to disclose information is unclear,[577] however art 7 of the Directive

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cipate in a market can be analysed as a means of signalling to consumers that particular quality standards will be observed. More subtly still, the possibility — but not the requirement — that a trader may secure some form of certification form a relevant public authority will permit the consumer to choose between certified traders and those who choose not to acquire such authorisation and who will (one may suppose) charge a lower price.' In the present study, however, I am mainly looking at contractual information duties, therefore such provisions of administrative law for example stay outside of the scope of this study; also BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 543) 48 who identifies indirect disclosure duties in rules on unfair exploitation, as well as provisions on conformity of contract.

573 See Sergio CÁMARA LAPUENTE, 'La Nueva Protección del Consumidor de Contenidos Digitales Tras la Ley 3-2014, de 27 de Marzo' [2014] Centro de Estudios de Consumo CESCO Working Paper <http://blog.uclm.es/cesco/files/2014/10/La-nueva-protecci\%C3\%B3n-del-consumidor-de-contenidos-digitales-tras-la-Ley-3-2014-de-27-de-marzo.pdf> accessed 15 March 2016, 62-63, who identifies various possible legal classifications of the breach of information duties.

574 MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101.

575 WILHELMSSON and TWIGG-FLESNER (n 113) 456; see also MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 92 pointing to 'the intention of ensuring the consumer's autonomy during pre-contractual negotiations' underlying the Unfair Commercial Practices Directive.

576 As did the English legislator through the Consumer Protection Amendment 2014.

577 MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101 points to various decisions of the CJEU, which failed to deliver an opinion whether and when 'the term "misleading" establishes a "requirement to inform".' – see C-220/98 *Lifting* [2000] ECR I-117; C-373/90

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links the misleading character of a commercial practice with the omission of material information:

> 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 decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.[578]

The indirect, albeit ample disclosure duty there established covers the information that the consumer needs for the informed decision, thus being complementary to the information paradigm and consumer model adopted by the European law.[579] In this way, with the help of unfair commercial practices, violations of pre-contractual information obligations are to be sanctioned, which is where contract law is mixed with unfair commercial practices.

The material information that the Directive refers to is information relative to, among others, the main characteristics of the product, the identity of the trader, the price inclusive of taxes and generally information requirements established by Community law in relation to commercial communication including advertising or marketing.[580] The CJEU however interprets the provisions of art 7 in a restrictive manner, inviting national courts

Nissan [1992] ECR I-131; *GB-INNO-BM*; *Mars GmbH*; Micklitz concludes that the prohibition of misleading advertising could not be condensed into a requirement to inform, at least prior to adoption of the Unfair Commercial Practices Directive.

578 Art 7.1.

579 MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 101-102.

580 See art 7.5 Unfair Commercial Practices Directive; MICKLITZ, 'Unfair Commercial Practices and Misleading Advertising' (n 216) 103-104 notes that 'only the violation of the duties based on Community law counts as misleading. Therefore if Member States have established information requirements that go further than Community law requirements, based on minimal harmonisation, a violation of these rules does not count as misleading omission under EC law.'; moreover it should be noted that the Unfair Commercial Practices Directive constitutes a *lex generalis* in relation to the provisions of Community law regulating specific aspects of unfair commercial practices (see art 3.4 of the Directive), which applies to, among others: Directive on consumer rights, Directive on the sale of consumer goods and Directive on electronic commerce.

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> to assess, on a case-by-case basis, taking into consideration the context of the invitation to purchase, the medium of communication used and the nature and characteristics of the product, whether a reference only to certain main characteristics of the product enables the consumer to take an informed transactional decision.[581]

The influence on the private national law of England and Spain of the Unfair Commercial Practices Directive in the context of indirect information duties is complex, since the Directive theoretically should not influence the contractual rights of the parties.[582] It is transposed into the Spanish legal system mainly through TRLDCU[583] and Ley de Competencia Desleal.[584] The rules of TRLDCU do not impose pre-contractual duties on traders, since the law in its art 19.2 expressly excludes the application of provisions relative to commercial communications to contractual relationships between traders and consumers. In what refers to the Ley de Competencia Desleal, arts 5 (misleading actions) and 7 (misleading omissions) can be regarded as establishing indirect information duties. Their breach gives rise primarily to remedies in two regimes: commercial law, providing remedies which are by no means contractual,[585] and administrative law of consumer protection offences.[586]Furthermore, the general law liability for misleading actions and omissions also needs to be taken into account; the rules applicable will be those relative to the law of defects of consent and breach of contract, of course if the conditions necessary for those actions are met.

In what refers to the English law, the Consumer Protection Amendment 2014

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581 Case C-122/10 *Konsumentombudsmannen v Ving Sverige AB* [2011] ECR I-3903 para 59.

582 Private law remedies and individual redress rights resulting from contract law rules being the focus of this study, I will not analyse in great detail other consequences of breach of information duties, and instances of information duties not giving rise to individual redress.

583 See arts 19, 20 and 49.

584 Ley 3/1991, de 10 de enero, de Competencia Desleal. Boletín Oficial del Estado, 11 de enero de 1991, núm. 10, p.959 (Ley de Competencia Desleal), see especially art 19 referring to unfair commercial practices.

585 See CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 46) 318-322; commercial law remedies indicated in art 32 of the Ley de Competencia Desleal.

586 Art 49 TRLDCU.

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modified the unfair commercial practices system of remedies introduced first through the UTR 2008 and to the offences there established the Consumer Protection Amendment 2014 added private, contractual means of redress for consumers who were victims of some of the unfair commercial practices. Regs 5 and 6 UTR 2008 define the indirect information duties: misleading action and misleading omission. Misleading action is a commercial practice containing false information regarding matters specified in reg 5(4),[587] likely to cause an average consumer to take a transactional decision they would not have taken otherwise[588] or concerning any marketing of a product and creating confusion with that of a competitor.[589] The former case of a false information inducing consumer's transactional decision contains a clear example of an indirect information duty, which could be formulated in a direct manner for example as 'trader shall provide consumer with truthful information regarding matters specified in reg 5(4).' Reg 6 introduces a concept of a misleading omission -– a commercial practice consisting of, for example, omitting or hiding material information and as a result causing the average consumer to take a transactional decision they would not have take otherwise.[590] Material information refers to the information needed by the average consumer to take an informed transactional decision and to information requirements applicable in relation to commercial communications, resulting from the Community law.[591] Similarly to the indirect information requirement stemming from the Directive, reg 6 translates into an obligation to provide consumer with material information before they enter into a contract with trader.

Initially, the indirect information duties resulting from reg 5 and 6 had not been of contractual character, as the only remedies available for breach were of public law nature. It has been changed by the Consumer Protection Amendment 2014. The contractual remedies for breach of indirect information duties resulting thereof are limited to those resulting from misleading action of reg 5 UTR 2008, ie provision of

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[587] Such as the main characteristics of the product, the nature of the sales process, the price or the manner in which the price is calculated, the need for a service, part, replacement or repair or the consumer's rights or the risks he may face, etc.

[588] Reg 5(2).

[589] Reg 5(3).

[590] See reg 6 for all the instances of misleading omissions.

[591] Reg 6(3).

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false information likely to cause an average consumer to take a transactional decision they would not have taken otherwise and actually constituting a significant factor in the aggrieved consumer's decision to enter into the contract or make the payment.[592]

Also, seller's liability for latent defects, a concept known both to English and Spanish law, can be regarded as an indirect introduction of a disclosure duty on the defects of the good being sold. Clearly, such classification requires a certain flexibility of the legal reasoning, however it can be deduced from various provisions of the general law, especially those contained in the Spanish *Código Civil*[593] and in the Sale of Goods Act 1979.[595] Nevertheless, although these provisions are relevant from the point of view of information duties, they do not apply to consumer contracts: in the Spanish law, art 117 of the TRLDCU relative to the remedies for the lack of conformity, excludes the possibility to apply for general contract law remedies concerning latent defects; in the English law, the CRA 2015 replaces for the B2C contracts provisions of the previously applicable legislation,[596] therefore for

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592 See reg 27A UTR 2008 as amended by the Consumer Protection Amendment 2014; in more detail the specific remedies thus established are discussed in Chapter III Section 3.1 *Specific remedies available to consumers*.

593 Arts 1484ff regulate the so-called *acciones edilicias* — remedies available to the buyer when the good purchased turns out to be faulty. From the point of view of information duties, those provisions are relevant, since the seller is only liable for the faulty goods if the buyer is not aware of the defects and art 1484 specifies that the liability arises if the defects affect the product purchased to the extent that the buyer, had they known about them, would not have decided to purchase the goods or would have agreed only to a lower price. It results therefore that the seller can avoid the liability if they disclose the defects to the other party; for more on *acciones edilicias* and their place in the system of contractual remedies in the Spanish law see [594].

595 Sale of Goods Act 1979 (SGA 1979), see especially s 14 of the SGA 1979.

596 Note 24 of the Explanatory Notes to the CRA 2015 states in relation to different pieces of legislation that:

– in what refers to the Supply of Goods (Implied Terms) Act 1973: 'For business to consumer contracts the provisions of the Supply of Goods (Implied Terms) Act 1973 ("SGITA") will be replaced by the Consumer Rights Act 2015. It will be amended so that it covers business to business contracts and consumer to consumer contracts only.'

– Sale of Goods Act 1979: 'For business to consumer contracts this will mainly be replaced by the Consumer Rights Act 2015 but some provisions of SGA will still apply, for example, rules which are applicable to all contracts of sale of goods (as defined by that Act -– essentially these are sales of goods for money), regarding matters such as when property in goods passes. The SGA will still apply to business to business contracts and to consumer to consumer contracts.'

– Supply of Goods and Services Act 1982: 'For business to consumer contracts, this Act's provisions will be replaced by the Consumer Rights Act 2015. The SGSA will be amended so that it

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the products (goods or digital content) purchased from the 1 October 2015 only the provisions of the CRA 2015 apply.

There are however various specific to consumer contracts indirect information duties established through provisions relative to the consumer sales law. Generally speaking, the seller does not have to disclose all the information they possess about the goods being sold, although they might be held liable for the lack of conformity of the goods with the contract of sale,[597] unless the consumer was aware of the lack of conformity. According to the Directive on the sale of consumer goods, '[t]here shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity (...).'[598] The logic of this provision is an indirect disclosure duty -– if the trader does inform the buyer about the non-conformity of goods, then they can avoid liability.[599] The Spanish law in art

covers business to business contracts and consumer to consumer contracts only.'

– Sale and Supply of Goods Act 1994: 'This Act amended the SGA and the SGSA and as such will be superseded by provisions in the Consumer Rights Act 2015 for business to consumer contracts.'

– Sale and Supply of Goods to Consumers Regulations 2002: 'These will be replaced by provisions in the Consumer Rights Act 2015.'

[597] Cf WILHELMSSON and TWIGG-FLESNER (n 113) 446-447 referring to an indirect information obligation resulting from the provisions of sales law that regulate the quality of goods: 'It is generally the case in sales law that there is no obvious obligation on a seller to disclose to the buyer all the information he may have about the quality of the goods he sells; yet, if the goods fall below a standard which the buyer in entitled to expect, the seller will be liable in breach of contract. Had the seller disclosed the relevant information about any shortcomings in quality, then the buyer could no longer claim that he expected a higher standard.'; see also EIDENMULLER (n 132) 1112-1113.

[598] Art 2.3 of the Directive on the sale of consumer goods.

[599] See WILHELMSSON and TWIGG-FLESNER (n 113) 458-459 noting however that 'a general statement that the goods do not conform to the tests [the "fit for normal purposes test" and the "normal quality and consumer expectations test"] is 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.' Further at 460 Wilhelmsson and Twigg-Flesner formulate a general duty of disclosure that could be derived from the provisions of the *acquis* in what refers to the consumer sales law: 'Before the conclusion of a contract, a party has a duty to give to 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.'

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116.3 TRLDCU practically reproduces the provisions of the Directive, while the English CRA 2015 also establishes various indirect information duties in relation to conformity of goods, albeit using different wording.[600] The conformity of goods with the contract includes:[601] the requirements for the goods to be of satisfactory quality,[602] fit for particular purpose[603] and as described.[604]

Also the Directive on unfair terms can be regarded as containing an indirect information requirement resulting from the transparency requirement.[605] The Directive requires the language in which the term was drafted to be transparent, according to the art 5: '[i]n the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, in-

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600 See s 19(3) CRA 2015 relative to the lack of conformity due to a breach of certain information requirements, resulting from s 9(2) (satisfactory standard, taking into account eg description: s 9(2)(a) and advertising s 9(2)(c); s 10(1) (goods fit for particular purpose, if purpose is made known to the trader) and s 11(4) (any information provided about the goods relative to main characteristics of goods becomes term of the contract in relation to Schedule 2(a) to The Consumer Contracts Regulations 2013).

601 Apart from the provisions mentioned relative to the satisfactory quality, fitness for purpose and goods as described, other aspects of the conformity of goods with the contract are also included in the relevant legislation, such as goods matching a sample seen (s 13 CRA 2015, art 116.a) TRLDCU) or a model examined by a consumer (s 14 CRA 2015, art 116.a) TRLDCU) before the contract is formed. Those provisions are only very distantly related to the information duties: the information is provided through objects — samples or models; these are not words, written or said, and not the behaviour of the trader that influences consumer's contracting decision. Those provisions stay outside of the scope of the analysis presented in this study, although it should be kept in mind that they are not completely irrelevant. Moreover, the remedies available for their breach are the same as for the provisions listed above.

602 S 9 CRA 2015, art 116.1.d) TRLDCU.

603 S 10 CRA 2015, art 116.1.b), c) TRLDCU.

604 S 11 CRA 2015, art 116.1.a) TRLDCU.

605 See Edoardo FERRANTE, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive' in Geraint Howells and others (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Markets and the Law, Ashgate 2005); see also LEONE (n 221) 323 citing Norbert Reich and Hans-W. Micklitz, 'Von der Klausel- zur Marktkontrolle' [2013] Europäische Zeitschrift für Wirtschaftsrecht 457, 460: '(...) Micklitz and Reich's conclusion that the recent case law has brought about a "revaluation" ("Aufwertung") of the transparency requirement into "a positive and effective information requirement".'; NORDHAUSEN SCHOLES (n 195) 217 considers the transparency obligation to be 'other contract-related information' which 'is not strictly speaking an information obligation, but deriving from the transparency requirement in the Unfair Contract Terms Directive (...).'

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telligible language.'[606] I will look at the transparency requirement in more detail further in Chapter 2 Subsection 2.1.2 *Requirements relative to the way of providing information*, however here it could be observed in general terms that the transparency requirement seeks to allow the consumer to make use of his rights, through including '(...) the duty of the provider to inform the consumer about certain *essentialia negotio*, like criteria for price increases, modification of the content of the contract':[607] transparency of contract terms allows the information there contained to be communicated effectively. Therefore, the manner in which determined information is to be provided -– clear, comprehensible, easily accessible — constitutes one of the aspects of the information duty. In itself it can be also regarded as a separate duty for the trader, the breach of which leads to defective fulfilment or full breach of the trader's information duties.[608]

In what refers to the indirect information duties introduced at the European level, the right of withdrawal, or cancellation, is also worthy of mentioning. I will look at the right to withdraw from a B2C online contract in more detail in Chapter 3 Subsection 3.3.2 *Right of withdrawal as an example of a specific remedy*, as it is closely connected to the remedies for breach of information duties.

Some authors consider the right of withdrawal to be an extension of the right to information, as it makes it possible for consumers to experience the goods before the purchase becomes irrevocable.[609] Consumers now have a possibility to withdraw from an online contract within 14 days of entering it in a majority of cases,[610] thanks to the art 9 of the Directive on consumer rights. The provisions of the Directive relative to the cancellation right are subject to the full harmonisation regime, therefore are implemented with no divergence into Spanish (arts 102ff TRLDCU) and English law

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606 Art 5; see also art 4(2) that requires the courts to take the transparency of the term into account in assessing its fairness.

607 MICKLITZ and REICH, 'The Court and Sleeping Beauty: the Revival of the Unfair Contract Terms Directive (UCTD)' (n 488) 786ff.

608 FERRANTE (n 605) 130.

609 HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (n 91) footnote 21.

610 See the exceptions to the right of withdrawal out of art 16 of the Directive on consumer rights and exceptions as to the whole regime relative to the online contracts out of art 3.3.

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(regs 27ff Consumer Contracts Regulations 2013).[611]

Finally, the general national contract law also imposes some indirect disclosure duties on the contracting parties.[612] First of all, there is the obligation of the parties to act in accordance with the principle of good faith and fair dealing, which is discussed above. Nevertheless, more specific, but still quite general rules of the national private law also establish some indirect information duties through a number of different doctrines, such as the vitiating factors (or defects of consent) -– mistake, misrepresentation and fraud. Wilhelmsson and Twigg-Flesner contrast a duty to inform with those concepts, pointing out that the law of mistake and fraud is majorly concerned with the consequences of providing false information, and not the duty to inform as such.[613] However, those doctrines are very closely linked to the information duty: some authors consider them to be forming a coherent rules governing pre-contractual information obligations,[614] others imply that a general disclosure duty could replace vitiating factors doctrines, such far reaching is the link between the two concepts.[615]

As already noted, mistake, misrepresentation and fraud deal with consequences of giving false or inaccurate information, rather than establish a straightforward disclosure duty, which is why I will discuss those concepts in the Chapter 3 where the consequences of breach of information duties are analysed. Nevertheless, as with other indirect information duties mentioned above, rules which set out the consequences of some pre-contractual behaviour can be also regarded as incentives to act differently. Information duties in consumer contracts are aimed at allowing con-

611 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013/3134 (Consumer Contracts Regulations 2013), subsequently amended by the Consumer Contracts (Amendment) Regulations 2015, SI 2015/1629.

612 SEFTON-GREEN, 'General Introduction' (n 187) 10-12.

613 WILHELMSSON and TWIGG-FLESNER (n 113) 448.

614 See eg Hans Christoph GRIGOLEIT, 'Irrtum, Tauschung und Informationspflichten in den European Principles und in den Unidroit-Principles' in Reiner Schulze and others (eds), *Informationspflichten und Vertragsschluss im Acquis Communautaire* (Mohr Siebeck 2003); cf GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 56) 310ff.

615 See Gerrit de GEEST and Mitja KOVAC, 'The Formation of Contracts in the Draft Common Frame of Reference – A Law and Economics Perspective' in Filomena Chirico and Pierre Larouche (eds), *Economic Analysis of the DCFR : the Work of the Economic Impact Group within CoPECL* (Sellier European Law Publishers 2010) 72; see also EIDENMULLER (n 132) 1112ff.

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sumers to take rational contracting decisions, the doctrine of defects of consent provides remedies where that contractual decision was based on false information.[616] How close these two concepts are can be illustrated with examples from both Spanish and English law. Art 1269 of the Spanish *Código Civil* defines *dolo* (fraud) as a situation where one of the parties, because of other parties insidious -– false, inaccurate -– words or machinations is induced to enter into a contract, which they would not have entered into, had the other party not induced them to do so. Similarly, in English law fraudulent misrepresentation is referred to as 'a false statement, by words or conduct (but not silence), of fact which is sufficiently certain to be relied upon by the representee.'[617] The differences in application of the doctrines in both systems are looked at in Chapter 3 Section 3.2 *General private law and remedies it offers*; the overarching general indirect duty resulting from those laws is a negative duty not to provide the other party with false information in order to induce them to contract.[618] The existence of such duties resulting from the rules on misrepresentation or mistake cannot be in any case generalised into a general disclosure duty from which specific duties could be deduced in individual cases. On the other hand, however, the indirect duties need to coexist with specific, detailed duties established especially through the implementation of European directives, often not only applying to the same factual situations, but also, even more importantly, providing the remedies to the aggrieved consumer.[619]

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[616] WILHELMSSON and TWIGG-FLESNER (n 113) 448.

[617] John CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Contract Law Library, Sweet & Maxwell 2012) 352.

[618] Cf WILHELMSSON and TWIGG-FLESNER (n 113) footnote 49 citing *Spice Girls Ltd v Aprilia World Service BV* [2000] EWHC Ch 140 and in the context of this case observing that '[e]ven in English law indirect duties of disclosure are constructed, for example, with the help of the concept of misrepresentation; the courts have been willing to hold that a misrepresentation can arise where the conduct of one of the contracting parties suggests something which is not, in fact, true (...).'

[619] Cf EIDENMULLER (n 132) 1112-1113 pointing out to the fact that 'as far as these doctrines [of misrepresentation, fraud and mistake] protect the interest of one party in receiving certain information from the other, it would be redundant to introduce additional information duties into contract law and to establish additional remedies for breach of such duties. More importantly, the establishment of additional information duties may give rise to inappropriate remedies.'

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1.2.3.2 Overview of concrete information requirements in B2C electronic contracts

Specific information duties are a tool used by the European legislator in a quantity often described as excessive.[620] Their general aim is to protect consumers as weaker market players in their relationships with traders, more specifically however information duties are being established by the directives in situations where consumers find themselves at a particular disadvantage[621] -– either because of the context in which the contract is concluded, or due to a particular nature of the transaction.[622] The former factor — the context of the transaction -– is relevant to the present study, the context being digital environment, which affects consumer's ability to take informed decision due to various characteristics of the e-commerce, such as unlimited availability of offers or impossibility of inspecting the product prior to purchase. The latter criterion of the nature of the transaction refers to particular types of contracts, where the legislator deems necessary that consumers be given specific information,[623] as in a case of contracts for financial services or package holiday. Those transactions can also be concluded (or advertised) online and then apart from the laws applicable because of the digital environment context of the transaction, also provisions specific for such type of contracts will apply.[624]

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620 See eg CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 46) 314.

621 Compare eg how the Directive on consumer rights deals with the trader's information obligation in general in any consumer transaction (art 5) and in off-premises and distance contracts (arts 6ff): firstly, the former situations are regulated to a much lesser extent, secondly, only the latter are covered by the full harmonisation principle.

622 WILHELMSSON and TWIGG-FLESNER (n 113) 461-462.

623 Ibid.

624 The abundant European legislation concerning specifically certain transaction types (and national laws implementing European rules) is not the focus of the present study, which is aiming at showing general mechanisms governing the information duties in online B2C transactions and their breach under English and Spanish law, therefore specific information duties established in the following directives and their transposition to the Spanish and English law stay outside of the scope of this study and are not analysed in more detail: Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety [2001] OJ L011/4 (Directive on product safety); Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending

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It will be only little exaggeration to say that the lists of information requirements on the B2C e-commerce are almost endless and it is not possible to comprehensively present in this study the countless information duties that the current legislation contains. Different provisions apply to sale of goods or supply of services contracts, various goods are excluded from the scope of application of certain statutes, whilst to others, such as to digital content, other provisions apply.[625] Moreover, transactions concluded with the use of credit card may benefit from consumer credit protection rules. Nevertheless, the aim of this study is to present certain mechanisms that guide the application of remedies for breach of the duties, and compare their functioning in two different legal systems, English and Spanish. Therefore, the main focus will be the placed on the operation of remedies and on comprehensible presentation of the complex system of remedies that originate both in specific legislation and in general national private law.

The complexity of consumer law is also closely intertwined with the fact that case law is considerably sparse.[626] The meaning of various provisions was therefore never tested and interpreted by courts. Moreover, partly due to new directives adopted at the European level, such as the Directive on consumer rights, but also because of increasing complexity of consumer law and national legislator's attempts to clarify existing rules, which was the origin of the CRA 2015 in the UK, many new statutes and statutory instruments have recently been adopted both in England and Spain.

Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16 (Directive on distance marketing of financial services); Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66 (Directive on consumer credit); Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10 (Timeshare Directive); Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 (Directive on consumer ADR); Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34 (Directive on credit agreements relating to immovable property); Package Travel Directive.

[625] Also the issue of the level of harmonisation applied by various directives adds to the complexity of the legal landscape, see HOWELLS and REICH (n 108) 52-53 52-53.

[626] Geoffrey WOODROFFE and Robert LOWE, *Woodroffe & Lowe's Consumer Law and Practice* (9th edn, Sweet & Maxwell 2013) 9.

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Therefore, not only are consumers deterred from bringing proceedings to courts because of their length and high costs, but also conflicts relative to analysed rules have not had a chance to potentially reach litigation yet.

I will centre my analysis primarily on online sale of goods contracts,[627] although other relevant rules will also be mentioned. The specific direct duties that are of a particular interest for the present study are established mainly in two directives: the Directive on electronic commerce and the Directive on consumer rights; information duties resulting thereof nevertheless need to be viewed in light of more general, indirect duties. The following overview of concrete information duties applicable to the B2C e-commerce is of a general nature,[628] nevertheless in order to be able to analyse the issue of breach of the duties and its consequences, it is necessary to identify those duties first.

The Directive on electronic commerce is not restricted to B2C contracts, however the legislative technique it uses in relation to information obligations is characteristic of consumer contracts.[629] Moreover the information provisions that it contains are not expressed in terms of pre-contractual information, as Wilhelmsson and Twigg-Flesner observe, however it appears to be evident that the information required by those provisions should be made available to the other party prior to the contract conclusion.[630] The main goal of the information duties laid down in the Directive on electronic commerce is to improve the confidence of the Internet users in the e-commerce:[631] art 5 is relative to the information necessary to allow the service

627 Hence the references made in the present study to the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36), which also establishes information duties, will be limited.

628 For a more detailed study of concrete information duties in the B2C contracts see eg Christian TWIGG-FLESNER, *The Europeanisation of Contract Law: Current Controversies in Law* (Routledge-Cavendish 2008) 63ff; Arno R LODDER, 'Information Requirements Overload? Assessing Disclosure Duties under the E-Commerce Directive, Services Directive and Consumer Directive' in Andriej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Research Handbooks in European Law, Edward Elgar 2014).

629 FINOCCHIARO (n 200) 114.

630 WILHELMSSON and TWIGG-FLESNER (n 113) 457.

631 Patricia MÁRQUEZ LOBILLO, *Empresarios y Profesionales en la Sociedad de la Información* (Cuadernos Mercantiles, Editoriales de Derecho Reunidas, SA 2004) 288ff; LODDER (n 628) 362.

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recipients, ie in our case consumers, to identify the service provider -– the trader;[632] art 6 aims at making commercial communications clearly recognisable; finally art 10 requires the service provider to give the other party information regarding various technical matters relating to order placement in order to make up for a technological asymmetry between the contracting parties.[633]

In what refers to the Directive on consumer rights, it is also designed with increasing consumer confidence in the e-commerce in mind, more precisely following the steps of the European distance selling legislation aiming at putting consumers acting in the digital environment in a similar position to those purchasing products in the course of traditional, physical trade.[634] Nevertheless, it is worth noting that the Directive in its art 3 excludes from the scope of its application numerous contracts, including those for passenger transport services, for the supply of foodstuffs and for package holiday, therefore considerably limiting the application of the rules relative to the pre-contractual information and withdrawal rights. Art 6 deals with information duties in distance contracts — art 6.1 in its letters (a) to (t) names various information requirements, which can nevertheless be put in groups according to the type of information that is required: characteristics and price of the product -– art 6.1(a), (e); trader's data allowing their identification and contact — art 6.1.(b), (c), (d);[635] information on costs — of using the means of communication 6.1.(f) and of returning the goods in a case of withdrawal 6.1.(i) and on deposits or financial guarantees to be paid by the consumer in art 6.1.(q); information relative to the contract itself -– arrangements for payment, delivery and performance 6.1.(g), for

[632] And to allow the customer to contact the trader, see LODDER (n 628) 365, 375ff.

[633] FINOCCHIARO (n 200) 114.

[634] Cf Jorg BINDING and Kai PURNHAGEN, 'Regulations on E-Commerce Consumer Protection Rules in China and Europe Compared – Same Same but Different?' (2011) 2 Journal of Intellectual Property, Information Technology and E-Commerce Law 186, 191; MIGUEL ASENSIO (n 2) para 892; for a detailed analysis of the Directive and information duties there established see MIRANDA SERRANO (n 108); see also Esther ARROYO AMAYUELAS, 'La Contratación a Distancia en la Directiva de Protección de los Derechos de los Consumidores' in Sergio Cámara Lapuente and Esther Arroyo Amayuelas (eds), *La Revisión de las Normas Europeas y Nacionales de Protección de los Consumidores: Más Allá de la Directiva sobre Derechos de los Consumidores y del Instrumento Opcional sobre un Derecho Europeo de la Compraventa de octubre de 2011* (2nd edn, Civitas-Thomson Reuters, Intersentia 2012).

[635] LODDER (n 628) 365, 375ff.

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post-sale service 6.1.(m), the duration of the contract 6.1.(o), the minimum duration of consumer's obligation under the contract 6.1.(p); information relative to the right of withdrawal -– art 6.1.(h), (j), (k); information with reference to consumer's redress rights -– art 6.1.(t) and 6.1.(n) relative to professional codes of conduct. A novelty introduced by the Directive on consumer rights is the information duty relative to the digital content -– which when sold on-line constitutes an example of the direct e-commerce -– its functionality in art 6.1.(r) and its interoperability with hardware and software of the consumer in art 6.1.(s). Finally, art 6.1.(l) constitutes a link to the law of sale of consumer goods, as it requires the trader to provide 'a reminder of the existence of a legal guarantee of conformity for goods.'

The Directive on consumer rights also contains some more indirect information requirements relevant for the electronic transactions, expressed rather as trader's obligation to seek consumer's express acknowledgement – art 8.2 (formal requirements for distance contracts):

> (...) The trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words 'order with obligation to pay' or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader.

Similar expression is used by art 22 (additional payments): 'Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. (...)' Consumer giving their express consent or acknowledgement need to be informed first that the order implies an obligation to pay or about any additional payments. Moreover, the trader cannot infer consumer's consent through so-called 'pre-ticked boxes': 'default options which the consumer is required to reject in order to avoid the additional payment (...).'[636]

What is the relationship between the information duties established in the Directive on electronic commerce and the Directive on consumer rights? Art 6.8 of the

[636] Art 22 in fine.

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Directive on consumer rights states that the '[t]he information requirements laid down in this Directive are in addition to information requirements contained in (...) Directive 2000/31/EC [on electronic commerce] (...).' The information duties from the Directive on consumer rights complement those established in the Directive on electronic commerce, however the provisions of the Directive on consumer rights prevail should there be any contradiction between the two acts.[637]

At the national level, the laws implementing the aforementioned directives are where the specific information duties applicable in B2C electronic contracts can be found. In what refers to the Spanish law, the LSSICE should be briefly looked at[638] -– its art 10 requires information relative to the service provider to be easily available to the service recipients; arts 19–22 referring to the commercial communication establish various duties linked to those; finally article 27 imposes on a trader a duty to inform consumers about the technical issues involved in entering an electronic contract.[639]

This study is concerned with pre-contractual information duties, however it is worth noting that the following art 28 establishes some post-contractual information obligations, relating mainly to the confirmation of the contract concluded. The E-commerce Regulations 2002 implement the Directive on electronic commerce into the English law, and reg 6 deals with general information concerning the service provider, regs 7 and 8 are relative to the commercial communications, and reg 9 sets out the 'technical' information to be provided before conclusion of an electronic contract.

In what refers to strictly consumer contract law, the main piece of legislation in Spain is TRLDCU and in the UK -– the new CRA 2015. The *status quo* in the English law is quite complex: first, the Directive was implemented via the Consumer

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637 Klaus TONNER, 'The Consumer Rights Directive and its Impact on Internet and other Distance Consumer Contracts' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 411-412.

638 Although the LSSICE does not affect the level of consumer protection, it does effectively impose information requirements aimed at completing information requirements in B2C distance contracts for the special case of electronic contracts, see HERNÁNDEZ JIMÉNEZ-CASQUET (n 5) 474.

639 The LSSICE, similarly to the Directive on electronic commerce is directed not only at B2C transactions, hence art 27 allows to exclude the information duty when the other party is not a consumer.

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Contracts Regulations 2013,[640] then in 2015 the CRA 2015 was adopted. The recently enacted Act 2015 introduces a new system of remedies available to consumers in the case of breach of their rights, including the right to receive information. According to the British Department for Business, Innovation and Skills:

> Because of the act, the law will be clearer and easier to understand, meaning that consumers can buy and businesses can sell to them with confidence. (...) UK consumers spend £90 billion a month. Transparent rights will help them to make better choices when they buy, generating the opportunity for businesses to compete, innovate and grow. With these changes in place, businesses and consumers will create an economy based on productive relationships and fairly won business reputations.[641]

The CRA 2015 consolidates consumer law legislation, replacing various relevant Acts and Regulations (but only in the extent applicable to B2C contracts),[642] such as Sale of Goods Act 1979 (although some provisions of SGA 1979 will still apply), Unfair Contract Terms Act 1977[643] and Unfair Terms in Consumer Contracts Regulations 1999.[644] Nevertheless, there are still in force other pieces of legislation that apply to B2C on-line transactions and contain provisions relevant to the provision of pre-contractual information, and especially the aforementioned E-commerce Regulations 2002 and Consumer Contracts Regulations 2013.[645]

The Directive on consumer rights was transposed into the Spanish law through the modification of the TRLDCU by the Ley 3/2014, which has introduced various

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640 For more on the implementation of the Directive on consumer rights into English law see Paula GILIKER, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (2015) 23 European Review of Private Law 5.

641 See Policy paper Consumer Rights Act 2015, from Department for Business, Innovation and Skills, published on 14 August 2015 <www.gov.uk/government/publications/consumer-rights-act-2015/consumer-rights-act-2015> accessed 15 May 2016.

642 For complete list of legislation replaced by the Act see note 24 in Explanatory Notes to CRA 2015.

643 Unfair Contract Terms Act 1977 (UCTA 1977).

644 The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

645 The UK consumer law therefore stays highly complex and technical despite the adoption of the CRA 2015, see GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' (n 258) 2.

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changes to the text of the TRLDCU.[646] The issue of implementation of the Directive into the Spanish law had been widely discussed,[647] finally the legislator opted for an almost literal inclusion of the text of the Directive into the existing statute on consumer protection — the TRLDCU.[648]

The information duties in distance contracts are covered by the full harmonisation principle established in the art 4 of the Directive on consumer rights, meaning that 'Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection (...).' In consequence, information duties both in Spanish and English law need to be the same as in the text of the Directive, which indeed they are: art 97 of the TRLDCU introduces information requirements in distance contracts, art 98 formal requirements for distance contracts; reg 13 of the Consumer Contracts Regulations 2013 makes reference to the Schedule 2 which lists the information items to be provided before

646 See eg Vicente MAGRO SERVET, 'Análisis de la Ley 3/2014, de 27 de marzo, por la que se modifica el texto refundido de la Ley general para la defensa de los consumidores y usuarios' [2014] Práctica de Tribunales 1; Ana Isabel BERROCAL LANZAROT, 'Líneas Maestras de la ley 3/2014, de 27 de marzo por la que se modifica el Texto Refundido de la ley general para la defensa de los consumidores y usuarios' [2014] Actualidad Civil 1.

647 See Encarna CORDERO, 'Cómo Transponer la Directiva de Consumidores al Derecho Español?' (2012) 1 Revista CESCO de Derecho de Consumo 108; Ana Isabel MENDOZA LOSANA, 'Observaciones, Comentarios y Propuestas de Mejora del Anteproyecto de Ley por el que se modifica el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias aprobado por el RDL 1/2007' (2013) 6 Revista CESCO de Derecho de Consumo 308.

648 Cf Ley 3/2014 Explanatory Memorandum s I in fine where the legislator confirms that the main criterion followed in the implementation of the Directive on consumer rights was to keep the Spanish legislation as close to the Directive as possible, minimising the impact on the existing legislation to the minimum; see also GILIKER, 'The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive' (n 640) 11-12, who analyses the 'copy out' implementation technique in the context of the transposition of the Directive on consumer rights into the English law:' "Copy out" requires the draftsman whenever possible to reproduce the wording of the directive (with suitable adjustments to integrate elements of the recitals when necessary). This avoids adding any extra rights, but also may be consistent with broader European goals. Following the exact wording of the directive is likely to minimize the risk of infringement proceedings under Article 258 TFEU (...). "Copy out" may also reduce the possibility of state liability for breaching EU law under Francovich. [And] (...) has the desirable effect of making the transposed law more visible. Where the EU provisions are simply integrated into national law, there is a danger that they disappear into national legislation, their European origins forgotten.'

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making a distance contract, reg 14 is relative to the requirements for distance contracts concluded by electronic means. The same applies to the exclusions from the scope of the application of the rules, relevant to this study, on pre-contractual information and withdrawal right. Art 93 of the TRLDCU and reg 6 of the Consumer Contracts Regulations 2013 indicate that various types of contracts are not included in the scope of the consumer law relative to distance contracts.[649]

[649] A solution which has been criticized especially in what refers to the contracts for passenger transport services, eg plane tickets, of indisputable significance for the e-commerce as such, see Patricia MÁRQUEZ LOBILLO, 'Contratación Electrónica de Viajes Combinados: Reflexiones tras la Propuesta de Directiva de julio de 2013 y el Proyecto de Reforma del TRLGDCU de octubre 2013 sobre el <<Derecho de desistimiento>>' [2015] La Protección de los Consumidores en Tiempos de Cambio. Ponencias y Comunicaciones del XIII Congreso de la Asociación Sainz de Andino; Luís María Miranda Serrano and others (eds) 141.

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2 Information duties, their fulfilment and breach — general analysis

2.1 Characteristics of the duty to inform and its breach

2.1.1 Content and scope of the information duties

In order to be able to analyse the breach of information duties, it is necessary not only to establish what duties are imposed on traders, but also their content and scope. Pre-contractual information duty is an obligation on the side of the trader -– an obligation that can be contrasted with an incentive or choice whether to provide or not some information to the consumer[1] -– resulting from legal rules requiring in a direct or indirect manner[2] that information be provided to the other party. Such consideration implies that breach of the duty will result in some legal consequences, as there is no legal obligation when there are no consequences of its breach; that would be merely an encouragement.

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[1] Thomas WILHELMSSON and Christian TWIGG-FLESNER, 'Pre-contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441, 446.

[2] As noted above in Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties.*

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Secondly, the very notion of 'pre-contractual duties' indicates that the obligation arises in the pre-contractual stage of the parties' contractual relationship, ie before the parties conclude the contract,[3] as opposed to the contractual information duties, requiring the information to be given once the contract has been concluded.[4] At this point, the notion of 'pre-contractual information duties' needs some clarification also in what refers to its relation to other concepts, such as contract terms, advertisements and commercial communications. First of all, pre-contractual information as such subsequently becomes a part of the contract, according to art 6.5 of the Directive on consumer rights: '[t]he information referred to in paragraph 1 shall form an integral part of the distance (...) contract and shall not be altered unless the contracting parties expressly agree otherwise.' The Directive however also refers to 'contractual terms', eg in the recital (15): '(...) Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms' suggesting therefore that although the information becomes an 'integral part of the contract' it is still different from contractual terms.[5] The use of varying terminology creates some confusion, nevertheless it seems that the pre-contractual information can be treated as contract terms, clearly after (and if) the contract is formed;[6] a possible explanation as to the use of different concepts in the Directive might be that the contract terms describe parties' rights and obligations under a contract, and some items of the information do not really shape parties' relationship, eg those relating to a reminder of the existence of a legal guarantee of conformity

[3] WILHELMSSON and TWIGG-FLESNER (n 1) 446 describe this time period in the following words: '(...) during the negotiations which may eventually result in a binding contract, or when a party has indicated his willingness to enter into a contract but the necessary formalities have not yet been completed.'

[4] Annette NORDHAUSEN SCHOLES, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009) 217.

[5] See ibid 234-235, where in the context of the Proposal for the Directive on consumer rights Nordhausen Scholes notes: '[i]t could be said that all that forms part of a contract will be the terms of the contract, but why would different terminology be used in different parts of the same legislative document? Should the term "integral part" mean something different from "contract terms"?'

[6] This consideration, ie pre-contractual information as contract terms will be explored in more detail in the context of remedies for breach of information duties in Chapter 3 of the present study.

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for goods[7] or the existence of relevant codes of conduct.[8] The Spanish legislation, TRLDCU, which as already mentioned practically copies the text of the Directive, also refers to both concepts: an integral part of the contract -– '*parte integrante del contrato*'[9] and contract terms — '*cláusulas del contrato.*'[10] The English legislation makes it clear: the CRA 2015 in ss 11(4), 11(5) and 12 in relation to goods; 36(3), 36(4) and 37 in relation to digital content and s 50(3) and (4) in relation to services requires '[a]ny information that is provided by the trader (...) [that] is information mentioned in (...) Schedule 2 to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (...) is to be treated as included as a term of the contract.'[11]

Also a reversed situation should be considered: can contract terms, to which eg refers the Directive on unfair terms in the transparency requirement,[12] as well as the TRLDCU[13] and the CRA 2015,[14] be regarded as pre-contractual information? Contract terms, especially in the electronic B2C contracts, are usually provided to consumers before the conclusion of the contract; moreover as the pre-contractual information becomes contract terms, then requirements regarding contract terms result applicable to the pre-contractual information as well.

Commercial communications and advertising[15] can amount to pre-contractual information,[16] as they contain information about the trader's product and they are

7 Art 6.1.(l) of the Directive on consumer rights.

8 Art 6.1.(n).

9 Art 97.5 TRLDCU.

10 See eg art 102.2 TRLDCU.

11 Cf ss of the CRA 2015 listed.

12 Art 5 of the Directive on unfair terms reads: 'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language.(....)'

13 Art 80 TRLDCU.

14 S 68 CRA 2015.

15 See eg art 2.(f) of the Directive on electronic commerce or 2.(d) of the Unfair Commercial Practices Directive considers commercial communications to be a type of commercial practice.

16 However cf art 14 CISG whch treats advertisements as invitations to treat, therefore not included in contract contents.

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logically provided to the consumer before the contract conclusion. Main aim of both commercial communications and advertisements is to promote trader's products and therefore induce the consumers to enter into contract with the trader. Under the Spanish law advertising is considered to constitute part of the contract -– art 61 of the TRLDCU states that the contents of an advertisemen[17] become part of the contract, even if the written contract does not expressly state that.[18] Commercial communications used in distance communication however, are included expressly in art 96 of the TRLDCU, which does not specify their character -– they can be treated as either offers, which form part of the contract, or invitations to treat, *invitatio ad offerendum*, which are only aimed at raising consumers' curiosity regarding the trader's products and invite consumers at offering contract conclusion to the trader. Under the Spanish law, the commercial communication in order to be considered an offer needs to be sufficiently precise and contain all the necessary elements of the contract, at least: the offeror's identity, main characteristics of the good or service offered, price or the manner in which it is to be calculated, payment and performance arrangements and the time period for which the offer is valid.[19]

In English law advertising may only in some limited circumstances be considered to be an offer, it will then naturally form part of the subsequent contract (if formed) — especially when the statement made in the advertisement is sufficiently precise.[20] Nevertheless, in English law traditionally a concept of 'mere puffs' is recognised[21] — sales talk which is an acceptable exaggeration, of no legal effect: a statement which is too vague to be considered either a contractual promise, subsequently incorporated

[17] The provision refers to '*oferta, promoción y publicidad*' that is different kinds of commercial communications directed at consumers.

[18] Raquel GUILLÉN CATALÁN, *El Regimén Jurídico de la Oferta Contractual Dirigida a los Consumidores (Adaptada al Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el TRLGDCU)* (Colegio de Registradores de la Propiedad y Mercantiles de España, Centro de Estudios 2010) 29 notes that even before the TRLDCU was adopted, Spanish courts treated advertisements as binding, basing such requirement on the art 1258 of the *Código civil* and the good faith principle resulting thereof.

[19] Natalia FERNÁNDEZ PÉREZ, *El Nuevo Régimen de la Contratación a Distancia con Consumidores: Especial Referencia a la Relativa a Servicios Financieros (* (La Ley 2009) 228-229.

[20] *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.

[21] Advertising puffs will also be mentioned further in Chapter 3 Section 3.2 *General private law and remedies it offers.*

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into the contract as a term, or a representation understood as a statement of fact intended to be relied upon.[22] In consumer contracts, the CRA 2015 in its s 9(6) relative to the quality of goods, states that in assessing if the quality of goods is satisfactory, any public statements made by the trader, including advertising, are to be taken into account.

In conclusion, it can be assumed that commercial communications and advertising may be considered pre-contractual information, if they are sufficiently precise and the trader's intention for them to be relied upon can be demonstrated. Moreover, specific Spanish legislation – art 61 TRLDCU – expressly considers advertising to form part of the contract. Therefore information included in advertising and commercial communications can relatively often be considered pre-contractual information, as it is aimed at inducing the consumer to contract on the one hand, and it might subsequently be included in the contract as terms on the other.

In the case of the pre-contractual duties we also need to specify the moment in time from when the disclosure duties and their fulfilment are viewed and the function that they are intended to perform. As already discussed, the main role of the specific information duties established in the European directives is to allow consumers to take informed contracting decisions. Logically, the trader's information duty should therefore arise irrespective of whether the contract with consumer is subsequently entered into or not. Moreover, some provisions applicable also to the online contracts require the information to be always available — eg art 5 of the Directive on electronic commerce: '[i]n addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service (...) at least the following information (...).'[23] Nevertheless, individual, private law remedies will arise only in limited cases if the parties finally decide not to enter

[22] See *Dimmock v Hallett* (1866) LR 2 Ch App 21 at 27 where Turner LJ observed: '(...) I think that a mere general statement that land is fertile and improvable, whereas part of it has been abandoned as useless, cannot, except in extreme cases—as, for instance, where a considerable part is covered with water, or otherwise irreclaimable—be considered such a misrepresentation as to entitle a purchaser to be discharged. In the present case, I think the statement is to be looked at as a mere flourishing description by an auctioneer (....).'

[23] See Patricia MÁRQUEZ LOBILLO, *Empresarios y Profesionales en la Sociedad de la Información* (Cuadernos Mercantiles, Editoriales de Derecho Reunidas, SA 2004) 288ff.

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into the contract with each other[24] -– this generally speaking belongs to the realm of competition law and administrative law sanctions. Also, especially in the electronic transactions, traders provide consumers with the contract terms before the conclusion of the contract; the terms constitute the information about consumer's rights and obligations under the contract.[25] Therefore, although the intrinsic characteristic of the pre-contractual duties is that they concern the stage prior to contract formation, their significance from the perspective of their breach and availability of potential private law remedies depends on the very fact of the contract having been concluded. The information provided gains then some new value. Now this consideration needs to be contrasted with the nature of the remedies for the breach of information duties, analysed further, which might be contractual, pre-contractual or both.[26] It can be concluded that for the purposes of the analysis of the private law consequences of the breach of information duties, they arise at the pre-contractual stage but are assessed from the perspective of the posterior contract formation.

The scope of the information duty can vary from a plain duty to provide truthful information to an obligation to advise the other party taking into account their specific needs. First of all, the scope of the duty depends on its effect on the party providing information — the trader in the consumer law context -– here some authors distinguish two concepts: a duty to 'inform' and a 'disclosure' duty.[27] The information duty requires the party to provide certain pieces of information to the other party, and its predominant aim is to improve market transparency thus encouraging informed transactional decisions; it is also closely linked to the weaker party protec-

[24] On the basis of the so-called *culpa in contrahendo*, cf egRuth SEFTON-GREEN, 'General Introduction' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2004) 12.

[25] This consideration is of primary importance for the analysis of breach of information duties, as the pre-contractual information can be in many instances reduced to contract terms.

[26] Paula GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' in Stefan Grundmann and Martin Schauer (eds), *The Architecture of European Codes and Contract Law* (Private Law in European Context Series, Kluwer Law International 2006) 313; for more detailed analysis of the nature of the remedies for breach of the pre-contractual information duties see below Subsection 2.2.3.2 *Nature of remedies: contractual, tortious or other?*

[27] WILHELMSSON and TWIGG-FLESNER (n 1) 451-452; SEFTON-GREEN, 'General Introduction' (n 24) 1-2.

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tion. The great majority of the consumer *acquis* contains provisions of such kind.[28] On the other hand, the duty to disclose information implies that the informing party might prefer to hide some information from the other party but is obliged to reveal it.[29] The disclosure duty is present in general contract law both in England and Spain, although to a different extent. The duty to disclose is aimed against dishonest parties with an intention to induce the other party to form a contract they would not have entered into, had they known all the material information. It corresponds to the general private law and brings to mind the duty to act in good faith, entailing in Spanish law the requirement of an honest behaviour towards the other party.[30] English law does not recognise the duty to act in good faith, however there is a link between the disclosure duty and the law of misrepresentation, where remedies are available to the misrepresentee induced into the contract through provision of false information. Of course, the law of misrepresentation for it to be actionable requires the representation that was actually made to be truthful, while disclosure duty is imposed at an earlier stage — before any representation was provided, however the main rationale of such general duty is similar: upholding the moral duty of honesty translating into protection of a real consent of the other party, rather than market transparency in itself. Nevertheless, the difference between those two concepts of information and disclosure is far from striking, and indeed both duties aim at allowing the other party to take an informed decision. Moreover, the plain information duty may often become a disclosure obligation, when the provisions require to provide information about something the party would prefer to hide.[31] In the present study I

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[28] WILHELMSSON and TWIGG-FLESNER (n 1) 452.

[29] SEFTON-GREEN, 'General Introduction' (n 24) footnote 3.

[30] See above Chapter 1 Subsection 1.2.2.1 *Good faith, fair dealing and pre-contractual duties of disclosure.*

[31] WILHELMSSON and TWIGG-FLESNER (n 1) 446 and footnote 21, who observe that the distinction between the duty to inform and the duty to disclose information '(...) should not be overstated, because even a simple obligation to provide information may cause a person to reveal something that he might have preferred to keep to himself and thereby become a duty of disclosure.' and further provide an example in the pertinent to the present study consumer law context: '[f]or example, in the consumer context, a trader is often required to provide information about complaints handling procedures. Where a trader only has basic procedures, or none at all, he might prefer not to reveal this to a consumer. What may look like a simple requirement to provide information becomes a duty to disclose.'

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am treating those two notions as synonyms and I am using them interchangeably,[32] however I am aware of their potentially different significance.

The scope of information duty can vary also from the point of view of their intended effect on the information addressee, namely the consumer. Plain information duty, consisting just of provision of various items of information required by law is subject to a lot of criticism, especially from the behavioural economics perspective. Nevertheless, there are certain types of information duties, which go further than plain information requirements: a duty to advise and a duty to warn. A duty to advise is an obligation going beyond a mere duty to inform — the information addressee should receive personalised information indicating the consequences of the future contract for their situation and needs, thus being put in a better position to take adequate contracting decision.[33] I argued elsewhere that in the B2C e-commerce a duty to advise may constitute a better solution than plain information requirements,[34] especially given the problems consumers experience due to the nature of online transactions.[35] The scope of a duty to advise, in what refers to different information items to be provided, is not necessarily broader than that of a mere information duty, however it reaches much deeper and requires the informing party to dedicate personalised customer care to the other party. Some form of personal communication between trader and consumer is necessary, so that the trader is made aware of the personal circumstances and needs of the customer. In the e-commerce context it could happen through e-mails for example, which is fairly common, nevertheless difficult and impractical to enforce on a broader scale. Advice

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[32] As does eg Stephen WEATHERILL, '19. Consumer Protection' in Jan M Smits (ed), *Elgar Encyclopedia of Comparative Law* (2nd edn, Edward Elgar Publishing 2012).

[33] Duty to advise is present for example in consumer insurance law, see Piotr TERESZKIEWICZ, 'The Europeanisation of Insurance Contract Law: the Insurer's Duty to Advise and its Regulation in German and European Law' in James Devenney and Mel Kenny (eds), *The Transformation of European Private Law Harmonisation, Consolidation, Codification or Chaos?* (Cambridge University Press 2013) 238ff; see also observations on such duty in French law, where it is well established in Hans-W MICKLITZ and others (eds), *Cases, Materials and Text on Consumer Law* (Ius Commune Casebooks for the Common Law of Europe, Hart Publishing 2010) para 3.48 (FR).

[34] Zofia BEDNARZ, 'Breach of Information Duties in the B2C E-Commerce: Adequacy of Available Remedies' (2016) 22 IDP. Revista d'Internet, Dret i Política 2, 8.

[35] See Chapter 1 Subsection 1.1.1.1 *Characteristics of the e-commerce* on drawbacks of online transactions.

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duties cannot replace information duties in their current form, but rather complement them. Duties to advise can be found for example in the rules on goods fit for particular purpose in the English CRA 2015[36] or in the Spanish law provisions of TRLDCU relative to conformity of the goods with the contract,[37] that implement the art 2 of the Directive on the sale of consumer goods.[38]

It is also possible to deduce the existence of a duty to advise from provisions of the Directive on unfair terms. Wilhelmsson notes that from the Annex(1)(i), requiring that the consumer have a real opportunity to become acquainted with the terms of a standard form contract before signing it, read in relation to art 5 on transparency an obligation '(...) to explain the content of the terms for example to consumers

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[36] S 10 CRA 2015 relative to the goods fit for particular purpose states in subsection (3) that '[t]he contract is to be treated as including a term that the goods are reasonably fit for that purpose, whether or not that is a purpose for which goods of that kind are usually supplied.' This provision, according to subsection (1) 'applies to a contract to supply goods if before the contract is made the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods,' however it will not be applicable 'if the circumstances show that the consumer does not rely, or it is unreasonable for the consumer to rely, on the skill or judgment of the trader or credit-broker.' Therefore, a duty to advise is implied — if the consumer tells the trader what they need the goods for, the trader is under obligation to advise the other contracting party if the goods they want to purchase are fit for that purpose, such duty is limited by consumer's reliance -– if it is not reasonable for them to rely on the trader's advice, then the trader will not be liable for the personalised information provided. Case law on a related provision of s 14(3) Sale of Goods Act 1979 seems to confirm this consideration, see eg *BSS Group Plc v Makers (UK) Ltd (t/a Allied Services)* [2011] EWCA Civ 809, 34ff, where it was held that a specialist dealer is required to exercise its skill and judgement in assessing whether valves that were being purchased were fit for a specific purpose for which they were intended to be used, even if the purpose had been made known to the vendor only impliedly.

[37] Art 116.1.c) of the TRLDCU states that products are presumed to be in conformity with the contract if they are fit for any particular purpose needed by the consumer as long as they had made this purpose known to the trader at the time of conclusion of the contract, under the condition that the trader has accepted the product to be fit for that particular purpose. In a manner similar to the provisions of the English CRA 2015, the trader is under a duty to advise the consumer on the fitness of the product they are purchasing for a particular purpose they want to use it for; the duty arises when the personal information about the purpose the consumer needs the goods for is communicated to the trader.

[38] Article 2 (Conformity with the contract) reads:
'1. The seller must deliver goods to the consumer which are in conformity with the contract of sale.
2. Consumer goods are presumed to be in conformity with the contract if they: (...)
(b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;'

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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,' may arise on the side of the trader.[39]

As one can see, duties to advise are actually established in certain situations in B2C, also online, contracts. They constitute a welcomed complement to the mere information duty, especially from the consumer's point of view. They remove the burden of absorbing, processing and understanding large quantity of information items from a consumer. On the other hand, a duty to advise, in order to be effective, requires communication between the contracting parties, which may often be inconvenient in electronic transactions, especially because it slows down the contracting process and is more problematic for the trader who has to engage greater resources in order to be able to attend to customers' inquiries.

Another instance of a type of information duty is a duty to warn, which can also be considered to be a subtype of a duty to advise — a duty to warn requires the trader to give notice to the consumer of a possible negative occurrence resulting from their contract, in which consumer's personal circumstances may play a role. Therefore it also implies a certain degree of communication between the contracting parties. As Beale observes, such a duty relating to services contracts is included in the DCFR,[40] although it cannot be said to be recognised by all European legal systems.

In the context of consumer's right to information, aiming at protecting consumers' economic interests, rather than safety or health, duties to warn are scarcely present. Nevertheless, in what refers to the e-commerce, and more precisely to its direct type, an information duty regarding contract for supply of digital content is close to a duty to warn. Arts 6.1.(r) and (s) of the Directive on consumer rights

[39] Thomas WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (2006) 7 ERA Forum Journal of the Academy of European Law 16, 25, who construes a possible wording of a duty to advise in consumer *acquis* as: '*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.*'

[40] In the words of Hugh BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (2008) XIV Juridica International 42, 49: in the Art IV.C–2:102 '(...) there is a general duty set forth for the service provider to warn the client if there is a risk that the service requested may cause damage or injury to the client's other property or interests, and even to warn that the service may not achieve the results the client wants.'

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require the trader to inform their contracting party about:

> (...) (r) where applicable, the functionality, including applicable technical protection measures, of digital content;
> (s) where applicable, any relevant interoperability of digital content with hardware and software that the trader is aware of or can reasonably be expected to have been aware of; (...).

The recital (19) of the Directive explains:

> In addition to the general information requirements, the trader should inform the consumer about the functionality and the relevant interoperability of digital content. The notion of functionality should refer to the ways in which digital content can be used, for instance for the tracking of consumer behaviour; it should also refer to the absence or presence of any technical restrictions such as protection via Digital Rights Management or region coding. The notion of relevant interoperability is meant to describe the information regarding the standard hardware and software environment with which the digital content is compatible, for instance the operating system, the necessary version and certain hardware features.

The information about functionality and interoperability of the digital content serves to warn the consumer, for example about a possible tracking of their behaviour or any technical interactions that the purchased software will enter into with the hardware and software already being used by the consumer. The main aim of such information therefore is to help the consumer to make an informed decision, taking into account potentially unwanted consequences of the contract for supply of the digital content. [41] The results of a possible breach of an information duty expressed as a duty to warn may be more severe for consumers, and therefore the remedies available in such occurrence should also be adequate.

Information duties vary also in what refers to the way in which they are expressed: we can distinguish positive and negative information duties. Information

[41] For instance, leisure applications, such as games, might automatically post content to the user's social network account. In such case, it is easy to imagine the unwanted consequences, which may involve for example an employer realising that his employee, ie the game's user, is spending time playing rather than working. The consumer should therefore be warned, rather than merely informed, about the interoperability of the digital product.

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duties in a direct form are usually positive – the trader is obliged to provide the consumer with a list of specified information items.[42] The indirect duties, which can be deduced from other provisions, not necessarily establishing disclosure duties, will on the other hand constitute information duties in a negative form. An example of negative information duties are the indirect duties resulting from the rules on unfair commercial practices, mentioned above.[43] Those provisions are based on a negative trader's duty not to mislead the consumer, however they can be expressed in a form of a positive information duty as well,[44] requiring the trader to provide consumers with all material information they need to make an informed choice. Nevertheless, such interpretation in which a prohibition is reversed to a positive information duty will be hard to accept in English law. For instance, the rules on misrepresentation require one party not to lie to the other party, to put it bluntly.[45] It does not mean however, that a prohibition of lying translates into a duty to tell the truth; the parties are allowed to keep silent. It needs to be noted therefore that inferring disclosure duties from other provisions is possible only within the limits that a certain legal system sets; in the English law those limits go much further than in Spanish law.

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[42] Geraint HOWELLS, 'The Potential and Limits of Consumer Empowerment by Information' (2005) 32 Journal of Law and Society 349, 353.

[43] See Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties.*

[44] WILHELMSSON and TWIGG-FLESNER (n 1) 463 deduce a following, positive in scope, rule from the prohibitions established in the Unfair Commercial Practices Directive:

'*(1) Where a business is marketing goods and services to a consumer, the business must, with due regard to all the circumstances and the limitations of the communication medium employed, provide such material information as the average consumer needs in the given context to take an informed decision on whether to enter into a contract.*

(2) Where a business uses a commercial communication which enables a consumer to make a purchase, the following information must be provided to the consumer where this is not already apparent from the context of the commercial communication:

– the main characteristics of the goods or services; the address and identity of the business; the price (including charges and taxes), and, where it exists, the right of withdrawal;

– peculiarities related to payment, delivery, performance, complaint handling, if they depart from the requirements of professional diligence.'

[45] Defects of consent and their relationship with the disclosure duties will be analysed further in Subsection 2.1.3.2 *Possible classifications of breach of information duties*; see also Chapter 3 Section 3.2 *General private law and remedies it offers* where the defects of consent and their role as remedies for breach of information duties is discussed in more detail.

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2.1.2 Requirements relative to the way of providing information

Various provision regulate the manner in which the information needs to be provided. It is perfectly understandable, as information needs to be provided in a way allowing it to play the role it was designed for -– primarily the one of enabling consumers to make informed choices, but also as a mean of facilitating posterior use of the information when necessary.[46] There are various issues concerning the manner in which the information is provided, the main being the clarity of the information, and especially the language used,[47] however other questions, such as the way and the moment of information provision should also be considered.

The already mentioned transparency requirement laid down in art 5 of the Directive on unfair terms[48] requires the terms of the contract[49] to be 'drafted in plain, intelligible language.'[50] This provision is paired with the *contra proferentem* inter-

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[46] For an example of a real life story demonstrating the importance of the information being presented in a way that makes it possible for consumers to absorb, process and understand it see eg Alex HERN, 'I read all the small print on the internet and it made me want to die' *The Guardian* (London, 15 June 2015) <www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet> accessed 15 November 2015.

[47] Here I am referring to the language meaning the wording used, and not the national language in which the information is delivered, as '(...) it may be suggested that there are no simple answers in a multilingual Community to the question of language and the communication of information to consumers.' as observed by John A USHER, 'Disclosure Rules (Information) as a Primary Tool in the Doctrine on Measures Having an Equivalent Effect' in Stefan Grundmann and others (eds), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter 2001) 161.

[48] Edoardo FERRANTE, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive' in Geraint Howells and others (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Markets and the Law, Ashgate 2005) 124 observing that the Directive introduces two separate regimes: courts' control of contractual content and protection of transparency.

[49] Contract terms that are provided to consumers before the conclusion of a contract, as it always happens especially in the electronic transactions, become therefore pre-contractual information.

[50] In the case C-26/13 *Kásler* [2014] ECLI:EU:C:2014:282 the CJEU interpreted this provision, in the context of a mortgage loan in a foreign currency, analysing the transparency of a term establishing the calculation method and the interest rate. The Court stated that it is from the perspective of an average, reasonably well-informed, observant and circumspect consumer that the terms need to be assessed, in more detail see Joasia LUZAK, 'Passive Consumers vs. the New Online Disclosure Rules of the Consumer Rights Directive' [2015] Amsterdam Law School Legal Studies Research

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pretation rule: '[w]here there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.'[51] Wilhelmsson and Twigg-Flesner note that these provisions indicate an existence in the *acquis* of a following support provision: '*[a] duty to provide information imposed on a business is not fulfilled unless the information is clear and precise, and expressed in plain and intelligible language.*' Such an interpretation of the transparency requirement is close to a duty to explain or even advice, the main objective of those provisions is to make the information understandable for the consumer, and it rests on the trader to ensure it.

Both Spanish and English law contain the transparency requirement in their respective consumer law provisions: art 80 of the TRLDCU and s 68 of the CRA 2015. Both provisions aim at achieving transparency in consumer contracts, however the Spanish provision is limited only to standard-form contracts, where the terms were not individually negotiated, while provisions of the CRA 2015 apply to all B2C contracts. On the other hand, the TRLDCU is more elaborate than the English legislation – the Spanish law not only requires the terms to fulfil requirements such as precision, clarity and plainness, but also makes sure that the terms are easily accessible[52] and legible, so that the consumer is able to familiarise themselves with the terms before entering into the contract.[53] Moreover, the size of the letters and colour of font used in the contract terms is also determined: letters cannot be smaller than 1,5 mm and the contrast between the font and the background should be

Paper No. 2015-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553877> accessed 13 June 2016, 6; recently in the case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA* [2015] ECLI:EU:C:2015:262 the CJEU confirmed the meaning of the 'plain and intelligible language' requirement, noting that a 'term is drafted in plain, intelligible language, (...) [if] it is not only grammatically intelligible to the consumer, but also (...) [when] the contract sets out transparently the specific functioning of the arrangements to which the relevant term refers and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms, so that that consumer is in a position to evaluate, on the basis of precise, intelligible criteria, the economic consequences for him which derive from it.'

[51] Art 5 in fine Directive on unfair terms.

[52] Including possible cross-references to other documents, which in any case need to be provided before the contract is formed – art 80.1.a) TRLDCU.

[53] Art 80.1 TRLDCU.

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sufficient, so to make reading easy enough.[54] The CRA 2015 in its s 68 is primarily concerned with a language used in the contract – the terms need to be transparent, ie 'expressed in plain and intelligible language' and legible.

Other directives also refer to the language of the information, the Directive on consumer rights mentions trader's obligation to 'provide the consumer with the (...) information in a clear and comprehensible manner'[55] and to 'make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible.'[56] The use of various different typifications: 'clear and comprehensible' and 'plain and intelligible,' in the Directive is criticised as lacking consistency.[57] From a linguistic point of view, 'clear' describes information that is evident, obvious, transparent;[58] 'comprehensible' means 'capable of being understood'[59]; information provided in a clear and comprehensible manner will be unambiguous and easy to understand. 'Plain' refers to something that is obvious and clear, while 'intelligible' is 'able to be understood, clear.' 'Plain and intelligible' again denotes information expressed in an unambiguous and easily understandable way. It appears that all those adjectives are actually synonyms, which makes it even more obscure as to what the legislator's rationale for such choice of words was.

The Directive is also concerned with the manner in which the information is to be provided, not only with the legibility of its content, hence the reference to the appropriateness of the way of information provision to the contracting means. This is also reflected in the wording of the art 8.4 of the Directive: '[i]f the contract is

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54 Art 80.1.b) TRLDCU.

55 Art 6.1 of the Directive on consumer rights.

56 Art 8.1 of the Directive on consumer rights.

57 Arno R LODDER, 'Information Requirements Overload? Assessing Disclosure Duties under the E-Commerce Directive, Services Directive and Consumer Directive' in Andriej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law* (Research Handbooks in European Law, Edward Elgar 2014) 368ff.

58 For the definitions of adjectives I used Chambers 21st Century Dictionary Online, accessed 20 July 2016, <www.chambers.co.uk/dictionaries/the-chambers-dictionary.php>.

59 Cf Norbert REICH and Hans-W MICKLITZ, 'Economic Law, Consumer Interests and EU Integration' in Norbert Reich and others (eds), *European Consumer Law* (2nd edn, Ius Communitatis Series, Intersentia 2014) 23.

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concluded through a means of distance communication which allows limited space or time to display the information (...)' (then the trader should only provide the consumer with the most relevant information items, listed further in the same art). Some provisions of the Directive, specifically applicable to electronic contracts, also require certain manner of providing information: for example in the art 8.2 the Directive refers to 'a clear and prominent manner' in which certain information items[60] need to be provided, before an electronic contract is ormed; art 8.3 establishes some information requirements concerning delivery and payment restrictions for trading websites, those information items have to be indicated 'clearly and legibly.' Without a doubt, in the case of electronic contracts, as special subtype of distance contracts, the legislator is aiming at making some terms, which are of major importance for the consumer's decision, communicated to them in a conspicuous way — hence the adjectives 'clear and prominent', meaning 'unambiguous,' 'evident,' 'easily noticeable,' 'standing out.' 'Clear and legible' indication, on the other hand, will be an easily readable one; here again it is unclear why the legislator opted for this particular wording, and why 'clear and comprehensible' expression was not repeated.

The requirement of a durable medium[61] points to the utility of the pre-contractual information both prior to contract conclusion – so that the consumer can look through the information provided in a moment they choose without being hurried, and posterior to entering the contract – when they need the information for reference.[62] In practice, consumers usually receive a confirmation e-mail, where the pre-contractual information should be provided.[63] In what refers to the information

[60] Resulting from art 6.(1) points (a), (e), (o) and (p) of the Directive on consumer rights: the main characteristics of the goods or services; the total price of the goods or services inclusive of taxes; the duration of the contract and the minimum duration of the consumer's obligations under the contract.

[61] 'Durable medium' meaning 'instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored' according to the art 2(10) of the Directive on consumer rights; see also LUZAK (n 50) 8.

[62] However, it seems to be somewhat repetitive when considered together with art 6.5 of the same Directive which requires the information to become an integral part of the contract.

[63] LODDER (n 57) 368ff notes that it is accepted since the now-repealed Directive on distance contracts that the concept of durable medium includes e-mail.

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provided through a link to the website where it is stored, the CJEU ruled in the *Content Services Ltd* case that such means of providing information are not durable enough.[64]

Spanish TRLDCU in its art 60, relating to consumer contracts in general, requires the trader to provide the consumer with relevant, truthful and sufficient information in a clear and comprehensible manner. In what refers specifically to distance contracts, art 97 adds various information requirements to the art 60, again asking for provision of information items in a clear and comprehensible manner. The provision of the information and contract terms on a durable medium is also established, especially in arts: 63.2, requiring contract confirmation in writing or on a durable medium and 98.1, relating to information requirements in distance contracts, requiring provision -– adequate to the means of distance communication used -– of certain information items before the contract is concluded; if such provision is carried out through a durable medium the information needs to be legible.

In what refers to the English legislation, it is in the Consumer Contracts Regulations 2013 – secondary legislation implementing the Directive on consumer rights – that requirements regarding the manner of information provision are established. Reg 13.(1) states: '[b]efore the consumer is bound by a distance contract, the trader– (a) must give or make available to the consumer the information listed in Schedule 2 in a clear and comprehensible manner, and in a way appropriate to the means of distance communication used, (...).'; reg 14.(2) relative to requirements for distance contracts concluded by electronic means repeats the wording used by the Directive on consumer rights, mentioned above: 'clear and prominent manner' and reg 14.(6) concerning trading websites sets out the need to indicate clearly and legible whether any delivery or payment restrictions apply. The reg 8 of the Consumer Contracts Regulations 2013 provides some clarity in what refers to the verbs denoting information provision: 'something is made available to a consumer only if the consumer can reasonably be expected to know how to access it.' This would suggest that 'making

[64] Case C-49/11 *Content Services Ltd v Bundesarbeitskammer* [2012] ECLI:EU:C:2012:419 paras 26ff; see also LODDER (n 57) 368ff; Candida LEONE, 'Transparency revisited – on the role of information in the recent case-law of the CJEU' (2014) 10 European Review of Contract Law 312, 10ff; LUZAK (n 50) 10ff; Hans-W MICKLITZ and Betul KAS, 'Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I' (2014) 10 European Review of Contract Law 157.

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information available' implies a possibility for the trader to, for example, display the information on their website, and not only give it directly to the consumer in a written form, as in an email for instance.

As we can see, similarly to the Directive, the national legislation deals both with the form of the content information, including comprehensibility, and with the manner in which it should be provided. It is not always clear however, why some provisions only list the information items to be provided, others make reference to the form and others still establish requirements relative to the language and comprehensibility.[65] Without a doubt, such *status quo*, of a rather chaotic character, as one might want to describe it, was initiated at the European level. To the provisions mentioned above we need to add other requirements relative to the provision of information laid down by the Directive on electronic commerce and national legislation implementing it.

The Directive on electronic commerce requires the information to be 'easily, directly and permanently accessible' in its art 5.1. Such provision implies therefore that the information should be accessible in a straightforward way, not requiring much effort or any additional actions. In the current digital world, such provision translated into the service provider's obligation to provide information on their website – information cannot be provided only through e-mail or a pop-up window, as these are transitory ways, and a good practice is to provide information on each of the pages of the website through a link to a page with the information.[66] Furthermore, art 10.1 of the Directive on electronic commerce lays down a requirement for the service provider to give information 'clearly, comprehensibly and unambiguously prior to the order being placed by the recipient of the service (...).' Regs 6(1) and 9(1) of the E-commerce Regulations 2002 practically repeat the wording of the Directive, referring respectively to 'a form and manner which is easily, directly and permanently accessible' and 'a clear, comprehensible and unambiguous manner.' Spanish LSSICE in its art 10.1 requires the information to be accessible permanently, easily, directly and for free – the last criterion having been added by the Spanish legislator. The art

[65] Christian TWIGG-FLESNER, *The Europeanisation of Contract Law: Current Controversies in Law* (Routledge-Cavendish 2008) 64.

[66] LODDER (n 57) 367.

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27 of the LSSICE regulates that the information, which is to be made available before the parties enter into the contract in a permanent, easy and free manner, should be clear, comprehensible and unambiguous – again Spanish legislator imposing rules more elaborated than those set out in the Directive.

The question arises however, what is the rationale of so many slightly different requirements? An information item, such as information on the main characteristics of goods (art 6.1.(a) of the Directive on consumer rights), needs to be provided in a clear and comprehensible manner before the consumer is bound by a distance contract (art.6.1), in plain and intelligible language (art 8.1) and the consumer needs to be made aware of it, directly before they place the order, in a clear and prominent manner (art 8.2)! Not to mention the fact that such information will have to be easily and directly accessible at any time for the consumer (art 5.(1) of the Directive on electronic commerce). When analysed separately, the requirements seem perfectly justified: eg the provision on easy and direct accessibility of the information (art 5.(1) of the Directive on electronic commerce) or the rule relative to the clear and prominent manner in which consumer needs to be informed about certain aspects of an electronic contract before placing their order (art 8.2 of the Directive on consumer rights). However when looked at together, the use of the adjectives – 'clear', 'prominent', 'comprehensible', 'intelligible' – appear to be a little repetitive at best, without good reason for it. Nevertheless, the notions mentioned here are of relevance in the process of determining whether the trader has fulfilled their information duties, and if not, what is the extent of breach.[67]

Another factor relevant for the assessment of the extent of fulfilment (or breach) of the information obligation is the moment in time when the information is required. The rules relative to the e-commerce, ie mainly Directive on the electronic commerce and national legislation: LSSICE and E- commerce Regulations 2002, establish that the general information be made permanently available by the service provider, as already mentioned, respectively in art 5.1, art 10.1 and reg 6(1). However, some specific information items should also be given to the service recipient prior to their placing the order, as laid down by the Directive on electronic commerce in art 10.1, requirement which is reproduced by the E-commerce Regulations 2002

[67] See Subsection 2.1.3.1 *Full and partial breach of information duties* below.

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in reg 9(1). The Spanish legislator opted for a different moment of pre-contractual information provision, again requiring it to be available permanently, according to the art 27 LSSICE. There is no doubt that the permanent availability of information is a broader concept that its provision prior to the order being placed -– information available permanently will necessarily be available also prior to the contract formation. However, a question arises as to the verbs denoting service provider's activity, as''giving information' (art 10.1 of the Directive on electronic commerce), 'providing information' (reg 9(1) of the E-commerce Regulations 2002) and 'making information available' (art 27 of the LSSICE).[68] As noted above, the Consumer Contracts Regulation 2013 clarify when the information is considered to be 'made available', and I believe it to be a sensible consideration. The notions of 'giving' and 'providing information' are therefore synonymic, whilst 'making information available' has a broader scope, and can be fulfilled either through direct information provision or through indicating where the information can be obtained, clearly in an easily accessible manner.[69]

The required moment of information provision is an issue worth separate consideration. As already discussed at the beginning of this Chapter, pre-contractual information needs to be provided before the contract is entered into by the parties. The Directive on electronic commerce requires general information to be available permanently, as noted above, and its art 10.1 asks for some specific information items to be given to the service recipient before they place their order. The Directive on consumer rights however, instead of using neutral wording of the Directive on the electronic commerce – 'prior to the order being placed by the recipient of the service' – insists that the information be provided '[b]efore the consumer is bound by a distance (...) contract, or any corresponding offer (...).'[70] The phrase used in the Directive, 'any corresponding offer' raises doubts: can consumer be bound by an

68 LSSICE uses wording of '*poner a disposición*', the exact wording being: '(...) *el prestador de servicios de la sociedad de la información que realice actividades de contratación electrónica tendrá la obligación de poner a disposición del destinatario, antes de iniciar el procedimiento de contratación* (...).'

69 See also observations made in Chapter 1 Section 1.1.2.2 *The model of consumer in the e-commerce law* on the active and passive consumers, where the CJEU judgment in the case *Content Services Ltd* concerning the notions of providing, giving and making information available is cited.

70 Art 6.1 of the Directive on consumer rights.

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offer?[71] It seems to be a rather unfortunate wording creating confusion, but clearly the legislator was trying to accommodate the English law concept[72] of 'invitation to treat': items displayed on the website are not considered to be offers, it is the buyer who places the offer which is then subsequently accepted by the trader.[73] The problem arising from the wording of the Directive on consumer rights, which the Directive on electronic commerce managed to avoid through the use of neutral concept of 'the order being placed' is that the moment of contract formation can be understood differently in various legal systems. Nevertheless, it should be clear for both traders and consumers that the information provision has to take place before the contract is concluded, so as Nordhausen Scholes notes, '[t]his must mean that a provision of the required information with the acceptance would be too late.'[74]

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[71] LODDER (n 57) 373ff.

[72] Also present in the Spanish, as well as international law, see eg art 14 CISG

[73] In the context of the traditional, physical trade, the general rule is that a display of goods in a shop is not an offer, but an invitation to treat: in *Pharmaceutical Society of Great Britain v Boots Cash Chemists* [1953] 1 QB 401 Somervell LJ stated that a display of goods in a self-service shop is 'a convenient method of enabling customers to see what there is and choose, and possibly put back and substitute, articles which they wish to have, and then to go up to the cashier and offer to buy what they have so far chosen.'; later confirmed in *Fisher v Bell* [1961] 1 QB 394 at 400 where the judge considered it to be 'quite impossible to say that an exhibition of goods in a shop window [with price tags attached] is itself an offer for sale.' Nevertheless, advertisements, in some particular circumstances, can be considered offers that only need to be accepted by a client for the valid contract to be formed, see the classic case of *Carlill v Carbolic Smoke Ball Company*. In what refers to the websites, it seems that '[w]ithin the e-commerce context, a website selling goods or services can easily be equated to a shop window display or the shelves of a self-service shop.' see Christine RIEFA, 'The Reform of Electronic Consumer Contracts in Europe: Towards an Effective Legal Framework?' (2009) 14 Lex Electronica 1, 28; similarly Ewan MCKENDRICK, *Contract Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2012) 69 observing that 'the potential range of liability may in fact make judges reluctant to conclude that an advertisement on a website is an offer.', especially because of a limited stock that might not be updated live on a website – if the display of goods on a website was considered to be an offer, and consumer's order an acceptance, then the trader is bound by a contract formed, which they cannot fulfil if they are out of stock, conversely if the consumer's order is an offer, the trader has a possibility to refuse it. However, in the continental law in general, and in Spanish law in particular, the display of goods on a trader's website will be considered to be a valid offer, under the condition that the product ordered is available – the trader can refuse to sell a product if they are out of stock and it does not imply that they are under a breach of contract – see Luis DIEZ-PICAZO, *Fundamentos del Derecho Civil Patrimonial. Vol.1: Introducción, Teoría del Contrato* (6th edn, Thomson-Civitas 2007) 283ff.

[74] NORDHAUSEN SCHOLES (n 4) 221.

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The Spanish TRLDCU requires the information in distance contracts to be provided before the consumer is bound by any distance contract or any corresponding offer – as already observed, the Spanish legislator simply copied the exact wording of the Directive. The provision of the reg 13 of the Consumer Contracts Regulations 2013 establishes that the information be given or made available '[b]efore the consumer is bound by a distance contract.'

2.1.3 Types of breach of information duties

2.1.3.1 Full and partial breach of information duties

In order to correctly fulfil their duty to provide information, the trader needs to comply with various sub-duties; specific items of information are required to be provided at a certain – pre-contractual – stage of their transactional relationship with the consumer in a certain form, sometimes an additional obligation to advise or warn is established.

The most obvious way in which information duties can be breached by a trader is when the information is simply not provided. Nowadays however, such a case will only occur rarely – consumers are used to having various rights in electronic transactions, and often are actively checking some information items, such as those regarding the right to withdraw or delivery costs. It will be much more common therefore for traders to provide some information, but nevertheless omit some other information items. This might be done by traders either on purpose, in order to hide some fact they do not want to reveal for some reason, or just because there are so many different information requirements established in various pieces of legislation, that sometimes even a well-wishing professional, which may especially the case for some SME with limited resources, may simply forget to transmit some information items to the consumers.

Another instance of breach of information duties is provision of false or inaccurate information, which again may happen accidentally or in an organised, intended way. This definitely occurs quite often, particularly on purpose, as logically it is easier for a dishonest trader to provide consumers with all the information items required, but falsify some, so that the consumers realise they had been tricked only once they

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have received their order.

Furthermore, the manner of provision of information also matters in the context of breach of information duties: if the information given is incomprehensible or illegible, then effectively its provision is flawed up to the extent comparable with information omission, as at least some part of the information was not in reality communicated to the other party.[75]

For the purpose of analysing the breach of information duties and available remedies, it is necessary to establish the extent of the breach. It is not an all-or-nothing type of problem, as all the pre-contractual information requirements cannot be treated as some kind of entity.[76] Therefore it is not necessary for the trader to breach their duty through provision of no information at all – which would be extremely rare, as observed above – for the consumer to be able to claim their remedies. Furthermore, some of the information requirements are definitely treated by the legislator as more important than others, for instance the Directive on consumer rights in its art 8.4 states:

> If the contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader shall provide, on that particular means prior to the conclusion of such a contract, at least the pre-contractual information regarding the main characteristics of the goods or services, the identity of the trader, the total price, the right of withdrawal, the duration of the contract and, if the contract is of indeterminate duration, the conditions for terminating the contract (...). The other information (...) shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1 of this Article.

It can be therefore logically assumed, that the information listed in this provision is regarded as particularly important for the consumer, especially in the pre-

[75] FERRANTE (n 48) 125 noting in the context of transparency requirement that provision of obscure information will actually amount to 'an omission rather than a positive course of action, (...) [which] also contravenes the duty of transparency.'

[76] Horst EIDENMULLER and others, 'Towards a Revision of the Consumer Acquis' (2011) 48 Common Market Law Review 1077, 1117ff point to different types of information duties, which influence on the contract vary: information duties relating to the process of contract formation or the content of the contract, information duties relating to the motivation to enter into a contract and information duties concerning rights available to the other party.

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contractual phase. The information items named here seem to be considered by the legislator to be necessary for the consumer to take their contractual decision,[77] and that is why they are treated differently than others. It is trite to note that such information items play a very different role in the parties' relationship than for example information relative to the contract formation itself – technical steps necessary to form an electronic contract and other related information (as in art 10 of the Directive on electronic commerce).[78] Also, some information is commonly referred to as 'material information' – it is the information of essential importance for the other contracting party.[79]

Whilst it cannot be accepted that some duties are only incentives, not actual obligations (of contractual or other nature, as discussed below), because then their breach would have no legal consequence at all, it is nevertheless possible to talk about total breach and contrast it with defective fulfilment of information duties. Total breach takes place when material information is not given at all, is false or is provided in a way that makes it accessing or understanding impossible. Defective fulfilment could be constituted by breach of other information requirements, especially when the influence on the contract formed is marginal, as for example when the information on technical steps leading to contract formation is inaccurate, but the consumer managed to enter into the contract anyway. However, such considerations are of rather theoretical interest, as in each case, where there are no specific consequences of breach established by the law, the court or a corresponding institution

[77] Which raises the question: what is the purpose of other information duties? As discussed in Chapter 1 Subsection 1.1.2.1 *The role of pre-contractual information in the European consumer policy*, the main rationale for information duties is exactly this -– restoring the information balance in the relationship of the parties, of which one is a professional and the other a consumer. Nevertheless, pre-contractual information plays also an important role in the period posterior to contract formation, especially through providing the consumer with knowledge regarding their contract and its potential breach.

[78] Cf EIDENMULLER (n 76) 1117ff.

[79] References to 'material information' or 'material facts' can be found in case law, see eg *Bell v Lever Bros Ltd* [1932] AC 161 at 227, where Lord Atkin stated that 'the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract.' and are very commonly used in academic writing, see eg Pierre LEGRAND, 'Pre-contractual Disclosure and Information: English and French Law Compared' (1986) 6 Oxford Journal of Legal Studies 322; Paula GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (2005) 5 European Review of Private Law 621.

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(eg mediators in the context of ADR procedures) will need to individually assess each case, the damage that the aggrieved party suffered and available remedies.[80]

2.1.3.2 Possible classifications of breach of information duties

Cámara Lapuente points to various different legal consequences that a breach of information duties can entail, such as: breach of good faith principle, specific remedies available for breach of some information duties expressly established in the specific legislation, remedies for lack of conformity with the contract, trader's liability for defective goods, general contract law including remedies applicable in cases of defects of consent, classification as unfair commercial practice and administrative sanctions.[81] All these possible classifications of the breach that occurred should be taken into account in each individual case in order to provide the aggrieved party with adequate remedies.

Breach of good faith principle can be discussed both in the context of the general contract law and specific consumer legislation, and is relevant only for the Spanish law, as English law is reluctant to recognise the principle of good faith and fair dealing.[82] In what refers to the Spanish consumer law, art 65 of the TRLDCU states that consumer contracts shall be complemented by requirements resulting from the principle of the objective good faith to consumer's benefit, also in the cases of the omission of the relevant pre-contractual information. Thus, the legislation expressly invokes good faith principle in the case of omission of pre-contractual information in consumer contracts.

The next possible consequence of the breach of information duties is the most

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80 As EIDENMULLER (n 76) 1121 point out '[i]t is not advisable to set up uniform remedies for the infringement of all information duties (...). Such uniformity is inconsistent with the diverse functions and significance of the information duties within a system of contract law (...). Rather, the consequences of an infringement should be specifically defined with regard to the respective purpose of the duty in question, and with due consideration of the (national) contract law doctrines that may come into play.'

81 Sergio CÁMARA LAPUENTE, 'La Nueva Protección del Consumidor de Contenidos Digitales Tras la Ley 3-2014, de 27 de Marzo' [2014] Centro de Estudios de Consumo CESCO Working Paper <http://blog.uclm.es/cesco/files/2014/10/La-nueva-protecci\%C3\%B3n-del-consumidor-de-contenidos-digitales-tras-la-Ley-3-2014-de-27-de-marzo.pdf> accessed 15 March 2016, 62-63.

82 See Chapter 1 Subsection 1.2.2.1 *Good faith, fair dealing and pre-contractual duties of disclosure.*

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obvious one – the application of specific remedies resulting directly from the specific consumer legislation, such as withdrawal period extension, if the consumer is not informed about their right to withdraw[83] or consumer not being bound by their order, if the trader failed to make them aware that the order implies an obligation to pay.[84] Specific consumer legislation also provides remedies for lack of conformity of the products – under Spanish law – and goods and digital content – under English law, with the contract,[85] which is of relevance if the information consumer received was false and the product does not conform to the contract. Trader's liability for defective goods[86] should also be considered; although it seems to be of a limited relevance for the breach of information duties in practice, some situations, eg when the digital content purchased caused damage to the consumer's hardware because of incomplete information they had received, can actually occur. The remedies for unfair commercial practices are also established in specific legislation and are only relevant under the English law, which provides individuals with civil law rights of private redress.[87]

In what refers to general private law consequences of breach of information duties, two broad classifications need to be taken into account: breach of contract and defects of consent. Breach of contract is closely linked to the specific legislation, which stipulates whether the information provided can be considered contract terms,[88] which is of relevance for situations where the information consumer received was false, or whether the very duty to provide information can be considered a contract term[89] – especially important in the cases of information omission.

The defects of consent, or vitiating factors, have already been mentioned in the context of indirect information duties in Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties* above. They were looked at as a potential source

[83] See reg 31 Consumer Contracts Regulations 2013 and art 105 TRLDCU.

[84] See reg 14 Consumer Contracts Regulations 2013 and art 98.2 TRLDCU.

[85] See ss 9ff (goods) 34ff (digital content) and arts 114ff TRLDCU.

[86] S and arts 128ff TRLDCU.

[87] See ss 27Aff UTR 2008.

[88] As do eg s 11(4) CRA 2015 and arts 61.2 and 97.5 TRLDCU.

[89] See eg reg 18 Consumer Contracts Regulations 2013.

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of disclosure duties arising in general private national law of England and Spain. However, their main significance lies in a reverse context – not as laws establishing information duties as such, but as rules providing the aggrieved party, whose right to pre-contractual information was breached, with remedies.[90]

Arguably, contrary to the Spanish legal system, English law does not recognise a general theory of defects of consent.[91] Two categories of defects of consent[92] are linked to the issue of information: mistake and fraud. The law of mistake aims at protecting the party to the contract that acts under misapprehension as to some facts relative to the contract; the concept of fraud on the other hand not only protects the mistaken party even further, but also, even more importantly, punishes the behaviour of the party that causes the misapprehension in order to induce the other party to contract. The duty to inform, as Sefton-Green observes, 'clearly straddles these two identifiable objectives of defects of consent.'[93] There is no doubt that duties to inform are intended as a protection for the contracting parties – indeed this is the main aim of information duties in consumer law. It is also submitted that disclosure duties go further than fraud, as they cover both passive and active behaviour of the party causing misapprehension, as well as fraudulent and negligent behaviour. It is therefore submitted that '[r]ecognising duties to inform may be an admission that mistake and fraud are insufficient to remedy all types of behaviour.'[94] Asymmetric information issues can be addressed in a more complete manner through establishing a duty to disclose that can be equated to 'a more refined fraud doctrine.'[95] The underlying values of defects of consent and disclosure duties are also similar: protection

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[90] Cf DCFR art II.–3:109: Remedies for breach of information duties, especially subsection (4) which reads: 'The remedies provided under this Article are without prejudice to any remedy which may be available under II.–7:201 (Mistake).'

[91] SEFTON-GREEN, 'General Introduction' (n 24) 3.

[92] John CARTWRIGHT, 'Defects of Consent in Contract Law' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 537.

[93] SEFTON-GREEN, 'General Introduction' (n 24) 11.

[94] Ibid.

[95] Gerrit de GEEST and Mitja KOVAC, 'The Formation of Contracts in the Draft Common Frame of Reference – A Law and Economics Perspective' in Filomena Chirico and Pierre Larouche (eds), *Economic Analysis of the DCFR : the Work of the Economic Impact Group within CoPECL* (Sellier European Law Publishers 2010) 72.

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of the party's real consent and upholding the moral duty to tell the truth.[96] Furthermore, the moment of the contracting process the defects of consent and information duties are both concerned with is the pre-contractual stage.

Although it is common for European legal systems to forbid the supply of deceptive information[97] – a positive duty not to actively mislead the other party is recognised in both English and Spanish law and referred to as misrepresentation and *dolo* and *error provocado* respectively – clearly there is an important difference between those concepts and disclosure duties: the latter require provision of information without prior demand,[98] they therefore respond to the issue of lack of knowledge of the other party, as contrasted with the need to remedy the, possibly induced, false knowledge.[99]

Nevertheless, the significance of the defects of consent in the context of information duties lies primarily in the remedies the legal systems analysed – English and Spanish – provide when the defects occur. The perspective of the defects of consent is remedial – ie these concepts relate to pre-contractual stage, but only operate posterior to contract formation, thus overlapping also with contractual remedies for breach of contract, or contractual non-performance.[100] Depending on the legal system in question, the defects of consent can provide remedies not only once the (false) information has been provided, but also in situations of non-disclosure.[101] The

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[96] SEFTON-GREEN, 'General Introduction' (n 24) 12ff.

[97] WEATHERILL, '19. Consumer Protection' (n 32) 240.

[98] EIDENMULLER (n 76) 1113 who also note that establishing information duties in law is only justified under particular circumstances, no such special justification is needed for forbidding fraud, as this is a generally undesired type of contracting behaviour, therefore the distinction between those concepts should be clearly accentuated in any comprehensive regulation of information duties; see also WEATHERILL, '19. Consumer Protection' (n 32) 240 who describes information duties as '[a] more imaginative response to the disabling effect on the efficient functioning of markets of the under-informed consumer' comparing disclosure duties to the commonly present rules on misrepresentation and fraud.

[99] WILHELMSSON and TWIGG-FLESNER (n 1) 448.

[100] SEFTON-GREEN, 'General Introduction' (n 24) 2 notes that mistake, fraud and duties to inform are not limited to contract formation, but they cross the conceptual bridge between pre-contractual and contractual remedies, and often overlap with the remedies under the heads of breach of contract.

[101] WILHELMSSON and TWIGG-FLESNER (n 1) 448; see Chapter 3 Section 3.2 *General private law and remedies it offers below.*

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Spanish law, as already noted, relies on the goods faith principle and deduces the existence of a negative fraud thereof; the English law in general recognises no such general disclosure duty, however it can be noted that the law of misrepresentation often provides more flexibility than could be expected, indirectly approximating the operation of defects of consent to the pre-contractual disclosure duty.[102]

2.1.3.3 Breach of information duties depending on the remedies: information omission and provision of false or inaccurate information

The instances of breach of information duties can be categorised in the function of the remedies available in both legal systems analysed: English and Spanish.[103] Those remedies will differ depending on the way in which the information duty was breached, especially if the information item that was required by law to be provided was not given at all (information omission) or if it was provided, but its content was false, inaccurate. It can be noted here that defective fulfilment of disclosure duty resulting from information having been provided in a faulty manner[104] can be also equated to one of the two instances proposed: for example if the information is illegible it can be deemed omitted, if it is difficult to understand or ambiguous it can be considered false.[105]

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[102] GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 26) 310.

[103] Clearly, other possibilities to group the relevant rules can be also considered, see for instance BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 40) 43 who proceeds to analyse the remedies available for the party who has entered into the contract on the basis of inaccurate or incomplete information according to how the 'misapprehension' of the facts occurred, ie if it was induced by the other party (or a third party) or self-induced; whilst SEFTON-GREEN, 'General Introduction' (n 24) 26 suggests to examine four distinct foundations of the duty to inform: fraud, precontractual liablity, duty to disclose arising from operation of law and mistake.

[104] More on the manner of providing information see Subsection 2.1.2 *Requirements relative to the way of providing information* above.

[105] Nevertheless, it is not always that easy to determine the type of breach of the disclosure duty, for instance if the information is not directly accessible it can be considered to have been omitted, but what if the consumer managed to effectively access the information, despite difficulties? Each case in practice will need to be considered individually, in the present study I am focusing on some general mechanisms and the main aim is to point out legal rules and provisions that should be taken into consideration when a breach of information duties occurred.

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Information omission is the first type of breach of information duties that comes to mind. In such case, the duty to provide information is breached; the duty arising especially from legislation in the context of consumer electronic contracts. When the information which was provided is inaccurate, the situation is quite different. In such case, not only the duty to provide information is breached (as in the case of omission), but also, the information itself is breached. What I mean by this last consideration, is that according to various rules, information can become part of the contract – in such case the term of the contract will be false; breach of some information items about the goods will result in the non-conformity of contract, and so on. The distinction between omission of certain information, misinformation and provision of information in a wrong way may be sometimes challenging. Traders often provide false information to make their offer of a product or service seem more attractive to consumers and consequently induce them to enter the contract. However, omitting some material information about the product or service may have exactly the same purpose.[106] Moreover, it is argued that from the economics standpoint, there is not much difference between omitting information and providing false information, since both lead to inefficient allocations.[107]

Nevertheless, in the context of the B2C e-commerce there is a noticeable difference between information omission and non-disclosure. The latter will constitute an incentive for the consumer to search for the missing information item, on the trader's website or on the Web in general. Provision of false information entails a greater risk for the individual consumer and for the market as such: the consumer will have

[106] GEEST and KOVAC (n 95) 71-72, rightly point out that information omission can be easily transformed into an explicit lie, when the trader is asked 'to explicitly state that there is nothing that has been concealed.', cf however *Sykes v Taylor-Rose* [2004] EWCA Civ 299 – the facts and judgment are commented in Chapter 1 Subsection 1.2.2 *General duty to disclose and its breach in national private law.*

[107] GEEST and KOVAC (n 95) 71-72 note: 'One of the most important findings of economic scholarship is the notion that to tell nothing is always to tell something. What that something is depends on the type of market. In some markets, consumers who get no information on the quality of a product will presume it is of an average quality. In other markets (like in Akerlof's market for 'lemons'), consumers will presume the lowest quality. Whichever presumption is made, the distinction between explicitly lying and just concealing information (by saying nothing) is less relevant than lawyers tend to believe. Both activities are intrinsically costly and wasteful (the liar invests in misleading through words, the concealer invests in non-detection, and in both cases the non-liar invests in detection) and both lead to inefficient allocations.'

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no motivation to check the truthfulness of information received, in consequence will end up purchasing a product that quite possibly will not satisfy their needs.

Furthermore, consequences of providing consumers with false information are usually different to those of omitting pieces of information. This is true especially under English law. It has been pointed out that under English law there is a distinction between 'positive action (to which liability may attach) and pure omission (to which no liability will attach in the absence of special circumstances).'[108] Furthermore, English system treats providing false information much more harshly than even taking advantage of other party's mistake, if the mistake was spontaneous.[109] This stems from the individualistic position of English law, which values reliance of the contracting parties in each other's promises over the protection of the mistaken party.[110] Such approach promotes certainty of transactions and finally has some justification in economics – ie promotes buyers that are diligent, careful and willing to search for the information for themselves. Moreover, sanctions which can be described as extra-compensatory are desirable in the case of intentional misinforming as deterrents;[111] also from the point of view of the aggrieved party if the other party's fraudulent behaviour – lying – was intentional, then easier availability of further reaching remedies restores the sense of justice and security of transactions.

The clear divide between an omission of information items and positive provision of misleading information is also the case for specific remedies, which are examined in Chapter 3 Section 3.1 *Specific remedies available to consumers*. The solutions established in the general private law are probably the source of such legislative choices in specific legislation. It therefore appears appropriate to adopt the analysed division as a basis for the organisation of the analysis of the instances of breach and

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[108] Simon WHITTAKER and Reinhard ZIMMERMANN, 'Coming to Terms with Good Faith' in Simon Whittaker and Reinhard Zimmermann (eds), *Good Faith in European Contract Law* (The Common Core of European Private Law, Cambridge studies in international and comparative law, Cambridge University Press 2008) 656.

[109] See Hugh BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (Clarendon Law Lectures, Oxford University Press 2012) Preface v-vii who notes that English law actually allows one party to take deliberate advantage of the other party's mistake.

[110] See Chapter 3 Section 3.2 *General private law and remedies it offers* for mistake, where the issue will be covered in more detail.

[111] GEEST and KOVAC (n 95) 72.

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remedies available.

2.2 General remarks on remedies available

2.2.1 Importance of the remedies for breach of information duties

Various information duties are established both at the European law and at the national law level. It is not always clear however, what, if anything, happens when the disclosure duties are breached by the trader, either through omitting some information items or providing inaccurate or illegible information. The issue is of importance for the B2C e-commerce: traders often fail to comply with their disclosure duties towards consumers[112] and cyberconsumers report it to be a major issue resulting in various undesirable consequences.[113] The Commission estimates that for instance in 2010 'total detriment European consumers incurred from problems amounted to about 0.4% of EU GDP.'[114] Clearly, the issues consumers experience in the context of the e-commerce constitute a fraction of those occurring in all B2C transactions; moreover, not all the problems are due to misinformation. Nevertheless, it can be safely assumed that breach of information duties in the B2C e-commerce is a reality that generates significant costs for the European economy.

Weatherill observes that: '(...) it is a precondition of effective competition that producers face damaging consequences should they fail to satisfy consumer demand

[112] OECD, 'Empowering and Protecting Consumers in the Internet Economy' (2013) 216 OECD Digital Economy Papers (OECD Publishing) <http://dx.doi.org/10.1787/5k4c6tbcvvq2-en> accessed 9 June 2016, 6: '[information on products, businesses and online transactions] is often long and complex (...), presented in small size, buried in footnotes, or accessible through a series of web links or windows.'

[113] Ibid 5-6; ibid 23 it is noted that there is a connection between misleading and fraudulent practices, such as imposing unauthorised charges on consumers, which importantly undermine trust in the e-commerce, and provision of inadequate information; see also The European Consumer Centres' Network, 'Online Cross-Border Mystery Shopping – State of the e-Union' (2011) <http://ec.europa.eu/consumers/ecc/docs/mystery_shopping_report_en.pdf> accessed 9 June 2016.

[114] Commission, 'A European Consumer Agenda – Boosting confidence and growth' (Communication) COM(2012) 225 final.

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(...)'[115] in the context of consumer protection and correct market functioning. If, for some reason, this market mechanism fails, eg because producers agreed between themselves to behave in the same way through fixing prices, then consumers' demand cannot influence the market in a desired way. It is the law that would have to intervene in order to restore the balance. Now, in what refers to the remedies for breach of information duties, the situation can be understood as similar, at least up to certain extent. If traders do not comply with information requirements, which is often the case, then this may lead to market failure, especially in combination with consumers' bounded rationality and information overload. Traders offering correct, up-to-standard information about their products will have to bear the costs of complying with information requirements and will face competition from those who breach information duties, whilst consumers, unable to distinguish between both groups of businesses, will not be able to promote the former group of traders. Eventually, good (honest) offers, ie those where full information is disclosed correctly, may be driven out of the market.[116]

An effective system of remedies for breach of information duties promotes marketplace honesty and transparency.[117] Consumers, knowing that the legal system guarantees the information and its truthfulness, do not need to spend more time and effort (transaction costs) than absolutely necessary on reading the pre-contractual information, in order to choose the best possible offer that matches their needs. Should something go wrong in their contractual relationship with the trader, thanks to the information saved on a durable medium and the system of remedies in place, they are protected. This is even more important, if we consider all the shortcomings of the consumer protection through information duties, as analysed in Chapter 1 Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts.*

Authors involving economic analysis of law in their analysis differ in what refers to determining best possible solutions to such market problems.[118] Some argue in

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[115] WEATHERILL, '19. Consumer Protection' (n 32) 238.

[116] George A AKERLOF, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 The Quarterly Journal of Economics 488.

[117] From a comparative perspective see similar observations of Geraint HOWELLS and Thomas WILHELMSSON, 'EC Consumer Law: Has it come of age?' (2003) 3 European Law Review 370, 382.

[118] See discussion in Chapter 1 Subsection 1.1.2.1 *The role of pre-contractual information in the*

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favour of non-legal protection of consumer rights;[119] others however support legal intervention:[120] for instance Ferrante rightly observes: '[t]he sanction – it helps to repeat it – cannot consist of the spontaneous competitiveness of the market, or even rational choices of the consumer, which are capable of expelling the "non-transparent" professional actor from the commercial arena. This just does not happen.'[121]

European Directives require Member States to implement the European texts in an effective way, this includes establishing in their national law effective sanctions and remedies for the breach of information duties. Art 20 of the Directive on electronic commerce for instance requires the Member States to determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and to take all measures necessary to ensure that they are enforced. The sanctions shall be effective, proportionate and dissuasive. The Directive on consumer rights refers to enforcement of the duties there established in its art 23, which reads: 'Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.'[122]

The enforcement of consumer rights needs to be carried through legal intervention. Such legal intervention should consist of competition or administrative law provisions sanctioning traders not complying with information requirements[123] – according to Eidenmuller and others:

> (...) non-compliance with information duties may be sanctioned by injunctions or fines which are imposed by collective organizations or public

European consumer policy on rationale of consumer protection and necessity of legal intervention in to the market.

[119] See eg a no doubt controversial view expressed by Omri BEN-SHAHAR, 'One-Way Contracts: Consumer Protection without Law' (2010) 6 European Review of Contract Law 221, 223: 'A (...) way to address the weakness of contract law in the consumer area is to abandon contract law as the locus of consumer protection, and to seek protection from alternative sources, which do not rely on private enforcement of the contract by aggrieved consumers.' In his paper, Ben-Shahar seeks 'to describe the value of alternative, non-legal protections of consumer rights.'

[120] See eg RIEFA (n 73) 36-37 pointing out that: 'better enforcement of the current requirements would be a first step in the right direction.'

[121] FERRANTE (n 48) 119.

[122] Art 23.1.

[123] As required by the provisions of the Directives mentioned above; see also EIDENMULLER (n 76) 1118.

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> authorities (institutional remedies). The general effectiveness requirement for implementing EU directives (*effet utile*) is met by the recognition of institutional remedies. Hence, from the European perspective, it is not normally necessary to provide contract law remedies for non-compliance with information duties established by the *acquis*.[124]

Detailed analysis of this solution stays nevertheless outside of the scope of the present study.[125]

Another possibility would be that of private law granting individual consumers right to redress in the case of breach of their right of information.[126] As pointed out above, it is not an express requirement of the European law to establish private law redress for breach of information duties.[127] Nevertheless, individual redress rights are needed too because information duties are not only relevant in the context of

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[124] Ibid.

[125] Eidenmuller and others ibid argue in favour of institutional sanctions: '[w]hile contract law sanctions provide individual protection, institutional sanctions also have preventive effects where individual incentives to enforce the former are too weak. Furthermore, private organizations as well as public authorities are able systematically to monitor the market and to enforce regulations.'; see also Chapter 1 Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts* and especially footnote 361 and views there expressed.

[126] BEN-SHAHAR, 'One-Way Contracts: Consumer Protection without Law' (n 119) 223 identifies two ways of improving consumers' possibilities to legally enforce terms of the caontracts: '[o]ne way is to strengthen contract rights and contract law's involvement. In this spirit, consumer protection oriented reforms that are often advocated include better disclosures, more effective rituals of assent, stronger remedies for breach of contract, and mandatory substantive terms to assure minimum standards.' The second way is the one already mentioned above: '[a] second way to address the weakness of contract law in the consumer area is to abandon contract law as the locus of consumer protection, and to seek protection from alternative sources (...).'; also EIDENMULLER (n 76) 1118 point to private law remedies:'[i]t is possible (...) to incorporate the specified information duties of the *acquis* into the regime of general contract law. This would mean that an infringement will give rise to one or several remedies within the individual contractual relationship.'

[127] See the wording of the provisions of the directives mentioned above: art 20 of the Directive on electronic commerce talks about sanctions – naturally belonging to the realm of administrative or even criminal law, art 23.2 of the Directive on consumer rights reads: 'The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions transposing this Directive are applied:
(a) public bodies or their representatives;
(b) consumer organisations having a legitimate interest in protecting consumers;
(c) professional organisations having a legitimate interest in acting.',
whilst art 24 refers to 'penalties'.

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consumers' contracting choices, but also, as already noted, they play an important role in the case of a breach of contract, as they provide consumers with means to enforce their individual rights. 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, ie the contract enforcement, together with administrative sanctions provided for infringement of consumers' rights is what really matters much more than doctrinal issues of how, and if, the valid contract was formed.[128]

Adequate remedies are of major significance also in the context of experience and, maybe even more importantly credence goods – consumers need private law remedies in order to have means of individual redress if the pre-contractual information duties had been breached, especially through provision of false information, sometimes long before the consumers were able to realise that the breach had occurred. 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 a computer, is exactly what they paid for? Or if the clothes they bought are effectively made of silk or fair trade cotton?[129] As already pointed out, 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,[130] that comes into play providing consumers with remedies against traders' failure to disclose. Grundmann observes that sufficient liability rules, together with certified information, constitute an adequate response to the problem of search and credence goods and unobservable breach.[131]

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[128] Benjamin E HERMALIN and others, 'Contract Law' in AMitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics. Vol.1* (Elsevier BV 2007) 99.

[129] Cf ibid 11ff.

[130] See Subsection 2.2.3.2 *Nature of remedies: contractual, tortious or other?* below.

[131] Stefan GRUNDMANN, 'Information, Party Autonomy and Economic Agents in European Contract Law' (2002) 39 Common Market Law Review 269, 285: '[t]he equivalent [to personal inspection and use] is information which is certified, eg via inspection by a third and neutral party and/or sufficient liability rules.'

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The traditional private national law rules provide remedies for breach of information duties, nevertheless they are not regulated in any way by European law, as already noted, and therefore they are not harmonised. Eidenmuller and others point out that '[t]he Member States should, however, be cautious about incorporating the European information duties into their general contract laws and thus subjecting them to the standard contractual remedies. It is by no means obvious that the application of such remedies fulfils a meaningful function.'[132] From the economic point of view in a broader perspective concerned above all with market and its functioning, the private law remedies are not necessary; more – they seem to be inadequate due to the costly and lengthy court proceedings and need to demonstrate the damage caused by the breach, to name just a few reasons.[133] The institutional remedies of administrative and competition law allow to correct the market functioning and fulfil the requirement of effective directives implementation.[134]

Nevertheless, both English and Spanish systems do have traditional doctrines which recognise some forms of mandated disclosure, and information duties in consumer contracts are introduced into the general contract law system.[135] Clearly, there is some risk involved in such approach to information duties and general contract law remedies. For example Carrasco Perera points out to the problem related to establishing the ever-expanding lists of information requirements – in some situations consumers may abuse the remedies resulting from breach of those requirements by traders, in order to free themselves from contracts that turned out to be a poor deal, on the basis of not receiving certain pieces of information.[136] Nevertheless,

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[132] EIDENMULLER (n 76) 1118

[133] The issue of adequacy of private general law remedies will be explored further in Chapter 3 Section 3.3 *Problem of adequacy of general remedies to particularities of B2C contracts.*

[134] EIDENMULLER (n 76) 1118.

[135] Various provisions of TRLDCU cross reference to the *Código civil*, the Act which is of application to all the private law contractual relationships; similarly CRA 2015 makes references to the traditional private law, noting that consumers can claim traditional law remedies in addition to or instead of specific remedies – see s 19(10)-(11); it is therefore evident that both systems recognise application of general private law to the consumer contracts, which includes also the application of the individual remedies.

[136] Ángel CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' in Sergio Cámara Lapuente and Esther Arroyo Amayuelas (eds), *La Revisión de las Normas Europeas y Nacionales*

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such situations are scarce – it is more a question of judges finding a way to restore some equilibrium in the contractual relationship between big companies, especially banks, and individual clients, than a real issue of relevance to the remedies for breach of information duties in the electronic contracts of usually low value.

2.2.2 Major problematic issues related to the remedies for breach

2.2.2.1 Dual nature of information duties and remedies for their breach

Despite the undisputed importance of information duties in the e-commerce and the need for effective remedies for their breach that would constitute on the one hand an incentive for traders to comply with the duties, and on the other a reliable tool that would ensure consumers' interests protection, no clear list of specific remedies applicable to the breach of information duties exists at any legislative level – neither in the European Union law, nor in the Member States' national systems. European soft contract law instruments offer some suggestions, nevertheless they have not been adopted by any applicable biding hard legislation. The numerous directives that impose information duties to be implemented in the national internal legal systems usually leave the remedies available for breach of those duties to the Member States' internal law.[137] Directives on electronic commerce and on consumer rights can serve as an example. Both Directives require Member States to take

de Protección de los Consumidores: Más Allá de la Directiva sobre Derechos de los Consumidores y del Instrumento Opcional sobre un Derecho Europeo de la Compraventa de octubre de 2011 (Civitas-Thomson Reuters 2012) 314.

[137] The fact that there is no clear list of specific remedies applicable to the breach of info duties, which brings about the need to look for remedies in general private law, was already observed as a general trend more than ten years ago, see Thomas WILHELMSSON, 'Private Law Remedies against the Breach of Information Requirements of EC Law' in Reiner Schulze and others (eds), *Informationspflichten und Vertragsschluss im Acquis Communautaire* (Mohr Siebeck 2003) 247; and is considered by various authors to be a long-standing problem, see Christian TWIGG-FLESNER and Daniel METCALFE, 'The Proposed Consumer Rights Directive: Less Haste, More Thought?' (2009) 5 European Review of Contract Law 368, 381; see also: Sergio CÁMARA LAPUENTE, 'Artículo 60: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 508.

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all measures necessary to ensure the implementation of their provisions, including information requirements, however the Directive on electronic commerce does not provide for any specific contractual remedies for breach of the duties, and in Directive on consumer rights only some specific information requirements, particularly those regarding the right of withdrawal[138] and costs,[139] are also directly protected by the Directive through rules establishing specific consequences of breach.[140] Therefore the effectiveness of the rest of the information requirements must be guaranteed by the national law,[141] which is not surprising as a policy choice: information duties are relatively small intervention into the national contract law and freedom of contract, which makes it easier at the European level to adopt directives that only refer to the duties, but leave remedies to the national laws.[142] Moreover, as already noted, Member States are only under an obligation to provide institutional remedies of administrative and/or competition law for breach of information duties by traders in order to guarantee effectiveness of the European directives, therefore in a great majority of cases the private law individual remedies depend on each Member State and the national law in question.

Due to the fact that European directives establish only some specific remedies applicable to the breach of information duties other consequences of breach must be sought in general national private law or in specific national legislation not originating in European directives. Furthermore, consumer protection provisions that introduce some specific remedies for breach of information duties do not exclude

[138] Art 10 of the Directive on consumer rights.

[139] Art 6.6.

[140] See Elizabeth HALL and others, 'The Consumer Rights Directive – An Assessment of its Contribution to the Development of European Consumer Contract Law' (2012) 8 8 European Review of Contract Law 139, 152; this is also true for other Community documents, see for example Twigg-Flesner's comments on the Green Paper on the Review of the Consumer Acquis 2007 – Christian TWIGG-FLESNER, 'No Sense of Purpose or Direction? The Modernisation of European Consumer Law' (2007) 3 European Review of Contract Law 198, 210.

[141] A solution which was criticized as leading to market fragmentation and incoherence, see TWIGG-FLESNER and METCALFE (n 137) 381; Raquel GUILLÉN CATALÁN, 'La Directiva sobre los Derechos de los Consumidores: un Paso hacia Delante, pero Incompleto' (2012) 7801 Diario La Ley 1, 3ff.

[142] Per analogy see RIEFA (n 73) 7ff.

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application of general private law rules.[143] On the contrary, consumer law's aim is to provide individuals with additional rights and remedies.[144] This creates a special situation in which rules that apply to the pre-contractual information duties in the B2C e-commerce in the scope of the European internal market originate on two different levels, in the European law and in the national law. The scope and type of remedies available will be different in each national legal system,[145] due to the influence of the traditional contract law on the effectiveness of information duties. At the national level there will be various different pieces of legislation, both primary and secondary, applicable together with the established case law; in England mainly the CRA 2015 and regulations: especially the Consumer Contracts Regulations 2013 and the UTR 2008 as amended by the Consumer Protection Amendment 2014, and also general contract-related law: legislation – the Misrepresentation Act 1967 and case law relative to the contractual and tortious remedies. In what refers to the Spanish law, the remedies are mainly established in the TRLDCU and *Código civil*, provisions of which are interpreted by the courts.

An issue regarding the hierarchy of applicable provision may arise. Under the English law, consumers will benefit from the general private law remedies in addition to specific consumer law remedies, however clearly not so as to recover twice the same loss,[146] or instead of specific consumer law remedies, and also when no such remedy is provided.[147] Sometimes, the provisions will expressly exclude application of general law remedies – for instance s 2(4) of the Misrepresentation Act 1967 reads:

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143 See Chapter 3 Section 3.2 *General private law and remedies it offers.*

144 See BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 40) footnote 3.

145 The Member States' legal systems represent different legal traditions, such as civil law, common law or Germanic law, which is especially important in the context of cross-border contracts. The duties of information are an important element of the European contract law, and the research in this field represents not only practical interest, but also theoretical: '[a]n investigation of the scope of the "duty to disclose" on a comparative law basis is most rewarding; it leads us straight to the heart of the philosophy underlying the law of contracts.' – see Friedrich KESSLER and Edith FINE, 'Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study' (1964) 77 Harvard Law Review 401, 438.

146 See eg reg 27L CPUTR 2008 as amended by the Consumer Protection Amendment 2014.

147 Cf eg s 19(10) CRA 2015.

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> This section does not entitle a person to be paid damages in respect of a misrepresentation if the person has a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) in respect of the conduct constituting the misrepresentation.

This means that the availability of specific remedy resulting from consumer law legislation excludes application of the general law remedies, but only if the law explicitly states so.

In what refers to the Spanish law, art 59.2 of the TRLDCU[148] states that consumer contracts are governed by the general contract law in all the aspects that are not expressly covered by the TRLDCU or other specific laws, following the principle of *lex specialis derogat legi generali*. Therefore, when no specific remedy for breach of information duties is established in specific consumer legislation, the general contract and obligations law will apply. However, it does not mean that the Spanish legislator excludes the application of general private law remedies when specific remedies arising from TRLDCU and other specific legislation are available. It is still quite a controversial issue under the Spanish law,[149] however generally speaking the choice of remedies is of the aggrieved party.[150] Moreover, some specific law provisions, as for instance art 61.2 of the TRLDCU on inclusion of the content

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148 This provision was recently changed by the Ley 3/2014, de 27 de marzo, for a detailed analysis of the reform see eg Encarna CORDERO, 'Protección Sectorial y Protección Consumerista General? De Minimis y de Maximis. Sobre la Reforma del Artículo 59.2 del TRLCU' (2014) 9 Revista CESCO de Derecho de Consumo 1.

149 Cf Fernando GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' [2007] InDret: Revista para el Análisis del Derecho 1, 13-14 mentioning the issue in the context of the concurrent actions of general remedies for breach of contract and those arising out of the latent defects of the goods purchased, and noting that the *Tribunal Supremo* has been pronouncing itself in favour of not excluding – ie allowing the application for – the general law remedies in the cases of availability of more specific remedies for latent defects, however the Court has been using a variety of arguments in a rather inconsistent manner, therefore there still arises litigation around this issue, cf eg Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 781/2005 de 21 de octubre (RJ 2006/1689), Fundamentos de Derecho, Segundo; see also case note: María MARTÍNEZ MARTÍNEZ, 'Comentario a la STS, 1ª, 21.10.2005' (2006) 71 Cuadernos Civitas de Jurisprudencia Civil 1107; see also Esther TORRELLES TORREA, 'Artículo 114: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1059; see also below .

150 GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 14.

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of the advertisement into the contract, art 65 of the TRLDCU on incorporation of the pre-contractual information, also in the cases of omission, into the contract to the benefit of the consumer in accordance with the good faith principle, or finally art 97.5 of the TRLDDCU do not specify remedies for their breach. It can be therefore understood that the general contract law remedies will be applicable in such cases.[151]

Another example of an explicit exclusion of the application of the general law remedies can be found in the art 117 of the TRLDCU relative to the remedies for the lack of conformity, which may be available in some instances of breach of information duties.[152] This provision excludes the possibility to apply for general contract law remedies concerning latent defects.[153] The text of the art 117, however, does not pronounce itself on the compatibility with other general law doctrines that are also of interest in the context of a breach of information duties. First of all, lack of conformity may imply breach of contract – the majority of the academics be-

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[151] See Sergio CÁMARA LAPUENTE, 'Artículo 61: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 515 and Sergio CÁMARA LAPUENTE, 'Artículo 65: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 581-582.

[152] See CÁMARA LAPUENTE, 'La Nueva Protección del Consumidor de Contenidos Digitales Tras la Ley 3-2014, de 27 de Marzo' (n 81) 62-63, who names six different legal consequences of the breach of information requirements established in the arts 60 and 97 of the TRLDCU, of which four are of contractual nature: breach of good faith principle of art 65 of the TRLDCU; specific remedies available for breach of some information duties expressly established in the TRLDCU, as eg extention of the withdrawal period; remedies for lack of conformity arts 114ff TRLDCU and trader's liability for defective goods; and general contract law including remedies applicable in cases of defects of consent; other non-contractual being: classification as unfair commercial practice and administrative sanctions of art 49 TRLDCU.

[153] Along these lines Nieves FENOY PICÓN, *El Sistema de Protección del Comprador* (Col Nal Registradores Propiedad y Mercantiles 2006) 1081; however there is a minority opinion that art 117 TRLDCU requires the consumer to opt for one of the regimes of remedies: for non-conformity or for latent defects, with the impossibility of claiming both at once – see Rodrigo BERCOVITZ RODRÍGUEZ-CANO, 'La Ley de Garantías en la Venta de Bienes de Consumo y la Defensa del Consumidor' [2003] Aranzadi Civil 1892, 1893; for more on the issue of the coexistence in the Spanish law of the scheme of remedies for the latent defects of the *Código civil* with provisions on non-conformity in consumer sales: FENOY PICÓN, *El Sistema de Protección del Comprador* (n 153) 149ff.

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lieve the two regimes to be incompatible, the aggrieved consumer having to claim non-conformity rather than breach of contract;[154] nevertheless the courts seem to allow the application of general law remedies despite the availability of the specific statutory remedies.[155] Although from a practical point of view, the specific remedies for non-conformity fit consumers' needs much better than the general law remedies, the choice should be that of the aggrieved consumer, as the specific consumer law remedies are intended to add to consumer protection rather than simply substitute one regime for another.[156] Secondly, the same set of facts can give rise to a claim for both non-conformity and defects of consent, especially those of importance in the context of breach of information duties: mistake (*error*) and fraud (*dolo*). In what refers to the possibility of opting for contract avoidance due to mistake or remedies for the lack of conformity, Torrelles Torrea rightly observes that the regime of remedies for non-conformity is more beneficial for the aggrieved party,[157] so in practice consumers will be inclined to claim lack of conformity anyway.[158] The majority view is that consumers are free to opt either for the action for non-conformity or for mistake.[159] The claim for fraud is nevertheless in many instances more attractive to the aggrieved consumers than the non-conformity regime, the two being also com-

[154] See FENOY PICÓN, *El Sistema de Protección del Comprador* (n 153) 172; Esther TORRELLES TORREA, 'Artículo 117: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1081-1082 and the literature there cited.

[155] See Audiencia Provincial de Pontevedra (Sección 1ª), Sentencia núm.337/2009 de 9 de julio (AC 2009/1840), Fundamentos de Derecho, Tercero where the court observes that availability of the specific law remedies for the non-conformity of the product with the contract does not exclude a possibility to claim other general law remedies, as for example damages, as it is expressly noted in the art 117 second para; TORRELLES TORREA, 'Artículo 117: Comentario' (n 154) 1082 also cites Audiencia Provincial de Pontevedra (Sección 1ª), Sentencia núm.95/2007 de 15 de febrero (AC 2007/1432).

[156] BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 40) footnote 3; however see also observations made in Chapter 3 Subsection 3.2.1 *Overview of the analysis of the general private law remedies.*

[157] Except for the limitation period of four years ex art 1301 *Código civil* as opposed to two years for non-conformity (see art 123 TRLDCU), which is the main advantage of the claim for mistake.

[158] TORRELLES TORREA, 'Artículo 117: Comentario' (n 154) 1082.

[159] Ibid; see also FENOY PICÓN, *El Sistema de Protección del Comprador* (n 153) 247ff.

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patible with an action for breach of contract (aggravated by fraudulent intention of the trader).[160]

Art 117 in its second para allows consumers who suffered loss due to the lack of conformity to seek damages in accordance with the general private law. The damages are available to the aggrieved consumers in addition to the other remedies for non-conformity,[161] similarly to the provision of s 19(10)(a) of the CRA 2015. There is no indication as to the kind of damages – in contract or tort – but it seems that the facts of the non-conformity instances are of a definitely contractual nature, so arts 1101ff of the *Código civil* will be applicable.[162] Nevertheless, the claim for damages under the regime of latent defects ex art 1486 of the *Código civil* is understood to be excluded, as the whole regime of latent defects is incompatible with an action for the lack of conformity.[163]

In conclusion, it can be understood that in both Spanish and English law, when the specific consumer law statute does not rule out application of the general law remedies, they are available.[164] The possibility of application of general law remedies when specific ones are available has various consequences. It has been pointed out that from the economic perspective it would be redundant for both types of remedies for breach of information duties to be available at the same time.[165] It seems that if the national contract law provides information duties (including general or indirect ones) that provide sufficient incentive for parties to exchange information and protect the party who is weaker in the situation of information asymmetry,

[160] TORRELLES TORREA, 'Artículo 117: Comentario' (n 154) 1083.

[161] SAP Pontevedra 337/2009 de 9 de julio, Fundamentos de Derecho, Tercero; TORRELLES TORREA, 'Artículo 117: Comentario' (n 154) 1083.

[162] Along these lines various courts on multiple occasions, see eg Audiencia Provincial de Alicante (Sección 7ª), Sentencia núm.118/2002 de 4 de marzo (AC 2002/825); Audiencia Provincial de Barcelona (Sección 1ª), Sentencia núm.650/2007 de 18 de diciembre (AC 2008/334); Audiencia Provincial de Ourense (Sección 1ª), Sentencia núm.340/2008 de 22 de septiembre (JUR 2009/81438); Audiencia Provincial de Granada (Sección 3ª), Sentencia núm.485/2008 de 21 de noviembre (JUR 2009/60612).

[163] TORRELLES TORREA, 'Artículo 117: Comentario' (n 154) 1083.

[164] Although a reservation needs to be made regarding the right to rescind the contract for breach when the remedies for the lack of conformity are available — see below Chapter 3 Subsection 3.2.1 *Overview of the analysis of the general private law remedies.*

[165] EIDENMULLER (n 76) 1113.

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the additional specific duties are simply not necessary, in addition to potentially bringing about undesirable consequences. Nevertheless, specific information duties are established by the European directives which are transposed into the national legal systems. Another issue thus arises – some of the directives, as for example Directive on consumer rights, are of full harmonisation. This notably means that the consumer protection in the national law resulting from the transposition of the directive cannot be higher than that established in the directive. In the context of information duties full harmonisation logically translates into prohibition of introducing additional duties. Theoretically, it should therefore result in exclusion of the application of general private law information duties and remedies for their breach, as they differ among the Member States and may cause protection level to be higher than that established in the Directive. Nevertheless, such consequences of the full harmonisation principle are simply impossible from the politics point of view – that is why the Directive is without prejudice to the national contract law, including rules on validity of contracts and consent: '[t]his Directive shall not affect national general contract law such as the rules on the validity, formation or effect of a contract';[166] rules which provide the aggrieved party with remedies for breach of disclosure duties!

Furthermore, information duties can be of different nature that usually correlates with their different origin. Duties of more general scope, often clause-like[167] will be usually established in general private law at national level. Embedded deeply into the system of private law, they tend to reflect moral principles and values governing the traditional regulation contract formation, as does the principle of pre-contractual good faith in Spanish law, or law of misrepresentation limiting the action to cases of explicit lies in English law. On the other hand, information requirements introduced into national law through European directives can be usually characterised as casuistic and very detailed.[168] Such is the list of information items established in

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166 Art 3.5 of the Directive on consumer rights, see also its recital (14).

167 WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (n 39) 19.

168 However, this is not always the case, see for example art 2 of the Directive on the sale of consumer goods (on conformity with the contract), which, as WILHELMSSON, 'European Rules on Pre-Contractual Information Duties?' (n 39) 20 points out, does not contain a direct duty to inform, however such a duty can be inferred from the provisions on conformity of the goods; see also Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties.*

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the Directive on consumer rights,[169] transposed into national laws in art 97 of the TRLDCU and Schedule 2 of the Consumer Contracts Regulations 2013. The discrepancy in character between the information duties established at the European and national level may have various consequences.

First of all, an important issue, already mentioned above, is the full harmonisation approach used in the Directive on consumer rights. The problems may arise when the general duty of fair dealing and good faith present in the national internal legal system implies a wider than the Directive scope of the duty to inform. Such a situation may be even considered a violation of the full harmonisation principle.[170]

Secondly, the nature of the information duties, that is whether they are obligations of a contractual or different character, also poses a problem, as internal systems may catalog them differently. It would then influence for instance jurisdictional rules applicable,[171] as well as lead to other important consequences.[172]

The character of the remedies for breach of the duties sometimes depends on the origin of the duty that was breached. More specific remedies, such as extension of the period of time to exercise a right, as in the case of the right of withdrawal,[173] may accompany detailed information requirements. Nevertheless, as I pointed out

169 See art 6.1 of the Directive that contains 20 information requirements in letters (a) to (t).

170 See observations expressed by Vanessa MAK, 'Full Harmonization in European Private Law: A Two-Track Concept' (2012) 20 European Private Law Review 213, 213ff, who points out that the CJEU in the context of the Directive on unfair terms decided to apply the 'result – oriented' approach to the full harmonisation in the cases: C-261/07 *VTB-VAB NV v Total Belgium NV* [2009] ECR I-02949, C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2010] ECR I-00217 and C-540/08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH* [2010] ECR I-10909. This approach to full harmonisation means that Member States are not allowed to apply the internal law, even if it is general contract law, to the matters covered by the directive.

171 See for instance CJEU case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-03967.

172 For example, under English law damages are measured differently for contractual and tortious liability. Under Spanish law, the time to present an action for damages in tort is 1 year, whilst for breach of contract it is up to 15 years.

173 Art 10.1 of the Directive on consumer rights reads: 'If the trader has not provided the consumer with the information on the right of withdrawal as required by point (h) of Article 6(1), the withdrawal period shall expire 12 months from the end of the initial withdrawal period, as determined in accordance with Article 9(2).', if the information is provided correctly the withdrawal period is of 14 days – see art 9.1.

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above, this is not always a case. If an information duty originating directly in a European directive is not protected by a specific consequence of its breach, then the national private law comes into play. In both English and Spanish general private law we can distinguish a number of doctrines, which are of relevance in the context of transmission of information between the contracting parties:[174] especially defects of consent, norms relative to the breach of contract, eg based on failure to conform to the description of products, and tort law rules – particularly such as the rules on negligence and *culpa in contrahendo*.[175] It seems however, that from the perspective of the national internal law of England or Spain, if the general private law doctrines mentioned are successful in achieving a sufficient protection of the interest of the contracting parties in receiving certain information from the other party, it would be redundant[176] to establish additional information duties in the contract law system and consequently to create additional remedies for breach of such duties.[177] Nevertheless, such a situation occurs with the implementation of consumer law directives which introduce additional disclosure rules; the fact which is understandable from the EU point of view, but may result in unexpected and potentially undesirable consequences for national legal systems of the Member States. Eidenmuller and others note that establishment of superfluous information duties may give rise to inappropriate remedies.[178]

Nevertheless, the general contract law rules, such as the law of misrepresentation

[174] Cf EIDENMULLER (n 76) 1112-1113 who note that: '[t]he most significant of these are the rules on the formation and interpretation of contracts, on the incorporation of standard terms of business, on mistake, misrepresentation, undue influence and fraud, and finally on breach of contract based on failure to conform to the description of the goods or services.'

[175] See Subsection 2.2.3 *Types of remedies available* below; see also GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 26) 314-315; Paula GILIKER, 'A Role for Tort in Pre-contractual Negotiations? An Examination of English, French, and Canadian Law' (2003) 52 International and Comparative Law Quarterly 969, 972ff.

[176] Sergio CÁMARA LAPUENTE and Evelyne TERRYN, 'Chapter Three: Consumer Contract Law' in Hans-W Micklitz and others (eds), *Cases, Materials and Text on Consumer Law: Ius Commune Casebooks for a Common Law of Europe* (Ius Commune Casebooks for a Common Law of Europe, Hart Publishing 2010) para 3.43 (EU) point out to 'a problem of unnecessary overlap and a lack of consistency in the existing national and Community instruments imposing information requirements.'

[177] EIDENMULLER (n 76) 1112-1113.

[178] Ibid.

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or mistake, will usually require a justification that the contract would not have been entered into, or would have been concluded on different terms, had the party been provided with correct information;[179] such condition might be difficult to prove in consumer contracts, which is an argument in favour of establishing specific remedies for breach of specific information duties. Moreover, specified pre-contractual information duties and remedies, established in abundance in the *acquis communautaire*, are more foreseeable and easier for traders to fulfil in a standardised manner.[180]

A particular issue linked to the dual nature of information duties and remedies for their breach is the integration of the information items provided into the contract – art 6.5 of the Directive on consumer rights states that '[t]he information referred to in paragraph 1 shall form an integral part of the distance (...) contract (...).'; this provision is further repeated by national legislation: art 97.5 of the TRLDCU and various ss of the CRA 2015.[181] The information will therefore become terms of the contract formed between the trader and the consumer. Nevertheless, the question arises regarding the status the information will assume within the contract, as the remedies will depend on whether the information is considered *essentialia negotii*, which would then imply that breach of information duties hinders the valid formation of the contract.[182] On the other hand, the Directive on consumer rights in its recital (14) states that:

> This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating

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[179] Cf in the context of the law of misrepresentation, as described eg by John CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Contract Law Library, Sweet & Maxwell 2012) 91ff, 139ff the courts will always require representee's reliance on the statement made -– the reliance has to be reasonable and must have influenced the decision-making process of the representee, ie induced them to enter into the contract; Spanish *Código civil* art 1269 on fraud (*dolo*) states that there is fraud when one of the contracting parties, using deceptive words or acting in such manner, induces the other party to enter into the contract they would not have concluded otherwise.

[180] EIDENMULLER (n 76) 1113.

[181] See ss 11(4) and (5) and 12, in relation to goods; ss 36(3) and (4) and 37, in relation to digital content; and s 50(3) and (4) in relation to services, that require the pre-contractual information to be treated as included as a term of the contract.

[182] NORDHAUSEN SCHOLES (n 4) 223.

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> for instance the conclusion or the validity of a contract (for instance in the case of lack of consent). Similarly, this Directive should not affect national law in relation to the general contractual legal remedies (...).

This consideration implies that no qualification of *essentialia negotii* can be established for the information items at the European level, and it depends purely on the national law application. It seems logical to assume therefore that the information items required by the Directive on consumer rights are not *essentialia negotii*, unless the national law considers them so.[183] The importance of the information items is also pertinent in the context of the defects of content as possible remedies – as already mentioned, generally speaking only information of a significant meaning, such as to induce the consumer into the contract they would not have concluded, had they been provided with correct information, can give rise to remedies linked to the defects of consent.[184] The information items which are required to be provided by the European law need to be therefore looked at also from the perspective of the national law in question in order to be able to determine remedies available; this needs to be done individually in each case.

2.2.2.2 Casuistic nature of information duties

Casuistic character of information duties leads to market fragmentation, due to the proliferation of information requirements in the *acquis communautaire* on the one hand, and the aforementioned problem of implementing them differently by the Member States on the other.[185] Furthermore, it is also an important issue further hindering the effective and logical application of remedies for breach of those du-

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[183] Ibid.

[184] EIDENMULLER (n 76) 1122-1123 observe that '[t]his requirement is not met with regard to most information duties of the *acquis*, as they generally relate to peripheral issues.' Nevertheless, I am inclined to argue the contrary: many *acquis* information requirements, such as those relating to main characteristics of the product, trader's identity, costs of delivery and return, existence of the right of withdrawal do in fact concern material issues and are important enough for the consumer to be able to claim that they would not have concluded the contract knowing the truth and/or breach of contract.

[185] HALL (n 140) 152-153.

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ties.[186] In the context of the B2C electronic contracts it is impractical to assess the existence and extent of the duty to disclose in each individual case, as already observed.[187] In a similar way, the proliferation of information duties makes it difficult to propose an adequate remedy for breach of each of them. However, information items are of different importance for the parties' relationship and play a different role in the contract. This means they can be organised in groups, breach of which will give rise to similar remedies, for instance: information relative to the contract contents (ie main characteristics of the product, identification of the parties, duration of the contract, price etc), information relative to consumer rights (especially information on the right of withdrawal), information relative to the contract formation process (technical steps needed for the contract to be concluded), information relative to dealing with complaints (eg trader's geographical address, possibility of having recourse to ADR schemes, existence and availability of codes of conduct etc).[188]

It should be noted however, that some of those remedies will be so closely linked to the core contract law concepts, as discussed below in Chapter 3 Section 3.2 *General private law and remedies it offers*, that their establishment at the European level is politically impossible. Such remedies originate in general national contract law; they are available in particular for breach of information duties relative to the content of the contract.[189] Each case of breach of information duties established by legislation should be assessed individually, the importance and the character of the duties breached needs to be evaluated in order to apply adequate remedies and/or sanctions on the trader. This way consumers' interests are secure and, on the other

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[186] Hans-W MICKLITZ and others, 'An Introduction to the Special Issue on "Behavioural Economics, Consumer Policy, and Consumer Law"' (2011) 34 Journal of Consumer Policy 271, 272 note that '[n]owadays, the consumer legal system is saturated with information duties, duties that tend to produce high costs for suppliers and also inundate the legal system. The result is an ever-growing enforcement deficit.'

[187] See Chapter 1 Subsection 1.1.2.4 *Finding a balance: optimal information duties in the B2C e-commerce.*

[188] Cf EIDENMULLER (n 76) 1119-1121 who distinguish three main groups of information duties in the function of available remedies: information duties relating to the process of contract formation or the content of the contract, information duties relating to the motivation to enter into a contract and information duties concerning rights available to the other party.

[189] Ibid 1119-1120.

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hand the efficient and individual assessment of each case is beneficial for traders as well: first, because the honest traders fulfilling their duties are promoted, second, due to the fact that consumers will not abuse their rights avoiding contracts for breach of the duties of lesser importance.[190]

2.2.3 Types of remedies available

2.2.3.1 Main remedies to be considered

First of all, the remedies available for breach of information duties can be divided into specific consumer law remedies and general private law remedies; sometimes remedies from those two different groups can be combined.[191] The specific remedies for breach of information duties are those transposed into national laws as a consequence of a European directive, due to this fact they belong to a sort of an additional layer of law within the national system; general private law remedies on the other hand originate in the national law, which they have been evolving with for centuries.

In order to introduce some clarity in the present analysis, remedies for breach of information duties should be differentiated from the consequences of breach. I am using the concepts of the consequences of breach or possible classification of breach when I am referring to legal rules applicable in the given case; the remedies result from those legal rules. For instance, if a breach of an information duty occurred through a false representation having been made to a consumer, the possible consequence of such breach could be an action in misrepresentation in English law or *dolo* (fraud) in Spanish law, the potentially available remedies will comprise a possibility to avoid the contract and damages.

The DCFR in its art II.–3:109 proposes a set of uniform remedies for the breach of information duties; the remedies include liability for non-performance, liability

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[190] CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 136) 314 pointing out to the issue of consumers claiming contract avoidance when information duties breached were insignificant, in order to find a way out of a bad deal.

[191] See eg s 19(10) CRA 2015, see also observations made above in Subsection 2.2.2 *Major problematic issues related to the remedies for breach.*

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for damages and a right to avoid the contract due to mistake.[192] Such a uniform set of remedies however, is neither desirable[193] nor actually present in the legal systems analysed, as English and Spanish law combine both specific and general private law remedies. There is no doubt that the remedies, in order to be effective, need to be adapted to the contractual relationship in question – a B2C electronic contract – and adequately respond to the consumer's interests prejudiced by the breach of the concrete duty. Therefore, two considerations need to be explored: the types of remedies adequate for consumer contracts[194] and purposes of each information duty.[195]

The adequacy of remedies for breach of information duties is discussed in more detail further in Chapter 3 Section 3.3 *Problem of adequacy of general remedies to particularities of B2C contracts*, here it is appropriate only to note that main issues

[192] Art II.–3:109 'Remedies for breach of information duties' DCFR reads:

'(1) If a business has a duty under II.–3:103 (Duty to provide information when concluding contract with a consumer who is at a particular disadvantage) to provide information to a consumer before the conclusion of a contract from which the consumer has the right to withdraw, the withdrawal period does not commence until all this information has been provided. Regardless of this, the right of withdrawal lapses after one year from the time of the conclusion of the contract.

(2) If a business has failed to comply with any duty imposed by the preceding Articles of this Section and a contract has been concluded, the business has such obligations under the contract as the other party has reasonably expected as a consequence of the absence or incorrectness of the information. Remedies provided under Book III, Chapter 3 apply to non-performance of these obligations.

(3) Whether or not a contract is concluded, a business which has failed to comply with any duty imposed by the preceding Articles of this Section is liable for any loss caused to the other party to the transaction by such failure. This paragraph does not apply to the extent that a remedy is available for non-performance of a contractual obligation under the preceding paragraph.

(4) The remedies provided under this Article are without prejudice to any remedy which may be available under II.–7:201 (Mistake).

(5) In relations between a business and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

[193] EIDENMULLER (n 76) 1122 observe 'uniform regulation which does not take account of the characteristics of the individual duty in question leaves a wide discretion to the courts and may even lead them to the conclusion that all the remedies listed are available for the infringement of any information duty. In addition, a uniform list of remedies in contract law disregards the fact that the infringement of information duties may be appropriately and sufficiently addressed by institutional sanctions.'

[194] See observations made by me in BEDNARZ, 'Breach of Information Duties in the B2C E-Commerce: Adequacy of Available Remedies' (n 34).

[195] EIDENMULLER (n 76) 1119ff.

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concern the need to engage in court proceedings in order to enforce the remedies, difficulties connected to the burden of proof and a limited deterrent effect of general law remedies in the context of standard form contracts.[196]

In what refers to purposes of information duties, as already noted in Subsection 2.2.2 *Major problematic issues related to the remedies for breach*, information requirements can be divided in groups depending on the function of the duty in question; the remedies for breach of the duties having the same purpose will be similar and should be adequate to the specific purpose of the duty. Therefore, information relative to the contract contents – the most important information items describing main characteristics of the object of the contract, making the identification of the parties possible, explaining main obligations of the parties under the contract, such as the price to be paid and the duration of the contract – is often protected through remedies influencing the validity or enforceability of the very contract in question. This is true both for general private law – which does so for example through defects of consent and in specific consumer regulations – for instance when consumer is not informed about some additional costs, ie does not know the total price of the product ordered, they will not have to bear that costs according to the art 97.6 of the TRLDCU or reg 40 of the Consumer Contracts Regulations 2013. Breach of information relative to consumer rights, such as notably information on the right of withdrawal, will result in the consumer rights being extended, as in the case of withdrawal period extension from art 105 TRLDCU and reg 31 Consumer Contracts Regulations 2013. Logically, the assumption is that the consumer cannot lose – or miss the time limit to exercise – their right just because they were not informed about it: the very purpose of the information duty relative to the other party's legal right is based on the idea to make it easy for them to exercise it in time.

However, it is less clear what remedies are available in the case of breach of information requirements covering the information relative to the contract formation process, such as technical steps needed for the contract to be concluded.[197] The problem with private law redress is that if the contract was effectively concluded,

[196] BEDNARZ, 'Breach of Information Duties in the B2C E-Commerce: Adequacy of Available Remedies' (n 34) 10-11.

[197] See eg art 27 of the LSSICE and reg 9 of the E-commerce Regulations 2002.

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despite the fact that information relative to the contract formation process was missing, then the individual consumer incurred no actual damage and the purpose of the duty – contract formation – has been fulfilled. The institutional sanctions[198] are needed only to reinforce market auto-regulation in such cases: consumers will probably be willing to avoid websites where it is unclear how to order the products. Nevertheless, private law remedies might be available if due to poor information relative to the technical steps required to enter into the contract, the consumer actually places an order they did not intend to. In such case, both general private law remedies, especially resulting from the rules on defects of consent, and specific provisions, such as art 98.2 of the TRLDCU or reg 14(4) and (5) of the Consumer Contracts Regulations 2013 will come into play. From such perspective, information relative to the contract formation process in the context of the electronic commerce is actually protecting consumer's real consent.

Information requirements concerning the way in which complaints are dealt with and making it easier for consumers to bring a complaint – for example trader's geographical address, possibility of having recourse to ADR schemes, existence and availability of codes of conduct are aiming at giving consumers a real possibility to enforce their contractual rights. Breach of such duties is aggravating trader's breach of contract, if it occurred, or can be even treated as an instance of contractual breach in itself: reg 18 of the Consumer Contracts Regulations 2013 requires every distance contract to be treated as including a term that the trader has complied with information duties, including those on filing complaints. The Spanish TRLDCU does not offer a similar protection, however general law remedies will be available, including those relative to the breach of contract.

Remedies available to consumers for breach of pre-contractual information requirements vary according to purposes the different duties intend to attain. The remedies will also have their own aims, from improving the aggrieved party's economic situation (ie through compensating the damage incurred) to deterring the traders from breaching the duties.

The specific remedies, established in the consumer legislation, are numerous and quite varied. Moreover, some remedies are often available only for breach of one

[198] EIDENMULLER (n 76) 1119ff.

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concrete duty, as for instance the extension of a time limit to exercise the right of withdrawal in the case of the omission of information relative to that right. The remedies resulting from specific legislation are presented in *Figures* 1. and 2. relative to English law and *Figures* 3. and 4. relative to Spanish law. In the great majority the remedies are similar, as they originate in the EU law and the national legislation is just a transposition of those rules. However, some differences can be observed and are analysed further in Chapter 3 *Remedies for breach of information duties available to consumers in English and Spanish law*. Within the specific law of remedies available to consumers some general types of remedies can be noted: remedies linked to ineffectiveness of the contract (or payment); monetary remedies; remedies forcing the trader to do something.[199] In addition, a remedy *sui generis* of the withdrawal period extension[200] should be mentioned.

Traditionally, remedies under English law can be divided into two groups: legal remedies and equitable remedies.[201] Although this distinction concerns mainly the general law, still it is deeply embedded into the fabric of the English law and has some influence especially on the consumers' expectations as to the statutory remedies.[202] The most significant remedies under the English general law are damages and termination,[203] which is in stark contrast to the Spanish law, where similarly to other continental legal systems more emphasis is put on maintaining the contractual relationship of the parties, even if fictitious because of the breach, hence the prominence of the specific performance as remedy.[204] The statutory remedies are in a

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[199] Cf GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 13 referring to general law remedies available under the Spanish law.

[200] Reg 31 Consumer Contracts Regulations 2013 and art 105 TRLDCU.

[201] See eg MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 924ff.

[202] Traditionally, under the concept of breach of contract in common law there is no possibility of '*saneamiento*' – 'repairing' of the contract, as the English law sees contracts as guaranties of a certain outcome, contrary to the Spanish law where more emphasis is put on the parties obligations towards each other arising from the contract. Hence, the English law is not concerned with maintaining the parties' relationship when a breach occurs – the logic is that if the outcome is flawed, the parties need to look for another contract, cf TORRELLES TORREA, 'Artículo 114: Comentario' (n 149) 1060.

[203] MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 796-798.

[204] See the Tribunal Supremo *obiter*: Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 601/2005 de 13 de julio (RJ 2005/5098), Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala

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great majority inspired by the European law – often they are a direct transposition of the EU law rules – and they often follow the continental law spirit, putting the remedies aiming at maintaining the contract first.[205] It all boils down to the values and policy decisions underlying the choice of the available remedies: '[w]hat should be the aim of a remedial regime for breach of contract? Should it be to encourage parties to continue their relationship and resolve their difficulties or should it encourage parties to walk away from a deal when things go wrong and seek performance elsewhere?' asks McKendrick, noting that 'English law appears to tend towards the latter model.'[206] It should be noted that in the context of consumer contracts, as I argued elsewhere,[207] consumers whose contractual right of information has been breached, would often benefit from simple contract rescission.[208] As far as the market efficiency is concerned, this solution allows consumers to allocate their resources again in a better way, and leaves dishonest traders eventually out of the market.

In what refers to the consumer law remedies for breach of information duties,

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de lo Civil, Sección 1ª), Sentencia núm. 704/2005 de 10 de octubre (RJ 2005/8577), Fundamentos de Derecho, Sexto; nevertheless some academics believe that the specific performance is not in reality a preferred remedy in the Spanish system, see GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 16; FENOY PICÓN, *El Sistema de Protección del Comprador* (n 153) 171.

[205] For instance, the hierarchy of the remedies for non-conformity is the following: first, the consumer has to opt for repair or replacement, and only if those fail to make the good conforming to the contract, can the consumer ask for a discount or contract rescission (rejection), although there is a 'short-term right to reject' available to English consumers for a limited period of time, 30 days, after the goods delivery, see ss 19ff CRA 2015 and arts 119ff TRLDCU; see also Esther TORRELLES TORREA, 'Artículo 118: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1087 noting that from the moment the Directive on the sale of consumer goods was adopted, there has always been a conflict between the hierarchy of remedies established in the Directive, and the English legislation allowing for the first short-term right to reject. The CRA 2015 maintained such solution, being in stark contrast with the continental spirit of the remedies offered in the Directive, which aim primarily at upholding the contractual relationship of the parties and letting the trader repair or replace the non-conforming product first; see also Chapter 3 Subsection 3.1.2.1 *Information duty breached relative to the main characteristics of goods*.

[206] MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 796.

[207] BEDNARZ, 'Breach of Information Duties in the B2C E-Commerce: Adequacy of Available Remedies' (n 34) 11.

[208] 'Rescission' meaning 'termination for breach' – for more on those two terms and problems of terminology see footnote 259 below.

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which are linked to ineffectiveness of the contract (or payment), especially consumer not having to bear some additional costs or charges and delivery costs,[209] or even consumer not being bound by the order they placed[210] should be mentioned. Furthermore, various remedies resulting from the rules on non-conformity, applicable to some situations of breach of information duties, also belong to this group of remedies: the right to reject in the CRA 2015[211] and contract rescission in the TRLDCU.[212] Also, the Spanish TRLDCU in its art 100 establishes that a consumer can avoid the contract, if the trader failed to provide them with a confirmation of the pre-contractual information on a durable medium.[213] Finally, and only in the English law, consumers have the right to unwind the contract set out in the regulations relative to the unfair commercial practices.[214] Rejecting the goods,[215] unwinding the contract,[216] as well as contract rescission available for non-conformity under the TRLDCU,[217] all mean treating the contract as at an end: the trader is under a duty to refund the consumer, and the latter has to make the goods – if the contract was for the sale or supply of goods[218] – available for collection by the trader.

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209 Art 97.6 in relation to art 97.1.e) and 97.1.j) of the TRLDCU and regs 35(5)(b) and 40 of the Consumer Contracts Regulations 2013, cf also regs 36 on supply of service in the cancellation period and 37 on supply of digital content in the cancellation period of the Consumer Contract Regulations 2013 and art 108.4 of the TRLDCU on the supply of water, gas, electricity or heating through the town systems and of digital content in the cancellation period.

210 Art 98.2 second para TRLDCU and reg 14(3)-14(5) Consumer Contract Regulations 2013.

211 Ss 20ff CRA 2015.

212 Arts 118, 121 TRLDCU.

213 A similar provision found in reg 16 of the Consumer Contracts Regulations does not provide for the contract being voidable if the information was not confirmed on a durable medium. Moreover, this remedy is not strictly speaking a remedy for breach of the pre-contractual information duties, as the provisions refer to the confirmation of the concluded contract.

214 Regs 27E-27H UTR 2008.

215 See s 20 CRA 2015.

216 See reg 27F UTR 2008.

217 See eg Audiencia Provincial de A Coruña (Sección 3ª), Sentencia núm.112/2008 de 25 de marzo (JUR 2008/172437), Fundamentos de Derecho, Sexto, where the court reminds that the contract rescission ex art 121 TRLDCU is of retroactive character, intended at putting the parties in the position they had been before the contract was concluded.

218 Cf regs 27E and 27F.(c) UTR 2008.

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Monetary remedies comprise the right to a price reduction, established both in the CRA 2015[219] and in the TRLDCU[220] and two more remedies resulting from the UTR 2008, described below. In what refers to the price reduction, s 24(1)-(2) explains what this right consists of:

> (1) The right to a price reduction is the right—
> (a) to require the trader to reduce by an appropriate amount the price the consumer is required to pay under the contract, or anything else the consumer is required to transfer under the contract, and
> (b) to receive a refund from the trader for anything already paid or otherwise transferred by the consumer above the reduced amount.
> (2) The amount of the reduction may, where appropriate, be the full amount of the price or whatever the consumer is required to transfer.

Art 122 of the TRLDCU describes the right to a price reduction stating that: it will be proportional to a difference between the value the product would have had at the time of delivery had it been conforming with the contract and the actual value of the product at the time of delivery. The English statute refers to an 'appropriate' price reduction, which according to the Explanatory Notes:

> (...) will depend on the circumstances and the remaining functionality of the goods. It is intended that the reduction in price should reflect the difference in value between what the consumer paid for and the value of what they actually receive, and could be as much as a full refund or the full amount already paid.[221]

The amount of the reduction is therefore similar under both Spanish and English statutes, however the TRLDCU does not refer to a possibility of the reduction reaching the full amount of the price. In fact, under Spanish law it is considered impossible for the amount of the reduction to be a full refund or even to constitute a great part of the price, since this would equal to the contract rescission.[222]

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[219] S 24 CRA 2015.

[220] Arts 121-122 TRLDCU.

[221] Note 139.

[222] Along these lines Audiencia Provincial de Barcelona (Sección 16ª), Sentencia núm.100/2008 de 22 de febrero (AC 2008/660), Fundamentos de Derecho, Tercero.

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Moreover, as already mentioned, only under the English law of unfair commercial practices, consumers have two more rights available: the right to a discount,[223] and the right to damages.[224] The right to a discount comprises four instances depending on the seriousness of the prohibited practice, for goods or services that cost £5,000 or less:[225]

> (1) A consumer has the right to a discount in respect of a business to consumer contract (...)
> (4) (...) the relevant percentage is as follows—
> (a) if the prohibited practice is more than minor, it is 25
> (b) if the prohibited practice is significant, it is 50
> (c) if the prohibited practice is serious, it is 75
> (d) if the prohibited practice is very serious, it is 100
> (5) The seriousness of the prohibited practice is to be assessed by reference to—
> (a) the behaviour of the person who engaged in the practice,
> (b) the impact of the practice on the consumer, and
> (c) the time that has elapsed since the prohibited practice took place.[226]

It is with mathematical precision that the UTR 2008 specifies the amount of the discount, however leaving the assessment of the seriousness to the courts. It can be presumed that higher amount of discount will be available in cases where traders engage in misleading actions fraudulently – in relation to reg 27I.(5)(a), or when the consumer files for the redress quickly after they realised they had been subject to such practice – in relation to reg 27I.(5)(c). The role of the criterion of the reg 27I.(5)(b) – the impact of the practice on the consumer – is nevertheless less clear. On the one hand, the prohibited practice in order to be actionable already needs to have constituted a significant factor in the consumer's decision to enter into the

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223 Reg 27I UTR 2008.

224 Reg 27J UTR 2008.

225 See reg 27I.(6)(a), for products exceeding the value of £5,000 the right to a discount works differently: '[i]n such a case, the relevant percentage is the percentage difference between the market price of the product and the amount payable for it under the contract.' – reg 27I.(7).

226 Reg 27I UTR 2008.

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contract.[227] On the other hand, there is a right to damages, that consumers can claim ‘if they have suffered losses that exceed the price paid for the relevant goods or service. Damages can cover distress and inconvenience, as well as losses suffered by the consumer because of the contract or payment they made as a result of the misleading (...) practice.’[228] The impact of the practice on the consumer prior to the contract conclusion is therefore included in the conditions that must be fulfilled when claiming the redress; the impact of the practice on the consumer posterior to entering into the contract seems to be covered by the right to damages. Nevertheless, this right is quite limited, as explained below, and this is where the criterion of 27I.(5)(b) comes into play, allowing the judge to grant a greater discount to a consumer who is not allowed to recover some loss through the right to damages.

The right to damages of the reg 27J UTR 2008 covers both damages for financial loss[229] and alarm, distress or physical inconvenience or discomfort,[230] which the consumer would not have incurred or suffered if the unfair commercial practice of the trader had not taken place. The right to be paid damages covers only loss that was reasonably foreseeable at the time of the prohibited practice. Reg 27J.(3) sets out another limit to the financial loss recoverable under the UTR 2008: ‘[t]he right to be paid damages for financial loss does not include the right to be paid damages in respect of the difference between the market price of a product and the amount payable for it under a contract.’[231]

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[227] S 27A.(6); see also Chapter 3 Subsection 3.1 *Specific remedies available to consumers*.

[228] Department for Business, Innovation and Skills, *Misleading and Aggressive Commercial Practices – New Private Rights for Consumers* (Guidance on the Consumer Protection (Amendment) Regulations 2014) 2014 para 57.

[229] Reg 27J.(1)(a).

[230] Reg 27J.(1)(b).

[231] The amount of the price difference is not recoverable in damages, however it is taken into account in the right to a discount, as the provision of reg 27I.(7): ‘(...) the relevant percentage is the percentage difference between the market price of the product and the amount payable for it under the contract.’ in cases where ‘the amount payable for the product under the contract exceeds £5,000’; ‘the market price of the product, at the time that the consumer entered into the contract, is lower than the amount payable for it under the contract;’ ‘and there is clear evidence of the difference between the market price of the product and the amount payable for it under the contract.’ – see reg 27I.(6).

In many cases, this amount might also be recovered under the rules of non-conformity of regs 19ff CRA 2015 and arts 114ff TRLDCU, where the consumer is given the right to price reduction

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In addition, it should be noted that the right to damages under general law can be made available by the specific consumer law,[232] as for example in the art 117 of the TRLDCU, which indicates in the second para that consumers have the right to damages in accordance with the general civil and commercial legislation for any damage incurred due to the lack of conformity. Also, the s 19(10) and (11) of the CRA 2015 reminds that it is open for the consumer to claim damages for the lack of conformity.

The third group of remedies are those akin to the specific performance: the right to repair and the right to replacement,[233] both originating in the law of non-conformity. These remedies are preferred under the Spanish law,[234] but the CRA 2015 allows to apply for a short-term right to reject prior to claiming the repair or replacement. Torrelles Torrea notes that the choice of the Spanish legislator to make only those two remedies primarily available to the consumer – and only when those fail to restore conformity the consumer might claim rescission – shows the emphasis put on the transactions security and maintaining the contract which prevail over consumers' trust in the market, also aiming at protecting SME for whom contract rescission might turn out too burdensome.[235]

The number of statutory consumer law remedies is limited, the remedies are very specifically described by legislation. Is there a need to open the list of the remedies,

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reflecting the difference between the price paid and the value of the product which was actually delivered. Nevertheless, the prohibited practice of a misleading action does not have to be necessarily based on misrepresenting the characteristics of the product – for instance, the trader may claim that the price for a certain product he is offering is the lowest on the market, whilst it is not. If in such case, given all the other circumstances, the trader's behaviour amounts to a prohibited practice, the consumer will not be able to recover the price difference under the non-conformity rules.

[232] In the sense that it is the specific statute that grants the right to damages, but the general private law rules determine how this right works, as opposed to the case of the right to damages such as eg the one established in the reg 27J UTR 2008, where its operation is detailed by the specific legislation.

[233] S 23 CRA 2015 and art 119 TRLDCU.

[234] Esther TORRELLES TORREA, 'Artículo 119: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1091.

[235] Ibid 1091-1092.

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letting the aggrieved consumers apply for other remedies, more appropriate in given circumstances? Spanish litigation under the law of non-conformity provides examples of consumers claiming remedies not listed by the legislation[236] – either TRLDCU or the previous law, which was incorporated into the TRLDCU.[237] A consumer claimed from the trader the difference in price the consumer paid for a car and the price for which they managed to sell the car, alleging they had to sell the car due to its unsatisfactory quality.[238] In another case a consumer paid for repairing the product themselves, instead of demanding the trader to do so, and then claimed price reduction, which was granted by the court.[239] Similarly, a consumer takes the car bought to the seller asking for its repair, which was denied, therefore goes to another mechanics and subsequently claims price reduction equal to the costs of repair.[240] Those examples show that courts need more discretion as strictness of the consumer law remedies can easily have an adverse effect of limiting the aggrieved consumer's possibilities of redress. On the other hand however, the hierarchy of remedies aims at protecting traders and especially SME; the balance must be sought between consumers' redress rights and market functioning.

In various cases of breach of information duties, consumers will also have general law remedies available. Generally speaking, specific statutory remedies are, or should be, more attractive to consumers, as they are intended to be adapted specifically to consumer, often electronic, contracts. Nevertheless, consumers might want to claim general law remedies in addition to specific remedies – for example damages

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[236] TORRELLES TORREA, 'Artículo 118: Comentario' (n 205) 1088-1090.

[237] Ley 23/2003, de 10 de julio, de garantías en la venta de bienes de consumo. Boletín Oficial del Estado, de 11 de julio de 2003, núm. 165, p. 27160, repealed by the TRLDCU.

[238] A claim which was dismissed as not belonging to the scheme of remedies for the non-conformity, see Audiencia Provincial de A Coruña (Sección 5ª), Sentencia núm.404/2007 de 24 de septiembre (AC 2008/435).

[239] Intrestingly, the product in this case was a pet, and repair consisted in veterinary treatement – Audiencia Provincial de Granada (Sección 3ª), Sentencia núm.485/2008 de 21 de noviembre (JUR 2009/60612).

[240] Audiencia Provincial de Ávila (Sección 1ª), Sentencia núm.179/2007 de 18 julio (AC 2007/2087); Audiencia Provincial de Málaga (Sección 4ª), Sentencia núm.89/2009 de 12 febrero (AC 2009/735); TORRELLES TORREA, 'Artículo 118: Comentario' (n 205) 1089 notes that both these decisions are in line with the *Código civil*, which in its art 1098.1 establishes that if a person under a duty to do something does not do it, it will be done at their cost.

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caused by a lack of conformity of the product with the contract, as mentioned above. Also, in some situations, general law remedies could be more beneficial to consumers, who will then claim them instead of specific remedies, eg because of more generous limitation periods.[241] Finally, sometimes consumers will have only general law remedies available to them, as when the benchmark set by the specific rules is too high for a vulnerable consumer.[242] However, the general law remedies will always play secondary role in comparison to the specific statutory remedies in consumer contracts, and especially in what refers to the electronic commerce, hence the specific remedies are mentioned first.

In the context of the breach of information duties, the remedies available under the doctrine of defects of consent and of the breach of contract should primarily be taken into account. As in the case of specific remedies, general law remedies can be divided into three main types:[243] remedies relative to the ineffectiveness of the contract; monetary damages and specific performance.[244]

In what refers to the ineffectiveness of the contract, both the terminology and practical implications of various concepts are of high complexity. Generally speaking, the defects of consent may result in the contract being void, voidable[245] or

[241] Eg in Spanish law limitation period for a mistake claim to avoid a contract is 4 years as opposed to 2 years for claim for non-conformity – see art 1301 *Código civil* and art 123 TRLDCU.

[242] Especially in the context of the private redress for unfair commercial practices under the English UTR 2008; for more on vulnerable consumers and average consumer benchmark established in the Unfair Commercial Practices Directive see Chapter 1 Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

[243] To be precise, the division comes from the general law and can also be applied to the specific remedies, however the specific remedies were presented first, and as was the division.

[244] Cf GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 13 referring to general law remedies available under the Spanish law for the breach of contract.

[245] For the sake of clarity, I will refer to those two possibilities of contract being void or voidable. However, in both English and Spanish laws and court decisions those concepts are often mixed, sometimes other notions are used, for instance in Spanish legal documents one can find reference to terms such as: '*ineficacia*' and '*inexistencia*' – contracts not producing any effects, or non-existent, see eg José Ramón GARCÍA VICENTE, 'Artículo 1290' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9199ff, also 'invalidez' (eg art 1301 *Código civil*), 'nulidad' (eg arts 1302ff *Código civil*, arts 53, 78 TRLDCU), 'anulabilidad' (eg art 1300 *Código civil*, art 53 TRLDCU), 'rescisión' (eg arts 1290ff *Código civil*, art 53 TRLDCU) and 'resolución' (eg art 1124 *Código civil*, arts 53, 78 TRLDCU), most importantly however the concepts of a contract being void (*nulo*) and voidable (*anulable*) are confused in the very *Código*

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unenforceable;[246] breach of contract will sometimes give the other party the right to terminate the contract.[247] The contract being void means that in reality there is no contract and the agreement is flawed to such extent that in the eyes of law it has never actually existed.[248] It is set aside for all purposes and produces no legal effects at all, the court only declares such *status quo ex tunc*,[249] although third parties acting in good faith are protected in Spanish law.[250] Voidable contracts can be pronounced invalid in a retroactive manner: they can be rescinded at the option of the party entitled to exercise the right to set the contract aside, the contract itself is considered to have existed until the moment when it was rescinded.[251] The distinction is important especially because of the effect on property rights of a third party both concepts have: if the good being the subject matter of the contract was subsequently sold to a third party, if the first contract was void, that party never acquired the property of the good. However if it was merely voidable, the rights of the third party will not be affected, provided they acquired the good in good faith.[252] Moreover, while the rescission of a voidable contract may be barred by the

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civil – see José Ramón GARCÍA VICENTE, 'Artículo 1301' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9251.

246 Strictly speaking, in the realm of general law remedies for breach of information duties, neither Spanish nor English law provide for the contract being unenforceable, nevertheless, as already mentioned, it is one of the specific statutory remedies, see above; see also WILHELMSSON and TWIGG-FLESNER (n 1) 468 who note that '(...) we may observe that some Member States provide that a contract cannot be enforced against a consumer if there has been non-compliance with pre-contractual information duties.'

247 For distinction between contract termination and contract rescission, see footnote 259 below.

248 Guenter TREITEL, *The Law of Contract* (11th edn, Sweet & Maxwell 2003) 286.

249 MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 523 and Ana COLÁS ESCANDÓN, 'Artículo 1301' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1545; Spanish law arguably refers also to '*contratos inexistentes*' (inexistent contracts), which are more than void – they simply do not exist, which is the case when the requirements necessary for the contract to be formed ex art 1261 *Código Civil* are not fulfilled, see Ana COLÁS ESCANDÓN, 'Artículo 1300' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1543.

250 COLÁS ESCANDÓN, 'Artículo 1301' (n 249) 1545.

251 MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 523 and COLÁS ESCANDÓN, 'Artículo 1300' (n 249) 1544.

252 Edwin PEEL, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) 452.

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lapse of time, there is no limitation period for claiming that a contract is void.[253]

The concepts of contracts being void or voidable are of special importance for the law of defects of consent.[254] Under the Spanish law, the defects of consent, and especially mistake (*error*) and fraud (*dolo*), relative to the present study, result in the contract being voidable;[255] under the English law, contracts are void for mistake[256] and voidable for misrepresentation.[257]

In both cases of contract being void or voidable, the contract 'disappears' – it is either declared invalid by the court or rescinded retroactively, the parties are under a duty to return what they have already obtained under the contract and restore the situation they had been in before the contract was concluded.[258]

Another similar remedy, which also results in 'unmaking' of the contract is contract termination for breach of contract.[259] The aggrieved party is entitled to rescind

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[253] For English law see eg CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 179) 5944; for Spanish law see José Ramón GARCÍA VICENTE, 'Artículo 1303' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9251ff; the art 1301 *Código Civil* which establishes the limitation period of 4 years for an action for avoiding a contract does not however distinguish between a contract being void and voidable – the art 1301 *Código Civil* refers to '*nulidad*' – 'nullity', which can mean both, see also Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 843/2006 de 6 septiembre (RJ 2006/8008), Fundamentos de Derecho, Tercero where the court observes that the limitation period of art 1301 applies only to voidable contracts, as the contracts which are void are void *ab inicio* and produce no legal effects, therefore the lapse of time cannot bar the declaration that a contract is void.

[254] CARTWRIGHT, 'Defects of Consent in Contract Law' (n 92) 539.

[255] See eg COLÁS ESCANDÓN, 'Artículo 1301' (n 249) 1545 who also points out to the fact that the mistake can be so serious as to make contract void due to the lack of consent; considering contracts voidable for defects of consent is characteristic for continental legal systems, see CARTWRIGHT, 'Defects of Consent in Contract Law' (n 92) 537ff.

[256] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 179) 585.

[257] MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 595ff.

[258] For Spanish law see the art 1303 *Código civil*, see also GARCÍA VICENTE, 'Artículo 1303' (n 253) 9263; for English law see eg *Redgrave v Hurd* (1881) 20 Ch D 1, see also MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 519ff and cases there cited.

[259] The equitable remedy of contract rescission is not to be confused with contract termination for breach: '[t]ermination operates prospectively, but not retrospectively. Thus termination operates to release both parties from their future obligations to perform their primary obligations under the contract, but it leaves intact rights which have accrued prior to the termination of the contract (*Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827). In this sense termination for breach differs from rescission of the contract [as in the law of misrepresentation] (...). Rescission (...) sets aside a contract for all purposes (that is to say the contract is set aside both retrospectively

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the contract, untying themselves from the obligations taken on under the contract and requiring return of what has already been paid or provided under the contract to the party in breach, seeking to be put in a position they would have been had the contract not been made.[260] All the remedies belonging to this group: contract being void,[261] contract rescission and termination for breach are linked to contract loosing its effectiveness, and they have a common aim: to put the parties in the position they were before entering into the contract.

On the other hand, other groups of remedies: compensation and specific performance, have the object of putting the injured party in the position they would have been in, had the contract been performed.[262] Damages are one of the main remedies of general private law, both in English and Spanish systems.

Damages might be available both in the case of defects of consent and for breach of contract; in both cases might be combined with contract rescission or termination. Damages are a form of monetary compensation for loss or injury: 'the pecuniary re-

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and prospectively). Termination for breach, by contrast, does not have retrospective effect: there is no attempt to unwind the contract. Indeed, it is possible for a term in a clause to survive termination.' see MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 7999; see also observations made by TREITEL (n 248) 760, who chooses to refer to a contract 'rescission' for breach, however pointing out it is a different remedy to the rescission of a voidable contract in the law of vitiating factors, notably misrepresentation: '(...) the courts (and contractual draftsmen) have commonly used words such as "rescission" and "termination". This traditional terminology has attracted judicial criticism. In the *Photo Production* case, Lord Wilberforce said that the use of "rescission" in this sense "may lead to confusion"; and Lord Diplock described the usage as "misleading" unless it was borne in mind that, in cases of breach, such rescission did not deprive the injured party of his right to claim damages for the breach. (...) Recent amendments to the Act [Sale of Goods Act 1979] likewise refer to the right of a buyer who deals as consumer to "rescind" the contract for breach of an express term and of certain implied conditions; and judges (including Lord Diplock) have continued to use the same terminology since the *Photo Production* case. This usage is certainly more convenient than the somewhat clumsy circumlocution of "treating a contract as repudiated (or discharged) for breach (or excused non-performance)." In the following discussion we shall therefore continue to use the term "rescission" to refer to the remedies described above, bearing in mind that such rescission does not deprive the injured party of his claim for damages where the failure in performance amounts to a breach. In this respect rescission for breach differs fundamentally from rescission for misrepresentation (...).'

[260] GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 30; TREITEL (n 248) 759.

[261] As far a declaring a contract void can be considered a remedy, since it is merely a statement of fact.

[262] TREITEL (n 248) 759.

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compense given by process of law for an actionable wrong.'[263] Various categories of damages are recognised under the English[264] and Spanish law;[265] the main distinction of primary importance is between damages for breach of contract and in tort, as availability and measure of those two forms of damages differs importantly.[266]

Finally, and only in the context of a breach of contract,[267] below for more detail on the difference between contract and tortious measure of damages. the remedy of specific performance is available. Specific performance is a remedy in which the party in breach is compelled to actually perform a contractual obligation;[268] traditionally in the English system, specific performance is a remedy available in equity.[269] There is little doubt that the specific performance is much more important a remedy for the Spanish legal system than for the English system, as already noted above. Nevertheless, there is a trend observable in both systems of a certain approximation; the remedy of specific performance is losing somewhat its significance in the Spanish

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263 Sirko HARDER, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing 2010) 3.

264 Such as: compensatory damages, aggravated damages, exemplary (punitive) damages, nominal damages, gain-based damages, vindicatory damages – see ibid 3-4.

265 Especially '*patrimoniales*', '*personales*' and '*morales*' – referring to economic loss, physical injury and suffering – see GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 19ff.

266 See Subsection 2.2.3.2 *Nature of remedies: contractual, tortious or other?*

267 Logically, since there is a contract to be performed, the court can possibly order its performance.

268 In both English and Spanish law, various types of specific performance are distinguished, see eg GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 15 and arts 571ff Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. Boletín Oficial del Estado, 8 de enero de 2000, núm. 7, p.575 (Ley de Enjuiciamiento Civil); and TREITEL (n 248) 1019 referring to various remedies that all are treated as types of a 'specific relief in equity': specific performance, injunction, damages and specific performance or injunction; in both English and Spanish system the specific performance can be distinguished from an action for an agreed sum, where the claimants asks for the specific enforcement of the defendant's primary obligation to perform what he has promised, which is the price, thus it is simply an action for money, see: TREITEL (n 248) 1013; GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 15.

269 MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 924.

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law,[270] and gaining recognition in the English system.[271]

2.2.3.2 Nature of remedies: contractual, tortious or other?

Firstly, it needs to be noted that private redress rights for the breach of information duties, be it available through the operation of the specific consumer law rules or based on the general law, actually depend on the subsequent contract formation. It does not mean that there cannot be a breach of information duties if the contract does not materialise – in such situations however private law of England and of Spain, both specific and general, usually will not intervene, mainly under assumption that the individual consumer in such case incurred no or little harm.[272]

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[270] See FENOY PICÓN, *El Sistema de Protección del Comprador* (n 153) 171; GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 16-18 who notes that there is a common belief that the remedy of specific performance is a preferred one, however no clear confirmation of such belief in courts' decisions can be found, as monetary damages are often granted even in cases where the claimant opted for specific performance.

[271] MCKENDRICK, *Contract Law: Text, Cases, and Materials* (n 73) 945-948.

[272] Information duties that are the focus of this study belong to the realm of pre-contractual obligations, their breach might belong to the so-called cases of '*culpa in contrahendo*.' The concept of *culpa in contrahendo* in the broad sense refers to a duty to carry out negotiations prior to a possible contract conclusion with care. María Paz GARCÍA RUBIO and Marta OTERO CRESPO, 'La Responsabilidad Precontractual en el Derecho Contractual Europeo' [2010] InDret: Revista para el Análisis del Derecho 1, 33 note that *culpa in contrahendo* denotes three groups of outcomes: (1) breaking off negotiations, (2) concluding a contract which is voidable due to a violation of the pre-contractual good faith principle and (3) concluding a contract which is valid, but disadvantageous to one of the parties due to the other acting contrary to the fair dealing principle in the pre-contractual phase. The first possible outcome – breaking off negotiations, in bad faith, prior to contract conclusion, rests primarily outside the scope of this study: neither Spanish, nor English law establish actual consequences of breaking off negotiations (and especially in the context of B2C electronic contracts), see GARCÍA RUBIO and OTERO CRESPO (n 272) 40-44 and CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 179) 538ff. However, situations in which some kind of remedy for pre-contractual fraudulent behaviour of a trader would be justified, even if no contract ha been concluded. For instance, Geraint HOWELLS, 'Unfair Commercial Practices – Future Directions' in Reiner Schulze and Hans Schulte-Nolke (eds), *European Private Law - Current Status and Perspectives* (sellier European law publishers 2011) 140 notes in the context of a remedy of damages for consumers victims of unfair commercial practices that 'there may need to be clarity as to whether it is considered desirable to include (...) claims (...) for small amounts – such as wasted trips to shopping malls due to the use of bait and switch tactics.' In the e-commerce context similar situations may occur, eg when a consumer is baited into spending considerable amount of time on the search and then contracting process, for example registering on the trader's website, only to find out at the end that the price is higher than advertised or the product is not what was seemingly offered before, and so realising this the consumer decides not to enter into the

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Although we can therefore consider that currently in both English and Spanish law the conclusion of the contract is a necessary condition for the remedies for breach of information duties to become available to consumers, it does not automatically imply that the remedies will be of contractual nature: both contractual (*responsabilidad contractual*) and tortious (*responsabilidad extracontractual*) nature of the remedies should be considered.[273] Determining whether contract or tort law applies might be of significance for the length of limitation periods,[274] for the law applicable in the case of potential cross-boarder dispute,[275] or for the measure of damages.[276] Generally speaking, the contractual damages aim at putting the ag-

contract, although after losing considerable amount of time and effort – scarce resources to many middle-class consumers these days. WILHELMSSON and TWIGG-FLESNER (n 1) 467 consider, although not without hesitation, that it may be possible to state an *acquis* principle in a following form: '*A party is liable for damage caused by its breach of information duties, even if no contract has been concluded.*' Wilhelmsson and Twigg-Flesner base such consideration on the the case law of the CJEU: '(...) we can see in the case-law of the ECJ a nascent principle whereby damages might generally be available for a failure to comply with an obligation under European law, based on the general principle of effectiveness. Thus, in *Courage v Crehan*, Case 453/99 [2001] ECR I-6297, the Court established an entitlement to damages where there has been a breach of Article 81 EC. More significantly, in *Antonio Munoz Cia SA v Frumar Limited*, Case 253/00 [2002] ECR I-7289 the ECJ held that regulations could be enforced in civil proceedings even though the claimant had no specific right under that regulation where another party had acted in contravention of the rules. Although both cases involved directly applicable provisions (ie, a Treaty Article and a Regulation respectively), and this fact was emphasised by the ECJ in its decisions, it does not seem beyond the realms of possibility that the *Munoz* principle might one day be extended to cover directives, at least where these have been properly implemented into domestic legislation. That would mean that domestic courts might have to accept claims for damages where there has been a breach of domestic legislation implementing a directive, and thereby effectively create a new form of action for "breach of EC statutory duty".' Nevertheless, it seems it is still not the case in the current state of the law, and therefore consumers, especially in relation to claims of very small amounts, will not have individual redress rights under private law when no contract has been entered into.

[273] WILHELMSSON and TWIGG-FLESNER (n 1) 466.

[274] For instance, according to the art 1968 *Código civil* the limitation period for an action in tort from art 1902 is of one year, whilst an action for breach of contract can be barred after fifteen years, which is due to change to five years as a consequence of the law reform through the Ley 42/2015, de 5 de octubre, de reforma de la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil. Boletín Oficial del Estado, 6 de octubre de 2015, núm. 239, p.90240 (Ley Reforma de Enjuiciamiento Civil) see art 1964 *Código civil*.

[275] Hans-W MICKLITZ and Norbert REICH, 'Crónica de una Muerte Anunaciada: The Commission Proposal for a "Directive on Consumer Rights"' (2009) 46 Common Market Law Review 471, 488.

[276] Under the English law damages in contract are awarded to put the claimant in the position they would be in, had the contract been performed correctly, and in tort the claimant is put

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grieved party in a position they would be in, had the contract been performed correctly, whilst tortious damages, being independent from the contractual relationship of the parties, are designed to restore the position of the party that they had been in before the tort was committed. Howells argues that the tortious measure of damages is the one best fitting consumer interest, since they are put into a position before the contract conclusion[277] and are able to allocate they assets again: purchasing a similar product, but from a different trader, therefore keeping the market functioning.

In many Member States pre-contractual information and their breach are regarded as a matter of contract, in others as a tort law issue; the question is not resolved at the European level either.[278]

through the damages in a position he would have been in, had they not entered the contract, see CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 179) 459ff; GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 26) 309ff; under the Spanish law, similarly to the English law, damages in contract law cover the 'positive interest' (*intrés positivo*) – the position in which the aggrieved party expected to be, had the contract been performed correctly, and in tort – the 'negative interest' (*intrés negativo*), ie the position they would be in, had they not entered into the contract, see José Ramón GARCÍA VICENTE, 'Artículo 1270' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9134; GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 20; see also Chapter 3 Subsection 3.2.3.1 *When misinformation amounts to breach of term and remedies resulting from contractual liability.*

[277] HOWELLS, 'Unfair Commercial Practices – Future Directions' (n 272) 140 notes in the context of unfair commercial practices that: '(...) contractual damages seek to put the claimant in the position he would have expected to have been in, whereas tortious damages seek to return the claimant to the position he was in before the unfair practice; fraud damages are the most generous covering all damages flowing from the practice. However, in the consumer context these debates are rather academic. (...) Hugh Collins [Hugh Collins, A Private Right of Redress for Unfair Commercial Practices – A Report for Consumer Focus (April 2009)] is right to observe that in the consumer context most will be satisfied with the tortious measure of damages being "(a) the return of the purchase price plus any costs incurred and wasted expenditure or (b) the difference in value between the purchase price and the fair market value of the asset." If in exceptional circumstances consumers have other laws they might be able to rely on an independent contractual claim under the general law.'

[278] WILHELMSSON and TWIGG-FLESNER (n 1) 467-468 observe: 'in making available damages, it may also be necessary to consider whether these should sound in contract or tort/delict. In some Member States, the instinctive reaction may be to say that this is a matter for contract law, whereas others may tend towards tort law. The legislative *acquis* has not resolved this issue, although pre-contractual information duties appear to be regarded as a matter of contract.' Wilhelmsson and Twigg-Flesner invite to take a look at a short survey by Advocate-General Geelhoed on the legal classification of pre-contractual liability in ECJ Case 334/00 *Fonderie Officine*

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In what refers to the general law remedies, it is usually quite clear how the remedies are classified. The remedies relative to the breach of contract naturally belong to the realm of contract law both in Spanish and English law. The liability for the defects of consent presents some more complexity. Under the English law the defects of consent traditionally give rise to liability in tort,[279] (although the remedy of contract rescission is of contractual nature); the adoption of the Misrepresentation Act 1967 introduced statutory liability for misrepresentation, nevertheless the measure of damages stays tortious.[280] In what refers to the Spanish law, the art 1270 of the *Código civil* gives no clear indication as the nature of the liability;[281] the opinions are divided,[282] however it seems the *Tribunal Supremo* is inclined to treat the liability arising out of misrepresentation – *dolo* – as contractual.[283] Nevertheless, the remedy

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Meccaniche Tacconia Spa v Heinrich Wagner Sinto Maschinenfabrik GmbH [2002] ECR I-7357 paras 58–63. Nevertheless, the very decision in this case seems to suggest that the pre-contractual duties are a matter of tort law. Wilhelmsson and Twigg-Flesner note that: 'the Court was asked to determine whether a claim for pre-contractual liability was a "matter relating to contract" or "matter relating to tort" for the purposes of the Convention [the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968]. It observed that a dispute could be relating to a contractual matter without there being a contract, but it was "essential ... to identify an obligation". In the absence of an "obligation freely assumed by one party towards another", there could be no matter relating to contract; consequently, an action based on pre-contractual liability is a matter relating to tort. This decision therefore points towards tort as the basis of liability for a breach of a pre-contractual duty to provide information, although it would perhaps be going too far to regard this decision as having resolved the point conclusively.'

[279] See eg GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 26) 313ff; SEFTON-GREEN, 'General Introduction' (n 24) 27.

[280] S 2 Misrepresentation Act 1967; GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 26) 309.

[281] Germán BERCOVITZ ÁLVAREZ, 'Artículo 1270' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1502-1503; GARCÍA VICENTE, 'Artículo 1270' (n 276) 9134.

[282] In favour of the contractual liability see eg BERCOVITZ ÁLVAREZ (n 281) 1503, GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 149) 20; in favour of the liability of tortious (*extracontractual*) nature: GARCÍA VICENTE, 'Artículo 1270' (n 276) 9134-9135; Antonio Manuel MORALES MORENO, 'El Dolo como Criterio de Imputación de Responsabilidad al Vendedor por los Defectos de la Cosa' (1982) 35 Anuario de Derecho Civil 591, 629.

[283] See eg: Tribunal Supremo (Sala de lo Civil), Recurso de Casación núm. 1929/1992, Sentencia de 14 de diciembre 1995 (RJ 1995/9101), Fundamentos de Derecho, Segundo; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 396/2000 de 19 de abril (RJ 2000/3185), Fundamentos de Derecho, Septimo, Noveno; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 671/2000 de 30 de junio (RJ 2000/6747), Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala de lo Civil, Sección

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available for mistake is that of contract rescission, however with no claim for damages available. Moreover, the mistake vitiates party's consent as to very important issues regarding the subject-matter of the contract,[284] and although the contract is only voidable, not void, treating the issue of mistake as *extracontractual* seems to be more appropriate.

In what refers to the statutory remedies established in the specific legislation, the character of some is rather clear. For instance, the remedies for lack of conformity are definitely of a contractual nature, since the regime of non-conformity is relative to the consumer sales law. Therefore the damages available under both Spanish[285] and English law[286] for lack of conformity will be of contractual measure.

As to the specific remedies established directly in the Directive on consumer rights and transposed into both Spanish and English law: consumer not having to bear some additional costs or charges and delivery costs[287] and consumer not being bound by the order they placed,[288] the question is not that clear. Those are statutory remedies *sui generis*: the Directive (and national legislation) simply states that: 'if the trader has not complied with the information requirements on additional charges or other costs (...) the consumer shall not bear those charges or costs.'[289] and 'the trader shall ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay. (...) If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order.'[290] Those two remedies differ in substance: in the first situation the contract

1ª), Sentencia núm. 1/2007 de 18 de enero (RJ 2007/529).

284 See art 1266 *Código civil*.

285 See art 117 TRLDCU.

286 See s 19(10) and (11) CRA 2015.

287 Art 97.6 in relation to art 97.1.e) and 97.1.j) of the TRLDCU and regs 35(5)(b) and 40 of the Consumer Contracts Regulations 2013, cf also regs 36 on supply of service in the cancellation period and 37 on supply of digital content in the cancellation period of the Consumer Contract Regulations 2013 and art 108.4 of the TRLDCU on the supply of water, gas, electricity or heating through the town systems and of digital content in the cancellation period.

288 Art 98.2 second para TRLDCU and reg 14(3)-14(5) Consumer Contract Regulations 2013.

289 Art 6.6.

290 Art 8.2 para 2.

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between the parties exist and is perfectly valid, only some part of it – additional charges or costs – is not enforceable against the consumer. Therefore this remedy seems to be of a contractual character. In what refers to the second one, however, I am inclined to consider it to be of tortious nature: no contract is formed between the parties if the consumer is not properly informed about their obligation to pay. Any liability that may arise in such situation stays outside of the realm of the contractual liability and is *extracontractual* – tortious.

Finally, the nature of the private law remedies under UTR 2008 seems to be that of tort rather than contract. The redress for misleading action of regs 5 and 27Aff UTR 2008 resembles to a great extent an action for misrepresentation, and indeed its availability excludes the application of s 2 of the Misrepresentation Act 1967 in what refers to the right to be paid damages. The action for contract rescission is still available, the damages for misrepresentation are of tortious measure, as already mentioned, hence the tortious character of the remedies under UTR 2008 can be deduced.

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3 Remedies for breach of information duties available to consumers in English and Spanish law

3.1 Specific remedies available to consumers

3.1.1 Relevant legislation

Specific remedies for breach of information duties – the statutory remedies – are established in specific consumer legislation,[1] it does not mean however that they are listed in a coherent way in a part of a concrete piece of legislation. On the contrary, specific remedies are dispersed through different provisions of different pieces of primary and secondary legislation. One of the reasons of such *status quo* is the fact that information duties are linked to various aspects of law and it would simply be impossible to create one piece of legislation containing all the relevant provisions in

[1] Although under general English contract law disclosure duties are imposed scarcely, there are various exceptions to this principle, especially established in legislation, cf Paula GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' in Stefan Grundmann and Martin Schauer (eds), *The Architecture of European Codes and Contract Law* (Private Law in European Context Series, Kluwer Law International 2006) 306 noting under what heads those exceptions are established.

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one place.

As already noted in Chapter 2 Subsection 2.2.3 *Types of remedies available* remedies for breach of information duties must be distinguished from legal classification of the breach. It is of importance for the analysis of specific remedies because in some cases specific consumer legislation provides the aggrieved party with a possible classification of the breach of their information rights, but the remedies available will be those of general law. For example, pre-contractual information that consumers receive from traders as established in the Consumer Contracts Regulations 2013 becomes a term of the contract – ss 11(4), 11(5) and 12 (in relation to goods), ss 36(3), 36(4) and 37 (in relation to digital content) and s 50(3) and 50(4) (in relation to services) of the CRA 2015 require the pre-contractual information received by the consumer in distance constracts to be treated as a term of the contract; similarly various provisions of the TRLDCU allow for the information to be included in the contract: art 61.2. relative to the contents of advertisements, art 65 which implies contractual liability for information omission contrary to the good faith and art 97.5 providing for the pre-contractual information to be considered an integral part of the distance contract.[2] In consequence, pre-contractual information in B2C electronic contracts becomes a term of the contract both in English and Spanish law. Moreover, the trader's obligation to provide pre-contractual information is regarded as an implied term of such contracts, which stems from reg 18 of the Consumer Contracts Regulations 2013[3] and art 65 of the TRLDCU. Therefore, both provision of false information or omission of information required by legislation can be classified as a breach of term. However, what are the remedies available in such situation? There is no simple answer: the remedies will be varied,[4] and under English law will comprise statutory remedies, common law and equity remedies, and in Spanish law remedies resulting from application of TRLDCU and general civil law, that is mainly

[2] Cf also observations set out in Chapter 2 Subsection 2.1.1 *Content and scope of the information duties*.

[3] Which reads: 'Every contract to which this Part applies is to be treated as including a term that the trader has complied with the provisions of (...) regulations 9 to 14, and (...) 16', which includes reg 13 relative to the pre-contractual information in distance contracts.

[4] On relationship between the specific statutory remedies and general law remedies see Chapter 2 Subsection 2.2.2 *Major problematic issues related to the remedies for breach.*

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Código civil and court decisions based on the legislation.[5]

[5] In what refers to the English law, before the adoption of the CRA 2015, implied terms were categorised either as 'conditions' of the contract or 'warranties.' Most of the statutory implied terms were conditions, breach of which enabled the consumer to choose either to treat the contract as terminated or to continue with the contract (ie keep the goods) but claim damages. The implied terms regarding goods being free from third parties' rights were in turn classified as 'warranties.' Their breach was relatively less serious but could also give rise to a claim for damages. Moreover, the legislation previously in force set out statutory remedies for consumers in situations where the implied terms regarding quality, fitness for purpose and corresponding to descriptions or samples were breached, those remedies included repair or replacement of goods, followed in some circumstances by termination of contract or receiving an appropriate reduction from the price (see note 43 in Explanatory Notes to CRA 2015). Currently, a different system of remedies is available to consumers. Generally speaking, various terms are considered to be implied by the CRA 2015, the Act cross-references to the Schedule 2 of the Consumer Contracts Regulations 2013. The remedies for breach of implied term vary depending on the one hand on the information requirement that was breached, and on the other on the type of breach and will be analysed in detail in the following Section 3.2 *General private law and remedies it offers*, here it is worth mentioning that they comprise the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods from s 19(5) CRA 2015, the short-term right to reject from s 19(3)(a) CRA 2015, the right to repair or replacement from s 19(3)(b) CRA 2015, and the right to a price reduction or the final right to reject from s 19(3)(c) CRA 2015. Additionally, specific remedies described in the present Section will not exclude the application (although there are some exceptions where legislation expressly excludes application of general law remedies, see eg s 2(4) Misrepresentation Act 1967 as amended by The Consumer Protection (Amendment) Regulations 2014) in addition to, instead of or where no specific remedy is provided – as stated in s 19(10) CRA 2015 – of general private law, that is common law or equitable remedies for breach of contractual term, such as claiming damages (s 19(11)(a) CRA 2015), seeking specific performance (s 19(11)(b) CRA 2015), relying on the breach against a claim by the trader for the price (s 19(11)(d) CRA 2015) or for breach of an express term, exercising a right to treat the contract as at an end (s 19(11)(e) CRA 2015). The general law remedies are nevertheless limited and shaped by the statute in some instances, for example in the context of the breach of term, s 19(12) of the CRA 2015 'provides that that the consumer is only entitled to treat the contract as at an end for breach of one of the statutory rights in sections 9-11, 13-16 or 17(1) by exercising a right to reject under Chapter 2, [which] (...) overrides any common law right to terminate the contract for breach of the terms which these sections require to be treated as included in the contract.' (see note 95 of the Explanatory Notes to the CRA 2015).

Under the Spanish law, a series of remedies, both of the specific character and of general law, is available to an aggrieved party when the term of their contract was breached. Arts 61.2 and 65 TRLDCU provide consumers with a possibility to claim general contract law remedies (Sergio CÁMARA LAPUENTE, 'Artículo 65: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 581), that is specific performance, damages, and rescission for breach (termination) – *resolución por incumplimiento* (Fernando GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' [2007] InDret: Revista para el Análisis del Derecho 1, 1). The Spanish law does not refer to different contract terms, conditions or warranties, nevertheless the *Tribunal Supremo*

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The consumer law provisions that establish statutory remedies for breach of information duties comprise various rules set out in different pieces of legislation in both Spanish and English law. The traditional legal solutions, in English law stemming from common law or equity, are of lesser relevance here – consumer law, partly due to the influence of the European law, tends to be based on statutory provisions. In Spanish law, specific remedies are established in one specific piece of consumer legislation, that is in the TRLDCU, however in a dispersed manner.

Firstly, the legislation implementing the provisions of the Directive on consumer rights transposes remedies there established. Hence, art 97.6 in relation to art 97.1.e) and 97.1.j) of the TRLDCU and regs 35(5)(b)[6] and 40 of the Consumer Contracts Regulations 2013 regulate the consequences of the trader omitting information about some costs or additional charges and the costs of returning the product in the case of consumer's cancellation. Similarly, art 98.2 second para of the TRLDCU and reg 14(3)-14(5) Consumer Contract Regulations 2013 establish that the consumer will not be bound by a contract or order they placed, if they have not been clearly informed[7] and have not explicitly acknowledged that the order would imply an obligation to pay. Also, the omission of the information on the right of withdrawal results in a specific consequence of the withdrawal period extension of up to 12 months.[8]

Another set of specific provisions that needs to be taken into account when look-

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on many occasions underlined that the remedy of the rescission for breach can only be available for a breach of certain seriousness (eg Tribunal Supremo (Sala de lo Civil), Sentencia núm. 353/1999 de 28 de abril (RJ 1999/3422), Fundamentos de Derecho, Primero; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 538/2000 de 23 de mayo (RJ 2000/3493), Fundamentos de Derecho, Primero; Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 8/2005 de 19 de enero (RJ 2005/519), Fundamentos de Derecho, Segundo). The TRLDCU also provides consumers with specific remedies *sui generis* that are described in this Subsection.

[6] Cf also regs 36 on supply of service in the cancellation period and 37 on supply of digital content in the cancellation period of the Consumer Contract Regulations 2013 and art 108.4 of the TRLDCU on the supply of water, gas, electricity or heating through the town systems and of digital content in the cancellation period.

[7] According to reg 14(4) Consumer Contracts Regulations 2013: 'if placing an order entails activating a button or a similar function, the trader must ensure that the button or similar function is labelled in an easily legible manner only with the words "order with obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader.'

[8] Art 105 TRLDCU and reg 31 Consumer Contracts Regulations 2013.

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ing for remedies for breach of information duties are rules relative to the lack of conformity of the product with the contract. Those provisions can be regarded as containing indirect information duties, as discussed in Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties*. Moreover, they can provide the aggrieved party with remedies, especially, but not limited to the situations where the piece of information that was false was relative to the main characteristics of goods. The regime of the conformity of the goods with the contract in the English law is established in various ss of the CRA 2015.[9] S 9(1) provides that 'Every contract to supply goods is to be treated as including a term that the quality of the goods is satisfactory' which is to be assessed considering especially 'the standard that a reasonable person would consider satisfactory, taking account of (...) any description of the goods (...).'[10] S 10 is relative to the goods being fit for particular purpose, a condition which is to be implied as a term of the contract if 'before the contract is made the consumer makes known to the trader (expressly or by implication) any particular purpose for which the consumer is contracting for the goods.'[11] One of the most relevant provisions from the point of view of information duties, s 11(4) states that:

> any information that is provided by the trader about the goods and is information mentioned in paragraph (a) of Schedule 1 or 2 to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (main characteristics of goods) is to be treated as included as a term of the contract.

Finally, s 12, although strictly speaking not belonging to the regime of conformity of goods with the contract,[12] contains other provisions of importance in the context

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[9] From the perspective of the present study, ss 9, 10, 11 and 12 are the most important. However, according to the s 19(1) CRA 2015, from the provisions listed only ss 9, 10 and 11 are actually relative to the conformity: '(...) In this section and sections 22 to 24 references to goods conforming to a contract are references to—

(a) the goods conforming to the terms described in sections 9, 10, 11, 13 and 14,
(b) the goods not failing to conform to the contract under section 15 or 16, and
(c) the goods conforming to requirements that are stated in the contract.'

[10] See s 9(2) CRA 2015.

[11] See s 10(1) CRA 2015.

[12] Cf s 19(1) CRA 2015.

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of the breach of information duties:

> Where regulation 9, 10 or 13 of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule 1 or 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.[13]

It should be noted that the cross-referencing technique used in this and other provisions of the CRA 2015 does not actually contribute to the clarity of the legal framework applicable to the issue of breach of information duties and consumer rights put more widely. Quite the opposite: from a consumer's perspective, such legislation is unnecessarily complex and requires significant effort to be understood.[14]

The provisions relative to the conformity of goods with the contract[15] established in the CRA 2015 is where the legal classification of the consequences of the breach of information duties can be found: the information provided is considered to be a term of the contract. It is only however the s 19 of the CRA 2015 that provides us with a full framework of rules applicable in the case of breach, indicating the remedies available:

> If the goods do not conform to the contract because of a breach of any of the terms described in sections 9, 10, 11, 13 and 14, or if they do not conform to the contract under section 16, the consumer's rights (and the provisions about them and when they are available) are—
> (a) the short-term right to reject (sections 20 and 22);
> (b) the right to repair or replacement (section 23); and
> (c) the right to a price reduction or the final right to reject (sections 20 and 24).[16]

[13] S 12(2) CRA 2015.

[14] Paula GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' Legal Studies, Record published 17.10.2016 1, 8-9.

[15] Cf provisions relative to the contracts for supply of digital content: ss 34ff and services: ss49ff.

[16] S 19(3) CRA 2015.

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The remedies will be different however if the breach is relative to the information duties referred to by s 12 of the CRA 2015:

> If the trader is in breach of a term that section 12 requires to be treated as included in the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.[17]

The quoted provisions of the CRA 2015 create a very specific regime of remedies available for the breach of information duties on the basis of the rules relative to the conformity of the product with the contract.

In what refers to the Spanish law, the TRLDCU creates a scheme of remedies for non-conformity in its arts 114ff. Art 119 establishes consumer's right to claim remedies listed in art 118, which are the following: repair, replacement, price reduction or contract rescission, in the case of a lack of conformity of the product with the contract.[18] The Spanish Act, similarly to the English CRA 2015, includes various provisions relating to the conformity of the product with the contract. Art 116 states that product is considered conforming provided that, *inter alias*, it matches the trader's description (art 116.1.a), is fit for both normal (art 116.1.b) and particular purpose if made known to the trader (art 116.1.c) and is of satisfactory quality (art 116.1.d).[19] The last criterion, that of a satisfactory quality, is framed as being

[17] S 19(5) CRA 2015.

[18] The TRLDCU refers to '*productos*' – 'products,' which are considered to be any movable good, in accordance with art 335 of the *Código civil*. The services are therefore not covered by those provisions; the question arises as to a possible qualification of the digital content as products, see Sergio CÁMARA LAPUENTE, 'La Nueva Protección del Consumidor de Contenidos Digitales Tras la Ley 3-2014, de 27 de Marzo' [2014] Centro de Estudios de Consumo CESCO Working Paper <http://blog.uclm.es/cesco/files/2014/10/La-nueva-protecci\%C3\%B3n-del-consumidor-de-contenidos-digitales-tras-la-Ley-3-2014-de-27-de-marzo.pdf> accessed 15 March 2016, 27ff, 62-62 who argues in favour of such solution; see also Esther TORRELLES TORREA, 'Artículo 115: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1066-1067.

[19] Esther TORRELLES TORREA, 'Artículo 116: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1072-1077.

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of a quality usual for such type of a product that could be expected taking into account the nature of the product and public statements made by the trader, such as advertising or labelling.[20]

The remedies, hierarchy of which will be analysed in the following Subsection 3.1.2.1 *Information duty breached relative to the main characteristics of goods*, apply practically independently of the type of breach, with the exception of contract termination that is not available if the non-conformity is of little importance – '*de escasa importancia*' – according to the art 121 of the TRLDCU. It can be therefore observed, that the English legislation determines the instances of non-conformity and similar provisions, such as s 12 of the CRA 2015 relative to the information other than on the main characteristics of good, in much more detail than the Spanish Act does, providing different remedies depending on the breach of a concrete information duty. The TRLDCU does not contain a provision similar to the s 12 of the CRA 2015, as the Spanish Act is only concerned with the conformity of the product with the contract, ie the breach of product-related information requirements can only lead to application of the regime of the arts 114ff.

There is also quite a clear difference between provision of false information and information omission in what refers to the legal classification of breach in both English and Spanish law, as generally speaking it is the provision of some false information rather than information omission that will give rise to the remedies for non-conformity. Within the provisions relative to the conformity, a description, including public statements, of goods or products is taken into account, therefore it needs to be false in order to give rise to the remedies; there is no list of information items to be provided – non-disclosure might be actionable in situations where a defect of the product is hidden by the trader, and it results in an unsatisfactory quality or the product non-conforming to the description. In what refers to the rules on fitness for a particular purpose, a communication of personal character between the consumer and the trader needs to take place,[21] since the particular purpose has to be made known to the trader in order to be actionable. It is only the Spanish

[20] Ibid 1075-1077; cf also s 9(5) and (6) CRA 2015.

[21] The purpose of the goods (products) can be made known to trader expressly or by implication – see s 10(1) CRA 2015; the TRLDCU does not pronounce itself on the way of making the purpose known to the trader.

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TRLDCU that requires the trader to expressly confirm that the product will be fit for that purpose.[22]

Finally, some rules relative to the unfair commercial practices also belong to the specific consumer law provisions that provide remedies for breach of information duties, nevertheless only under English law – the Spanish specific legislation does not offer any specific right of private redress for consumers who were victims of unfair trading practices.[23] Therefore, only general rules of contract law will be of assistance for aggrieved consumers in Spain if the facts of the unfair commercial practice provide grounds for action for defects of consent for example; in England the situation has changed only recently after the adoption of the Consumer Protection Amendment 2014 to the UTR 2008.[24] In the context of the breach of information duties, only the provisions relative to the misleading actions will be of interest – aggressive commercial practices are outside of the scope of this study and misleading omissions, as discussed below, are not covered by the private redress rights.

The introduction of specific consumer law redress for unfair commercial practices in the English law had been subject to a wide debate in which academics and the Law Commission took part.[25] Effectively, the new regime practically replaced the common law and statutory rules of misrepresentation and duress, the former being of interest to the present study. The law of misrepresentation might

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[22] See art 116.1.c).

[23] See Ángel CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' in Sergio Cámara Lapuente and Esther Arroyo Amayuelas (eds), *La Revisión de las Normas Europeas y Nacionales de Protección de los Consumidores: Más Allá de la Directiva sobre Derechos de los Consumidores y del Instrumento Opcional sobre un Derecho Europeo de la Compraventa de octubre de 2011* (Civitas-Thomson Reuters 2012) 318-322; actions available under Spanish law are those of commercial law – see art 32 of the Ley de Competencia Desleal and administrative law offences – see art 49 TRLDCU.

[24] Cf Geraint HOWELLS, 'Unfair Commercial Practices – Future Directions' in Reiner Schulze and Hans Schulte-Nolke (eds), *European Private Law - Current Status and Perspectives* (sellier European law publishers 2011) 135-136 who mentions other European systems where private redress is possible.

[25] See Hugh COLLINS, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (2010) 73 The Modern Law Review 89; HOWELLS, 'Unfair Commercial Practices – Future Directions' (n 24); Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (Law Com No 332, 2012 / Scot Law Com No 226, 2012).

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still result applicable to the instances of breach of information duties,[26] however it will be of a much lesser importance to the aggrieved consumer now after the new private redress rights have been adopted. Doubts were expressed whether consumers would benefit from replacing the old general law scheme by a new one of unknown efficacy.[27] Nevertheless, the old rules offering consumers redress for misleading commercial practices, that is mainly the law of misrepresentation, were considered to be unnecessary complex and poorly adapted to consumers' needs:

> The law of misrepresentation has not been developed with consumers in mind.[28] (...) The 1967 [Misrepresentation] Act is not well known or well-used. It uses obscure and tortuous language and has been subject to academic criticism. Furthermore, there is considerable uncertainty over the three remedies it provides: rescission, damages and damages in lieu of rescission.[29]

The consultations revealed great support for adopting a specific regime of private redress for consumers aggrieved through unfair commercial practices[30] and the Law Commissions concluded that:

> The current [ie before the adoption of the Consumer Protection Amendment 2014] law of misrepresentation is not as effective as it should be. Consumers find it too difficult to value losses and obtain redress. Businesses also incur unnecessary costs in having to come to grips with the Regulations [UTR 2008] and with the different concepts used in the [general legislation] (...).[31]

From the comparative perspective the availability of private redress for some of the unfair commercial practices is an important factor that influences not only the

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26 See Section 3.2 *General private law and remedies it offers.*

27 HOWELLS, 'Unfair Commercial Practices – Future Directions' (n 24) 138.

28 Law Com No 332, 2012 / Scot Law Com No 226, 2012 para 4.5.

29 Ibid para 4.6.

30 Ibid paras 4.9-4.14.

31 Ibid para 4.15.

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individual consumer's situation,[32] which is rather obvious, but also market functioning. As Howells observes, the market impact of the unfair commercial practices law depends on the combination of substantive rules, sanctions and their enforcement, which are now very different among the EU Member States, as the example of Spanish and English law shows; such situation might go against the purposes of the Unfair Commercial Practices Directive that was designed with the unification of the law in the internal market in mind.[33]

The relevant provisions introducing the private right of redress for consumers harmed through unfair commercial practices are contained in Part 4A of the UTR 2008 regs 27A – 27L. Various rights: the right to unwind the contract,[34] the right to a discount,[35] and the right to damages[36] are granted to consumers who entered into a contract with a trader[37] who engages in a prohibited practice:[38] either misleading action under reg 5 or aggressive practice under reg 7.[39] The prohibited practice must constitute 'a significant factor in the consumer's decision to enter into the contract

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[32] As HOWELLS, 'Unfair Commercial Practices – Future Directions' (n 24) 142 puts it: '(...) there is a feeling that consumers harmed by unfair practices should be restored to the position they were in beforehand.'

[33] Ibid 142-143; see also European Parliament, 'Implementation of Unfair Commercial Practices Directive' (Resolution) P7_TA(2014)0063 para 1 stressing 'the effectiveness of the legislation established by the Directive and its importance in making consumers and traders more confident with regard to transactions within the internal market (particularly cross-border transactions), in guaranteeing businesses greater legal certainty, and in helping to enhance consumer protection in the Union' and pointing out to the fact that the '(...) disparities in the application of the Directive risk impairing its effectiveness.'

[34] Regs 27E-27H.

[35] Reg 27I.

[36] Reg 27J.

[37] See reg 27A(2): 'The first condition [of a consumer's right to redress] is that—
(a) the consumer enters into a contract with a trader for the sale or supply of a product by the trader (a "business to consumer contract"),
(b) the consumer enters into a contract with a trader for the sale of goods to the trader (a "consumer to business contract"), or
(c) the consumer makes a payment to a trader for the supply of a product (a "consumer payment").'

[38] Reg 27A(4) – it is the second condition of a consumer's right to redress.

[39] Misleading omission under reg 6 UTR 2008 is not covered by the private right of redress.

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or make the payment.'[40]

Misleading omissions ex reg 6 UTR 2008 are excluded from the private redress rights. Such legislative solution comes as no surprise, given the approach of the English law to non-disclosure. The arguments against providing redress for non-disclosure, albeit in the context of the general private law, are well known.[41] Nevertheless, some important drawbacks for consumers might occur in consequence of exclusion of the misleading omissions from the specific redress scheme. Rogue traders may take advantage of a loophole thus created, as the line between misleading actions and omissions is rather fine.[42]

For the commercial practice, and especially the misleading action, which is of interest to the present study, to be actionable, various conditions must be met. Firstly, the consumer must have entered into the contract with the trader – as noted above the reg 27A requires it to be a business to consumer contract, ie where the trader sales or supplies a product to the consumer; a consumer to business contract, where it is the consumer who sells goods to the trader, as eg where a consumer sells their jewellery to a jeweller; or a consumer payment contract, in which the consumer makes a payment to the trader for the supply of a product. In consequence, there is no redress right under the scheme established in the UTR 2008 if the contract has not been entered into between the consumer and the trader.

Furthermore, reg 27B(1)(a) requires the trader's practice to amount to a misleading action, as defined in reg 5 of the UTR 2008.[43] This means that the consumer

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40 Reg 27A(6).

41 See Chapter 1 Subsection 1.2.2.2 *General duty to disclose and its breach in national private law.*

42 See eg Karen CLUBB, 'Redressing the balance?' (New Law Journal, 28 February 2014) <www.newlawjournal.co.uk/content/redressing-balance> accessed 15 May 2016.

43 Reg 5.–(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

(3) A commercial practice satisfies the conditions of this paragraph if–

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(a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or

(b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if–

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii) the commitment is firm and capable of being verified and is not aspirational, and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.

(4) The matters referred to in paragraph (2)(a) are–
(a) the existence or nature of the product;
(b) the main characteristics of the product (as defined in paragraph 5);
(c) the extent of the trader's commitments;
(d) the motives for the commercial practice;
(e) the nature of the sales process;
(f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product;
(g) the price or the manner in which the price is calculated;
(h) the existence of a specific price advantage;
(i) the need for a service, part, replacement or repair;
(j) the nature, attributes and rights of the trader (as defined in paragraph 6);
(k) the consumer's rights or the risks he may face.

(5) In paragraph (4)(b), the "main characteristics of the product" include–
(a) availability of the product;
(b) benefits of the product;
(c) risks of the product;
(d) execution of the product;
(e) composition of the product;
(f) accessories of the product;
(g) after-sale customer assistance concerning the product;
(h) the handling of complaints about the product;
(i) the method and date of manufacture of the product;
(j) the method and date of provision of the product;
(k) delivery of the product;
(l) fitness for purpose of the product;
(m) usage of the product;
(n) quantity of the product;
(o) specification of the product;
(p) geographical or commercial origin of the product;
(q) results to be expected from use of the product; and
(r) results and material features of tests or checks carried out on the product.

(6) In paragraph (4)(j), the "nature, attributes and rights" as far as concern the trader include the trader's–
(a) identity;
(b) assets;
(c) qualifications;

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has redress rights if the information provided to them was false or in any way deceiving, although factually correct and in the meantime caused (or was likely to cause) the average consumer to take a transactional decision[44] he would not have taken otherwise. The average consumer benchmark is also employed in assessing if the information was deceiving or likely to deceive. The cross-reference from the reg 27B(1)(a) to the reg 5 of the UTR 2008 results in the consumer having to prove not only that the misleading action has been carried out, but also that it has been likely to cause the average consumer to enter into the contract. There are various implications, first of all a potential difficulty of proof, and secondly, practical exclusion of more vulnerable consumers from the scheme.[45]

In addition to the objective test above, the consumer must also show that the prohibited practice carried out by the trader was a significant factor in their actual decision to enter into the contract. Such requirement has only been introduced in the Consumer Protection Amendment 2014, it had not existed before in the UTR 2008 in relation to an offence of reg 5. The standard of proof that must be met in civil proceedings is all probability,[46] nevertheless it is still an important obstacle that consumers need to overcome to obtain their redress.

(d) status;
(e) approval;
(f) affiliations or connections;
(g) ownership of industrial, commercial or intellectual property rights; and
(h) awards and distinctions.

(7) In paragraph (4)(k) "consumer's rights" include rights the consumer may have under Part 5A of the Sale of Goods Act 1979(a) or Part 1B of the Supply of Goods and Services Act 1982(b).

[44] 'Transactional decision', as defined in reg 27B(2) means: '(...) any decision taken by a consumer to enter into a contract with a trader for the sale or supply of a product by the trader, or for the sale of goods to the trader, or to make a payment to a trader for the supply of a product.'

[45] For more on vulnerable consumers and average consumer benchmark established in the Unfair Commercial Practices Directive see Chapter 1 Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

[46] As opposed to 'beyond reasonable doubt' in criminal proceedings; reg 27K(1) reads: 'A consumer with a right to redress under this Part may bring a claim in civil proceedings to enforce that right.'; on standard of proof in civil and criminal proceedings see eg Mike REDMAYNE, 'Standards of Proof in Civil Litigation' (1999) 62 The Modern Law Review 167.

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3.1.2 Specific remedies established in statutes

3.1.2.1 Information duty breached relative to the main characteristics of goods

National legislation provides consumers with various remedies that are presented in this Chapter. First I am looking at remedies resulting from specific consumer legislation; the next Section 3.2 *General private law and remedies it offers* is dedicated to general private law remedies. The analysis of the general private law is organised around the distinction between information omission and provision of false information; such divide in available remedies can also be seen in the context of the specific statutory remedies, as shown in *Figures* 1. – 4. Especially in what refers to English law, specific remedies for omission of material information are significantly more limited then those available in the case of misinformation. Such approach stems from the traditional law of misrepresentation, which will be analysed further on, together with other general private law remedies, where omission of material information is usually not actionable.

The specific remedies for breach of information duties also differ significantly depending on the type of information duty breached. We can distinguish two types of situations where consumer was provided with untrue or inaccurate information. This distinction is closely related to the consequences of breach of information duties and plays an important role in the law of misrepresentation and general law remedies. However it also seems to have shaped the system of specific remedies up to some point and therefore it is worth mentioning at this stage of the study as well. Firstly, traders misinform consumers, providing false or misleading information with the aim of influencing consumer's decision on entering the contract. This practice is common in trade and it usually concerns the information on the product (good). On the other hand, traders might also try to misinform consumers in a different way, making it more difficult for them to pursue their rights, for instance giving false information on their rights to redress, hoping it would discourage consumers from presenting complaints.

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In the sales of goods contracts,[47] information relative to the description of goods is specifically protected, allowing consumers to take advantage of some specific rights, applying almost exclusively to the situations of breach of information duties relative to the main characteristics of goods, set out in the provisions on non-conformity of goods with the contract. For this reason, the remedies for breach of an information duty relative to the main characteristics of goods are presented first.

Generally speaking, and subject to the observations made below, both English and Spanish law treat the information about the main characteristics of goods as contract terms.[48] Also both systems provide consumers with similar remedies for the lack of conformity of goods with the contract:[49] the rights to repair, to replacement, to discount and to reject the goods – rescind (terminate) the contract. The CRA 2015 specifically indicates in its s 19 statutory remedies which are available to consumers for breach of terms treated as included by the ss 9 – 11,[50] moreover reminding that general contract law remedies for breach of those terms are open to consumers in the circumstances.[51] TRLDCU also lists specific remedies available for non-conformity,[52] not excluding the application of general law remedies, although neither expressly

47 For the sake of clarity, I am focusing in this Subsection on the remedies available for the breach of information duties in the contracts for the sale (supply) of goods. Nevertheless, there also are many provisions, relative to other types of contracts than sale contracts and to contracts for supply of other products, and especially digital content and services. The CRA 2015 for example establishes specific remedies for contracts for supply of both digital content and services: ss 33-47 and ss 48-57 respectively. So do other pieces of specific legislation (see eg footnote 101 below for UTR 2008). The Spanish TRLDCU often refers to products, a concept which includes digital content as well, see CÁMARA LAPUENTE, 'La Nueva Protección del Consumidor de Contenidos Digitales Tras la Ley 3-2014, de 27 de Marzo' (n 18) 27ff; see also footnote 18. The remedies however are practically the same as in the case of the breach of information relative to the goods, therefore the remedies available in contracts for supply of goods are analysed and serve as a model showing the mechanisms and solutions adopted. Wherever pertinent, other contracts are also mentioned.

48 See ss 9-11 CRA 2015 and arts 61.2, 65 and 97.5 TRLDCU.

49 Under Spanish general law, there is no breach of contract if the good is not fit for a particular purpose or if it is not of satisfactory quality, provided that it was not specified in the contract, see Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 981/2005 de 20 de diciembre (RJ 2006/291), Fundamentos de Derecho, Séptimo. As we shall see, the specific provisions of consumer law establish the contrary.

50 That provide remedies for breach of information duties relative to the goods.

51 S 19(9)-(11) CRA 2015.

52 Art 118 TRLDCU.

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referring to them.[53]

Both CRA 2015 and TRLDCU establish a hierarchy of the remedies, in the sense that a consumer is only free to exercise some rights after they have unsuccessfully tried to exercise another. Such was the concept first introduced in the Directive on the sale of consumer goods,[54] transposed into Spanish and English law. The TRLDCU adheres to the text of the Directive, making it available to consumers to first choose between repair or replacement of non-conforming goods; only if the consumer cannot exercise their right to repair or replacement – eg because it is impossible or would be disproportionate – or when the trader has failed to complete one of those remedies within a reasonable time and without significant inconvenience to the consumer, then is the consumer entitled to require price reduction or contract rescission.

According to the art 119 TRLDCU, the consumer can require the trader to repair or replace the non-conforming product, the choice being the consumer's: there is no hierarchy of those two remedies, none has preference over the other.[55] However, the condition is that none of the two turns out to be objectively impossible[56] or

[53] See observations made in Chapter 2 Subsection 2.2.2.1 *Dual nature of information duties and remedies for their breach.*

[54] The art 3.2 of the Directive reads: 'in the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge by repair or replacement, in accordance with paragraph 3, or to have an appropriate reduction made in the price or the contract rescinded with regard to those goods, in accordance with paragraphs 5 and 6' and then clarifies that 'in the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate' (art 3.3) and only then can the consumer require price reduction or contract rescission: 'the consumer may require an appropriate reduction of the price or have the contract rescinded:
– if the consumer is entitled to neither repair nor replacement, or
– if the seller has not completed the remedy within a reasonable time, or
– if the seller has not completed the remedy without significant inconvenience to the consumer.'
Even then however, 'the consumer is not entitled to have the contract rescinded if the lack of conformity is minor' (art 3.6).

[55] See eg Audiencia Provincial de Cantabria (Sección 4ª), Sentencia núm. 52/2008 de 17 de enero (JUR 2008/115557), Fundamentos de Derecho, Segundo.

[56] Objectively in the sense of excluding the subjective impossibility on the side of the trader, see Esther TORRELLES TORREA, 'Artículo 119: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1093.

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disproportionate.[57] Once the consumer has chosen the desired remedy, both thems and the trader are bound to follow with their choice.[58]

The repair should make the product conforming with the contract, it has to be proportionate, free of charge and satisfactory to the consumer and needs to be carried out within a reasonable time and without significant inconvenience to the consumer.[59] The replacement consists of providing the consumer with a new product, which is conforming to the contract – a remedy which might turn out to be burdensome especially for the SME, while being understandably attractive to consumers.[60]

If the repair or replacement did not succeed in making the product conforming to the contract,[61] the consumer now has a possibility not only to require the other remedy, ie replacement or repair, but also is entitled to exercise their right to the price reduction or contract rescission.[62]

The consumer's choice of secondary remedies of price reduction and contract

[57] A remedy is disproportionate if it implies costs that are unreasonable when compared to the costs of carrying out other remedies: art 119.2 TRLDCU explains that a remedy is to be considered disproportionate when in comparison to another remedy imposes on the trader costs which are unreasonable, taking into consideration the value of the product as it would be conforming to the contract, the relevance of the non-conformity and whether the alternative remedy could be carried out without major inconvenience for the consumer.

[58] See eg Audiencia Provincial de Tarragona (Sección 3ª), Sentencia núm. 245/2009 de 16 de julio (AC 2009/1881), Fundamentos Jurídicos, Segundo.

[59] See art 120 TRLDCU; TORRELLES TORREA, 'Artículo 119: Comentario' (n 56) 1092; Esther TORRELLES TORREA, 'Artículo 120: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1099-1100.

[60] TORRELLES TORREA, 'Artículo 119: Comentario' (n 56) 1092.

[61] See Audiencia Provincial de Palencia (Sección 1ª), Sentencia núm. 109/2006 de 5 de abril (JUR 2006/236935), Fundamentos Jurídicos, Tercero, where it is noted that it is the consumer who needs to demonstrate that the product still lacks conformity after the repair; see also Audiencia Provincial de Burgos (Sección 2ª), Sentencia núm. 61/2005 de 17 de febrero (JUR 2005/101107), Fundamentos de Derecho, Cuarto, where the Court observed that the consumer's personal satisfaction in relation to how the repair was carried out is irrelevant, as it is the objective lack of conformity that persists despite the repair that needs to be demonstrated for the consumer to be entitled to secondary remedies of price reduction, rescission or the other remedy (ie replacement in this case).

[62] Art 120.d) and f) TRLDCU.

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rescission is not limited by the requirement of proportionality,[63] the only factor preventing the consumer from opting for the contract rescission is when the non-conformity is of minor importance – '*de escasa importancia*'.[64] Price reduction[65] consists of the consumer keeping the ownership of the good and receiving monetary compensation that cannot nevertheless be a full refund, as this would mean contract rescission.[66] The right to rescission, as already noted above in Chapter 2 Subsection 2.2.3.1 *Main remedies to be considered*, is restricted in Spanish law to the specifically delimited situations, as the Spanish system tends to favour security of transactions and maintaining the contractual relationship over allowing the parties to terminate it in any event of breach. The art 121 TRLDCU, which puts the right to rescind at a secondary place in comparison to the repair and replacement, and further limits the rescission to where the lack of conformity was more than just of a minor importance – is still seen as a significant widening of the availability of the remedy of the contract rescission (termination) for breach in the Spanish law, as a particular seriousness of the breach is not required by the provisions of the TRLDCU.[67]

The solution adopted in the CRA 2015 differs importantly from those of the Directive on the sale of consumer goods and the TRLDCU, especially in what refers to the hierarchy of the remedies. The CRA 2015 provides consumers with an additional right to reject – to contract rescission (termination) for breach – 'a short-term right to reject', available for 30 days after the goods were delivered.[68] The availab-

[63] Esther TORRELLES TORREA, 'Artículo 121: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1105.

[64] Art 121 TRLDCU *in fine*.

[65] For the amount of the price reduction see Chapter 2 Subsection 2.2.3.1 *Main remedies to be considered*.

[66] Audiencia Provincial de Barcelona (Sección 16ª), Sentencia núm.100/2008 de 22 de febrero (AC 2008/660), Fundamentos de Derecho, Tercero.

[67] TORRELLES TORREA, 'Artículo 121: Comentario' (n 63) 1107.

[68] S 22(3) CRA 2015: 'The time limit for exercising the short-term right to reject (unless subsection (4) applies) is the end of 30 days beginning with the first day after these have all happened–

(a) ownership or (in the case of a contract for the hire of goods, a hirepurchase agreement or a conditional sales contract) possession of the goods has been transferred to the consumer,

(b) the goods have been delivered, and

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ility of the short-term right to reject does not influence the other remedies – it is an additional right; also exercising other rights of repair or replacement within the short-term rejection period does not deprive the consumer of this right, according to s 22 CRA 2015:

> (6) If the consumer requests or agrees to the repair or replacement of goods, the period mentioned in subsection (3) or (4) [30 days or less for perishable goods] stops running for the length of the waiting period.
>
> (7) If goods supplied by the trader in response to that request or agreement do not conform to the contract, the time limit for exercising the short-term right to reject is then either–
>
> (a) 7 days after the waiting period ends, or
>
> (b) if later, the original time limit for exercising that right, extended by the waiting period.

The additional – in comparison to the Directive and to the Spanish legislation – short-term right to reject reflects the English law preference to let the aggrieved party terminate the contract and pursue damages, as opposed to the continental law principle of maintaining the contractual relationship.[69]

The CRA 2015 combines the common law short-term right to reject with the remedies introduced through the transposition of the European Directive, of more 'continental' character. Apart from this additional short-term right to reject, consumers under the Act can opt for remedies similar to those established in the TRLDCU: the rights to repair or replacement, and secondary rights to price reduction or final reject. The repair of the goods is achieved through making the goods conform to the contract.[70] The repair or replacement of the goods must be done within a reasonable time and without significant inconvenience to the consumer,[71] and is free of

(c) where the contract requires the trader to install the goods or take other action to enable the consumer to use them, the trader has notified the consumer that the action has been taken.'

69 GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' (n 14) 9.

70 S 23(8) CRA 2015.

71 S 23(2), subsection (5) CRA 2015 provides a definition of those concepts: 'Any question as to what is a reasonable time or significant inconvenience is to be determined taking account of–
(a) the nature of the goods, and
(b) the purpose for which the goods were acquired.'

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charge for them.[72] As under Spanish rules, the consumer 'cannot require the trader to repair or replace the goods if that remedy (the repair or the replacement) (...) is impossible, or is disproportionate compared to the other of those remedies.'[73] Further, the Act explains the meaning of 'impossible' and 'disproportionate', practically repeating the wording of the Directive on the sale of consumer goods, and therefore in words similar to the TRLDCU:

> Either of those remedies is disproportionate compared to the other if it imposes costs on the trader which, compared to those imposed by the other, are unreasonable, taking into account–
> (a) the value which the goods would have if they conformed to the contract,
> (b) the significance of the lack of conformity, and
> (c) whether the other remedy could be effected without significant inconvenience to the consumer.[74]

The art 119 of the TRLDCU requires the impossibility to be objective, therefore excluding the subjective impossibility on the side of the trader. The CRA 2015 does not mention the objectivity of the impossibility, nevertheless such is the interpretation of the identical wording of the Directive on the sale of consumer goods,[75] it can be assumed that the impossibility referred to by the CRA 2015 is also objective.

The choice of the primary remedy binds the consumer, in the sense that the consumer who requires or agrees to repair or replacement cannot exercise the other remedy or the short-term right to reject, however only to give the trader a reasonable time to proceed with the chosen remedy, and unless giving the trader that time would cause significant inconvenience to the consumer.[76]

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[72] S 23(2)(b) CRA 2015: '[If the consumer requires the trader to repair or replace the goods, the trader must–] bear any necessary costs incurred in doing so (including in particular the cost of any labour, materials or postage).'

[73] S 23(3) CRA 2015.

[74] S 23(4) CRA 2015.

[75] See eg Hanna SIVESAND, *The Buyer's Remedies for Non-conforming Goods: Should There be Free Choice Or are Restrictions Necessary?* (European Legal Studies Vol 2, Sellier European Law Publishers 2005) 29.

[76] S 23(6) and (7) CRA 2015.

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One of the secondary rights: the rights to price reduction or final right to reject can only be exercised after the primary rights, ie repair or replacement, did not succeed in making the goods conform to the contract, or consumer cannot require neither repair nor replacement, as they are both impossible or disproportionate, or the trader failed to repair or replace the goods within a reasonable time and without significant inconvenience to the consumer.[77] The amount of price reduction, as already noted in Chapter 2 Subsection 2.2.3.1 *Main remedies to be considered* can reach the full amount of the price that the consumer has paid or is required to pay,[78] which stays in contrast to the solution adopted in the Spanish law. Moreover, there is no requirement for the non-conformity to be more than of a minor importance for the consumer to claim the final right to reject – as it is established both in the TRLDCU[79] and in the Directive on the sale of consumer goods.[80] Those solutions, together with the fact that the CRA 2015 grants consumers the additional short-term right to reject, demonstrate the policy choices made by the legislators in England and Spain: the former focusing primarily on the individual rights, the latter more concerned with the transactional security and maintaining the contractual relationships.

In both analysed legal systems, the remedies for lack of conformity constitute a response to the situations where information duties relative to the goods were breached. Indeed, s 11(4) of the the CRA 2015, relative to the provisions on conformity, entitled 'Goods to be as described', directly points to the information requirements established in the Schedule 2 relative to the information in distance contracts of the Consumer Contracts Regulations 2013:

> Any information that is provided by the trader about the goods and is information mentioned in paragraph (a) of Schedule 1 or 2 to the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) (main characteristics of goods) is to be treated as included as a term of the contract.

[77] S 24(5) CRA 2015.

[78] S 24(2) CRA 2015.

[79] Art 121 TRLDCU.

[80] Art 3.6 Directive on the sale of consumer goods.

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The lack of conformity resulting from the goods being different to what was described to the consumer – the hypothesis of art 116.1.a) TRLDCU and s 11 CRA 2015 – fits perfectly the situation of the information duties breach, especially through provision of false or inaccurate information, and even more so in the electronic contracts. The trader, taking advantage of the fact that the consumer does not see the good themselves, describes it – and also graphic presentation of goods, such as pictures or photographs should be taken into account – in such a way as to make it seem more attractive to the consumer, in order to sell the good to them. Subsequently however, when the consumer receives the good, they realise it is not as it was presented by the trader, ie it is not conforming to their contract, as the trader's description of goods is treated both by Spanish and English law as contract terms: arts 61.2 and 97.5 of the TRLDCU and s 11(1) of the CRA 2015. This example nevertheless is hard to reconcile with a situation where the information was omitted: s 11(4) of the CRA 2015 expressly refers to 'any information that is provided by the trader (...)', art 61.2 TRLDCU mentions the content of the information provided (*el contenido*) and according to the art 97.5 of the TRLDCU the information forms integral part of the contract and cannot be change afterwards – which implies there needs to be information that can be changed.

Some provisions allow to treat the omission of information as breach on information duties, giving rise to remedies for the lack of conformity. This is the case with provisions relative to the quality of the goods and their purpose. Trader can free themselves from the liability for the non-conformity resulting from the unsatisfactory quality of the goods if they specifically draw consumer's attention to it before the contract is made.[81] Therefore, if the trader omits the information on the unsatisfactory quality, the consumer will have remedies for non-conformity available. In the context of the provisions relative to the purpose of the goods, English and Spanish legislative solutions differ. S 10 of the CRA 2015 stipulates that the trader will be in breach of term, if the goods are not fit for a particular purpose, made known to the trader by the consumer. It does not require however the trader to expressly confirm the fitness of the goods for that particular purpose – contrary to the

[81] S 9(4) CRA 2015; the TRLDCU in its art 116.1.d) in relation to 116.3 indirectly states the same: there is no lack of conformity if the consumer knew or reasonably should have known about the lack of conformity.

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Spanish provision of art 116.1.c) of the TRLDCU – which entails a conclusion that keeping silent in the case of goods not fit for the particular purpose will amount to the lack of conformity under English law, but not under Spanish law. Nevertheless, the liability for information omission may rise under the TRLDCU if the trader fails to inform the consumer that the goods are not fit for normal purpose.[82]

Nevertheless, as *Figures* 1. and 3. demonstrate, there are various rules relative to the lack of conformity entailing information duties that can practically be breached only through provision of false information; what will be the consequences of omitting information in those cases? Under Spanish law, art 65 of the TRLDCU provides a solution to the issue: the loopholes in consumer contracts are to be completed, to the consumer's benefit according to the principle of the objective good faith, also in the cases of omission of the relevant pre-contractual information. Cámara Lapuente notes that it can be therefore understood that the omitted information may be enforced by consumers.[83] Nevertheless, determining the content of the omitted information does not consist of interpreting the parties' subjective intentions, nor their hypothetical reconstruction – the extension of the contract contents is done through the operation of the objective good faith principle.[84] The concept of the objective good faith refers to the way the parties act: their honest and just behaviour.[85]

Under English law however, only reg 18 of the Consumer Contracts Regulations entitled 'Effect on contract of failure to provide information' expressly deals with consequences of information omission, stating that: 'every contract (...) is to be treated as including a term that the trader has complied with the provisions (...) [including reg 13 on information to be provided before making a distance contract].' Nevertheless, a difference in the approach adopted by the TRLDCU and the Consumer Contracts Regulations 2013 can be noted: Spanish law aims at filling the gaps

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[82] Art 116.1.b) in relation to art 116.3 TRLDCU.

[83] CÁMARA LAPUENTE, 'Artículo 65: Comentario' (n 5) 581.

[84] Ibid; see also: Calixto DÍAZ-REGAÑÓN GARCÍA-ALCALÁ, 'Artículo 1258' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1482-1483, in the context of the art 1258 *Código Civil* establishing a similar principle to the art 65 TRLDCU for the general contract law, who notes that a particular 'reconstruction' of the contract takes place, and is done through the sources which are foreign to the parties subjective intentions.

[85] See eg Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 84/2009 de 12 de febrero (RJ 2009/1487), Fundamentos de Derecho, Segundo.

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in the parties' contract, ie actually providing the consumer with adequate information – substituting the information that could have been reasonably expected to have been included in the contract[86] – therefore effectively providing the consumer with means to enforce their rights in exactly the same way as if they had been provided with false information. The English law, on the other hand, offers to include a term that the trader has complied with the information duties – the trader will therefore be in breach of this particular term, and not in breach of a concrete information requirement. In consequence, the omission of information under the Spanish law, through the application of the art 65 of the TRLDCU will result in application of the remedies for the non-conformity of the goods with the contract, in addition to the general contract law remedies for breach of contract: specific performance, contract rescission and damages. The remedies for breach of reg 18 are those available for the breach of term, as discussed in Section 3.2 *General private law and remedies it offers*, as there is no indication that information omission could give rise to remedies for lack of conformity (except for the situations analysed above).[87] It should be noted, however, that both art 65 of the TRLDCU (through the reference to the objective good faith principle) and reg 18 of the Consumer Contracts Regulations 2013 are concerned with the trader's behaviour: the compliance with the information requirements. Art 65 goes a step further than reg 18, however, as it aims at reconstructing the very content of the contract between the parties, and not only promotes the trader's behaviour according to the requirements.[88]

Also the availability of other remedies referred to in *Figures* 1. and 3. is influenced

86 CÁMARA LAPUENTE, 'Artículo 65: Comentario' (n 5) 581-582.

87 Moreover, s 19(12) of the CRA 2015 excludes the right to treat the contract as at an end, ie the right to rescind the contract, for a breach of an implied term except as provide s 19(3) and (4), however only referring to the terms implied by the CRA 2015. It does not apply directly to the reg 18 Consumer Contracts Regulations 2013, nevertheless constitutes another evidence of the English law's hostility to the duty of information disclosure and providing remedies for pure information omission.

88 It should be noted that another interpretation is also possible: that reg 18 Consumer Contracts Regulations 2013 has actually a similar meaning to art 65 TRLDCU and allows to fill in the loopholes in the contract which occurred through trader's failure to provide information. Such a view seems nevertheless less coherent with the general English law approach that, as already discussed on various occasions in the present study, is reluctant to reconstruct parties' contracts according to the principles of good faith and fair dealing, and also to provide remedies for the information omission.

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by the type of breach, ie information omission or provision of false or inaccurate information. English law provides in UTR 2008 private redress only for misleading actions of reg 5, but not for misleading omissions of reg 6,[89] therefore only provision of false information will give rise to the private law remedies, ie: the right to unwind the contract and get a full refund,[90] the right to a discount[91] and the right to claim damages for additional losses or harm the consumer has suffered.[92] The consumers can claim other remedies under another statute, common law or equity for prohibited practices – with the notable exception of the claim for damages under s 2 of the Misrepresentation Act 1967[93] – however it cannot lead to a double recovery.[94]

The private redress rights for unfair commercial practices were introduced through the Consumer Protection Amendment 2014, after the public consultations had been carried out on the matter.[95] Previously, aggrieved consumers could only seek private redress through general law, which in the context of breach of information duties

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89 See reg 27B.(1) UTR 2008.

90 Regs 27E, 27F, 27H UTR 2008.

91 Reg 27I UTR 2008.

92 Reg 27J UTR 2008.

93 S 2(4) Misrepresentation Act 1967.

94 Reg 27L.(2) UTR 2008.

95 Law Com No 332, 2012 / Scot Law Com No 226, 2012; see also COLLINS, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (n 25) 115 who describes how the idea of private redress for unfair trading practices seemed far-fetched in the context of the English system: '(...) the new right of action would in effect create a new kind of private law claim. The current laws of misrepresentation, duress, and undue influence could be supplemented by an action for compensation for losses caused by unfair commercial practices. The existing common law is cautious in providing compensation for actions during pre-contractual negotiations. It does not accept a general duty to bargain in good faith or with professional diligence and it imposes few duties of disclosure of information on businesses. A private right of redress might introduce some significant changes. For example, it might give the right to claim compensation for misleading, but not false, statements. Similarly, it might give the right to claim compensation for failure to disclose material information, a right that has been steadfastly denied by the common law judges for centuries. A private right of redress might also create for the first time a remedy of compensation for undue influence or aggressive business practices, where the traditional remedy has been limited to rescission of the contract and restitution. The Government has given the task of assessing the implications of a civil action to the Law Commission. Its preliminary advice, pending a full report, concerns the complexity of the issue of providing private redress.'

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refers mainly to misrepresentation;[96] the fact which has been criticised as the law of misrepresentation is quite complex and has been developed mainly in the course of business-to-business litigation and therefore does not particularly fit consumers' needs.[97]

The consumers can exercise their right[98] to unwind the contract within 90 days,[99] through an indication made to the business,[100] unless the goods[101] have already been fully consumed.[102] Moreover, a consumer does not have the right to unwind in respect of the contract if they have exercised previously the right to a discount, clearly in respect of the same contract and the same prohibited practice.[103]

The other two remedies: the right to a discount and the right to damages are not restricted to within the 90 days period, therefore the normal limitation period of six years applies.[104] The amount of the discount depends on the amount payable for the product under the contract and the seriousness of the prohibited practice.[105] If the amount payable under the contract does not exceed £5,000, then the amount of the discount will be 25% if the prohibited practice is more than minor, 50% if it is

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96 Other general private law doctrines that consumers could refer to were duress, undue influence and harassment, which are however relevant rather in the context of the aggressive commercial practices, which are not the focus of the present study.

97 See considerations expressed in the following Section 3.2 *General private law and remedies it offers.*

98 See also analysis of the remedies in Chapter 2 Subsection 2.2.3 *Types of remedies available.*

99 Reg 27E.(3): '(...) 90 days beginning with the later of–
(a) the day on which the consumer enters into the contract, and
(b) the relevant day.'

100 Which can be something that the consumer says or does – reg 27E.(2).

101 This Subsection of the present study focuses on the remedies available for breach of information duties relative to the goods, nevertheless the UTR 2008 also make reference to the services, digital content, lease and other rights. The bar to the unwinding from the contract in those cases would be other circumstances: full performance of the service (reg 27E.(8)(b)), full consumption of the digital content (reg 27E.(8)(c) – in the sense that if the digital content was available to the consumer for a fixed period and that period has expired, reg 27E.(9)(b)), expiration of the lease (reg 27E.(8)(d)), full exercise of the right (reg 27E.(8)(e)).

102 Goods have been fully consumed only if nothing is left of them – reg 27E.(9)(a).

103 Reg 27E.(10).

104 See s 5 the Limitation Act 1980.

105 Reg 27I.(4)-(7) UTR 2008.

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significant, 75% if it is serious, and ultimately 100% if it is very serious.[106] It can be noted that again the English law allows for a discount or price reduction equalling the full amount paid under the contract. The seriousness of the practice is to be assessed by reference to the trader's behaviour, the impact it had on the consumer, and the time lapse since the prohibited practice took place.[107] For contracts in which the consumer was to pay more than £5,000[108] the discount equals the percentage difference between the market price of the product and the amount payable for it under the contract.[109] Finally, consumers are also entitled to claim damages for financial loss incurred and alarm, distress or physical inconvenience or discomfort suffered;[110] the right to damages is limited only to damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice.[111] Only in relation to the remedies of damages, defences are available to the traders:

> A consumer does not have the right to damages if the trader proves that–
> (a) the occurrence of the prohibited practice in question was due to–
> (i) a mistake,
> (ii) reliance on information supplied to the trader by another person,
> (iii) the act or default of a person other than the trader,
> (iv) an accident, or
> (v) another cause beyond the trader's control, and

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106 Reg 27I.(4) UTR 2008.

107 Reg 27I.(5) UTR 2008; see also observations made in Chapter 2 Subsection 2.2.3.1 *Main remedies to be considered*.

108 And also when the market price of the product, at the time that the consumer entered into the contract, is lower than the amount payable for it under the contract, and when there is clear evidence of the difference between the market price of the product and the amount payable for it under the contract – reg 27I.(6)(b) and (c).

109 Reg 27I.(7) UTR 2008.

110 Reg 27J UTR 2008.

111 Reg 27J.(4) UTR 2008; such solution is less favourable to the aggrieved consumer than the damages under s 2 Misrepresentation Act 1967, which are referred to as 'generous' by some authors (see eg Ewan MCKENDRICK, *Contract Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2012) 607). Indeed, damages for misrepresentation seek to put the claimant in a position they would have been in, had they not entered into the contract, and the defendant is liable for all losses flowing directly from the misrepresentation made, regardless of their forseeability (*Royscot Trust Ltd v Rogerson* [1991] 2 QB 297).

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(b) the trader took all reasonable precautions and exercised all due diligence to avoid the occurrence of the prohibited practice.[112]

The burden is on the consumer to establish their claim, and especially they need to show that they entered into the contract with the trader,[113] the misleading action had been carried out by the trader, which is likely to cause the average consumer to enter into the contract,[114] and finally that the misleading action was a 'significant factor' in their transactional decision.[115] The UTR 2008 therefore makes reference to two different tests: an objective one of the average consumer – when establishing if the prohibited practice had been carried out, and a subjective one – when establishing whether the practice constituted a significant factor in the claimant's decision. The implications are that such a solution makes the law less clear and it may happen to be complicated for consumers at the moment of establishing traders' liability. Moreover, both tests may also turn out difficult to demonstrate. The average consumer benchmark has already been present for sometime in the UTR 2008 before the reform, which introduced the private redress rights, for the purposes of the administrative or criminal offences in various Member states, not only England, and in the Unfair Commercial Practices Directive itself, it has been therefore more or less thoroughly examined.[116] Nevertheless, it is not clear how it could be transferred into the domain of private individual redress, where it is not a governmental body, such as the Competition and Markets Authority, that needs to demonstrate the influence of the practice on the average consumer, but an individual claimant. Also fulfilling the subjective test, ie demonstrating that the practice was a significant

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112 Reg 27I.(5) UTR 2008.

113 Reg 27A.(2) UTR 2008, which excludes therefore advertisements for example.

114 Reg 5.(2)(b) UTR 2008.

115 Reg 27A.(6) UTR 2008.

116 See eg Annette NORDHAUSEN SCHOLES, 'Information Requirements' in Geraint Howells and Reiner Schulze (eds), *Modernising and Harmonising Consumer Contract Law* (sellier European law publishers 2009); Joasia LUZAK, 'Passive Consumers vs. the New Online Disclosure Rules of the Consumer Rights Directive' [2015] Amsterdam Law School Legal Studies Research Paper No. 2015-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553877> accessed 13 June 2016; Bram B DUIVENVOORDE, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Studies in European Economic Law and Regulation, Volume 5, Springer International Publishing 2015) 20-22.

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factor in one's decision may cause some issues: is significant a decisive one? Or is it just one of the main factors that made the consumer choose this particular offer? Consumers unable to carry out the proof in relation to those two tests will not be entitled to the remedies set out in the UTR 2008. It might however be possible for them to claim redress under the law of misrepresentation instead, especially as there is no average consumer benchmark in the traditional law, although an action in misrepresentation certainly has its own particularities as discussed below in Section 3.2 *General private law and remedies it offers.*

The private redress rights for unfair commercial practices may also bring about some undesirable consequences for the traders, as the 90 days period for unwinding the contract is rather long. Consumers are entitled to reject even used products, often with no allowance for the usage.[117] There is a fine line between consumer (additional) protection through private redress against unfair trading practices and consumers trying to avoid contracts that turned out to be not as attractive as they thought.[118]

3.1.2.2 Remedies for breach of other information duties

There are significantly fewer remedies available to consumers when breach of information duties concerns requirements relative to information other than about the goods, as *Figures* 2. and 4. illustrate. The reason is evident: the scheme of remedies for the lack of conformity is the most prominent and it is only relevant in the context of the information about the goods. Nevertheless, the English CRA 2015 contains a provision similar to those relative to the non-conformity but concerning information other than about the goods — s 12 entitled 'Other pre-contractual information included in contract,' which reads:

> (1) This section applies to any contract to supply goods.
>
> (2) Where regulation (...) 13 [relative to the information to be provided before making a distance contract] of the Consumer Contracts (Informa-

[117] Reg 27F.(7)-(10).

[118] Cf considerations expressed by CARRASCO PERERA, 'Desarrollos Futuros del Derecho de Consumo en España, en el Horizonte de la Transposición de la Directiva de Derechos de los Consumidores' (n 23) 314.

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> tion, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) required the trader to provide information to the consumer before the contract became binding, any of that information that was provided by the trader other than information about the goods and mentioned in paragraph (a) of Schedule (...) 2 to the Regulations (main characteristics of goods) is to be treated as included as a term of the contract.
>
> (3) A change to any of that information, made before entering into the contract or later, is not effective unless expressly agreed between the consumer and the trader. (...)

Therefore any pre-contractual information in distance contracts (contracts to supply goods) becomes a term of the contract under the CRA 2015. Similar observation can be made about Spanish law – arts 61.2 and 97.5 of the TRLDCU also require that the information be treated as a contract term. What is different however, are the remedies available: the CRA 2015 provides a specific statutory remedy in its s 19(5):

> If the trader is in breach of a term that section 12 requires to be treated as included in the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.

The Spanish law only provides general contract law remedies, as already noted above in the context of the breach of information about the goods. It can be observed that the remedy established in the CRA 2015 is much more limited than the scheme of remedies for the lack of conformity; moreover it is only operative in the case of provision of false information, and not omission, as the wording of the s 12(2) indicates.

There are some particular information items specifically protected both in Spanish and English law in a very similar way, as their protection originates in the Directive on consumer rights: explicit information about an order implying obligation to pay, information about additional payments and costs and information about the right of withdrawal. Those information items were developed with the electronic contracts in mind – an information that clicking on a button labelled ‘order’ will imply an obligation to pay or the need to obtain consumer’s express consent for

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the additional payments, which cannot occur through pre-ticket boxes on a website. Also, the particularity of those information items resides in the fact that it is the omission of the information that entails legal consequences. It is logical, as all those information items are of an 'all-or-nothing' kind: either they are provided (eg the information about the order implying an obligation to pay) or not; the trader wanting to deceive a consumer can only not inform them – otherwise they would need to put up an express lie on their website, such as 'the order does not imply an obligation to pay', which would not make any sense.

Another aspect that all those information items have in common is that they inform a consumer about their rights (the right of withdrawal) or obligations (to pay, to bear the costs or charges), which makes providing a remedy for breach of the information quite straightforward: the consumer is either not bound by the obligation they were not informed about, or the period to exercise the right gets prolonged, as they might not know about the right. And so omission of an explicit information about the order implying obligation to pay and failure to obtain consumer's express acknowledgement of that information results in consumer not being bound by that order according to the reg 14(3)-(5) of the Consumer Contract Regulations 2013 and art 98.2 of the TRLDCU. Similarly, omission of clear information on some additional payments and not getting consumer's express consent for them leads to the consumer not having to pay that costs, or if they have already paid, then trader's duty to reimburse them: reg 40 of the Consumer Contract Regulations 2013 and art 97.6 in relation to art 97.1.e) of the TRLDCU.

Finally, two information items are linked to the right of withdrawal. The effect of the omission of the information about the consumer's obligation to bear the costs of direct returning of the good in the instance of cancellation is that the consumer does not have to bear that costs, similarly as in the case of other charges and payments mentioned above.[119] The omission of the information on the very existence of the cancellation right brings about the extension of the period in which the consumer is entitled to exercise that right up to 12 months from 14 days.[120] Technically, as Wilhelmsson and Twigg-Flesner note, the remedy consists more of a cancellation

[119] Reg 35(5)(b) Consumer Contracts Regulations 2013 and art 97.6 in relation to art 97.1.j) TRLDCU.

[120] Reg 31 Consumer Contracts Regulations 2013 and art 105 TRLDCU.

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period postponement than extension – as the 14 days period starts running when the consumer receives the information about their right, at any time during the 12 months.[121]

Under English law, also in what refers to the information other than concerning the main characteristics of goods, the remedies established in the UTR 2008 are available. They operate in an identical manner in both the case of information relative to the characteristics of the goods and other information, and are presented in detail above. Nevertheless, it is worth noting that one of the conditions of trader's liability for a misleading action is that it needs to constitute a significant factor in the consumer's decision to enter into the contract.[122] In a great majority of cases it is the information about the good or product being the subject-matter of the transaction that can influence consumer's contracting intention – although it does not mean that other situations are impossible.

Finally, it should be noted that general law remedies, both contractual and tortious, also play an important role providing consumers with means to enforce their rights, often through a provision of the consumer law that cross-references to the general law.

3.2 General private law and remedies it offers

3.2.1 Overview of the analysis of the general private law remedies

General private law constitutes a necessary foundation and development for the consumer law provisions.[123] General private systems of law in England and Spain regu-

[121] Thomas WILHELMSSON and Christian TWIGG-FLESNER, 'Pre-contractual Information Duties in the Acquis Communautaire' (2006) 2 European Review of Contract Law 441, 466.

[122] Reg 27A.(6) UTR 2008.

[123] In 'Introduction' to the *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), edited by Christian von Bar and others (Munich 2009) para 40 it is noted that: 'The two Groups concur in the view that

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late possible consequences of breach of information duties in the B2C e-commerce. There are various situations of breach where specific remedies, analysed in Section 3.1 *Specific remedies available to consumers* will be applicable. Nevertheless, quite often it is the general private law that will have to guarantee the effectiveness of the duties established in legislation implementing European directives.[124] General law remedies might also be applicable instead of, or in addition to specific remedies.[125]

The analysis of the general private law applicable to breach of information duties requires a slightly different approach than examining specific remedies established in legislation. Breach of information duties covers the situations where although the consumer was not provided with relevant information, in an effective manner, at the pre-contractual stage, the contract was completed. Both English and Spanish law, as already discussed above, contain various provisions relative to non-disclosure, which might result applicable when consumer's right of information was breached. All the possible remedies that will be analysed must be applicable in the situation where in the B2C contract made on-line consumer's right to receive information was breached. This implies various assumptions for the consecutive analysis.

First of all, the contract between the parties – consumer and trader – was made. It is worth emphasizing that potential pre-contractual remedies will need to be applicable in the situation when the contract was actually made, therefore losses suffered and potential claims and remedies resulting from breach of negotiations or costs incurred by the consumer mislead by advertising for instance, not leading to contract formation, will be outside the scope of this study.[126]

Secondly, in the situation analysed, where parties entered the contract over the Internet, the trader's duty to inform results from legislation. The (non-)existence of the general duty to disclose and its consequences for the contract law in general

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consumer law is not a self-standing area of private law. It consists of some deviations from the general principles of private law, but it is built on them and cannot be developed without them. And "private law" for this purpose is not confined to the law on contract and contractual obligations.'

[124] As already observed in Chapter 2 Subsection 2.2.2 *Major problematic issues related to the remedies for breach.*

[125] Cf *Figures* 1. – 4.

[126] Cf with the observations concerning the private redress rights established in the UTR 2008 made in Section 3.1 *Specific remedies available to consumers* above.

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were discussed above in Chapter 1 Subsection 1.2.2 *General duty to disclose and its breach in national private law*, and the conclusion was reached that English law does not recognise a general duty to disclose. Traditionally, it is based on the principle of freedom of contract, therefore it is on the buyers to inform themselves, *caveat emptor*, and ask relevant questions during negotiations, as active deceiving is not permitted.[127] Nevertheless, the underlying philosophy of freedom of contract and transactional certainty stems from a commercial context where equality, at least theoretical, of bargaining power between the parties is present.[128] This is not the case of consumer contracts though, hence information duties imposed on businesspersons contracting with consumers. In this special class of contracts, consumer contracts, similarly to *uberrimae fidei* contracts duty to disclose indisputably exists in both English and Spanish law. Therefore, when analysing remedies available for breach of information duties, we should keep in mind that the legal situation in which they will apply is such where specific information duties are established in the legislation.

The following analysis aims not only at being comparative, but also at adopting an approach to the problem, which is theoretical but focuses also on practical implications of the rules analysed. Similarly to the analysis of the specific remedies in Section 3.1 *Specific remedies available to consumers*, the general law remedies are organised according to different situations of breach. The method adopted is not one of specific case studies,[129] however the practicality of the approach resides in starting hypotheses and functional comparative method.[130] The remedies and legal classifications coming into play in the case of breach of information duties are there-

[127] See eg Paula GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (2005) 5 European Review of Private Law 621, 624 pointing out that 'The courts will not permit statements which actively mislead the other party,' however as already discussed previously, this 'does not extend to a duty to disclose information which would influence the other party's position.'

[128] Ibid 630.

[129] As is the case for other studies, see for instance an excellent study of defects of consent and information duties: Ruth SEFTON-GREEN (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2004).

[130] More on comparative law methodology see eg Ralf MICHAELS, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press 2006) 431ff; Jaakko HUSA, *A New Introduction to Comparative Law* (Hart Publishing 2015) 96ff; see also *Introduction* to the present study.

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fore analysed for different kinds of breach: information omission and provision of false information, and reactions of Spanish and English law to such hypotheses are presented. Within those, the possible classifications of breach are compared, notably the defects of consent and vitiating factors and the breach of contract.

The applicable legal rules, concepts they create and actual remedies need to be organised in groups in order to facilitate the comparative analysis, which can be done in various ways. For instance, Beale[131] proceeds to analyse the rules of the general contract law that may provide party with remedy when they entered a contract under some form of 'misapprehension' of the facts, according to how the 'misapprehension' of the facts occurred, ie if it was induced by the other party (or a third party) or self-induced. Beale uses the term 'misapprehension', as the word 'mistake' is a legal term bearing a lot of connotations as to its legal relevance that may denote different concepts in various legal systems. Also, Beale focuses only on misapprehension of facts, such as characteristics of the product or circumstances of the contract, as opposed to misapprehension of the terms of the contract. When analysing French, German and English law Beale suggests that all these systems share the approach to fraud (fraudulent misrepresentation) – the aggrieved party will be entitled to avoid the contract and the fraudster liable for potential damages. The terminology appears to differ importantly in relation to negligent or innocent misrepresentation, treated as mistake induced by the other party in German and French law, however the results stay similar for all analysed systems – one can avoid a contract if 'the misapprehension was as to something important' and the other party will be liable for damages if acted negligently. It is in the third category of Beale's division – self-induced misapprehension – that the results achieved by common law and civil law systems differ importantly, especially in what refers to a situation when the other party new about their contractor's mistake, but kept silent.[132]

Sefton-Green[133] suggests to examine four distinct foundations of the duty to

[131] Hugh BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (2008) XIV Juridica International 42.

[132] For English law approach to silent non-disclosure see observations made in Chapter 1 Subsection 1.2.2 *General duty to disclose and its breach in national private law* and the analysis below.

[133] Ruth SEFTON-GREEN, 'General Introduction' in Ruth Sefton-Green (ed), *Mistake, Fraud and*

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inform, which are: fraud, pre-contractual liability, duty to disclose arising from operation of law and mistake. Fraud, understood as fraudulently induced mistake, is related to the pre-contractual liability – where the breach of the duty to inform involves negligence, such as in negligent misrepresentation. Remedies for both fraud and pre-contractual liability will usually include the right to set the contract aside and damages based in tort. Nevertheless, as Sefton-Green points out, misrepresentation comes from a duty to tell the truth, which is not the same as duty to inform, on which the *culpa in contrahendo* (pre-contractual liability) is based. The duty to disclose established in law is the third possible foundation analysed by the author. It is twofold – may be established by specific legal provisions, as is the case of the consumer law, or may also originate in case law applicable to certain contractual relationships, eg where there is a relationship of trust between the parties, such as in the *uberrimae fidei* contracts. Finally, the author considers mistake caused by information omission.

The scope of this study, however, in comparison to Beale's and Sefton-Green's analysis is broader and more restricted at the same time. First of all, the focus of this study is breach of information duties and its consequences. Defects of consent, such as fraud, mistake and misrepresentation (on which Beale and Sefton-Green focus) form an important part of this study, but in my analysis I also take into consideration rules relative to breach of contract and specific consequences of breach and remedies established in consumer legislation. On the other hand, I will examine rules that specifically apply to the B2C e-commerce, which means that some provisions relative to B2B and C2C contracts will not be relevant. Moreover, the comparative scope of this study is limited to English and Spanish law, therefore other European legal systems are not analysed.

Various general private law doctrines regulate the transmission of the information between the contracting parties,[134] independently from the consumer law provisions. Indirect information duties[135] stemming from general private law not only overlap

Duties to Inform in European Contract Law (The Common Core of European Private Law, Cambridge University Press 2004) 13-14.

[134] Horst EIDENMULLER and others, 'Towards a Revision of the Consumer Acquis' (2011) 48 Common Market Law Review 1077, 1112-1113.

[135] See Chapter 1 Subsection 1.2.3.1 *More general and indirect information duties.*

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with the specific duties established in the consumer law, but also, even more importantly, provide remedies for breach of those specific duties. General private law rules that need to be taken into consideration comprise especially rules on formation and interpretation of contracts, especially the doctrines of mistake and misrepresentation – or defects of consent in the continental law terminology, and rules relative to breach of term or more generally breach of contract.[136]

As pointed out in Chapter 2 Subsection 2.1.3.3 *Breach of information duties depending on the remedies: information omission and provision of false or inaccurate information* breach of the duty to inform can occur in two different ways and I will organise my analysis accordingly.[137] This division is primarily inspired by the English law of misrepresentation, according to which only active misinformation requires legal consequences, whilst silence is usually not operational. This traditional and highly individualistic approach is still present in the common law – hence different specific remedies established for omission of material information and for providing false information, as we could see in Section 3.1 *Specific remedies available to consumers* above.

Therefore, in my analysis I will first focus on the breach that may occur when the information, or its important piece, was simply omitted by the trader. And although the general principle states that non-disclosure is not operational in English law, the consumer contracts constitute an exception to that principle, as the European rules on B2C contracts impose numerous information requirements thus making the disclosure mandatory. Through an operation of an implied term originating in legislation, the gap in the contract resulting from information omission can be filled in. Then, a breach may amount to the breach of term, but also other possible qualifications, such as defects of consent, come into play. Second possibility involves situations, where the information that was provided to the consumer is incorrect

[136] Cf EIDENMULLER (n 134) 1112 who refer to: 'the rules on the formation and interpretation of contracts, on the incorporation of standard terms of business, on mistake, misrepresentation, undue influence and fraud, and finally on breach of contract based on failure to conform to the description of the goods or services.'

[137] See also explanations relative to my organisation of specific remedies established in legislation in Section 3.1 *Specific remedies available to consumers* above.

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– not true or inaccurate.[138] In this context especially the law of misrepresentation, fraud and mistake will be relevant. Nevertheless, implied terms and breach of statutory duty may also result applicable. The classifications of breach of information duties and remedies available to consumers assigned to the two groups mentioned above overlap. For example the courts may imply terms of the B2C contract in two situations: when the information was not provided and when it was provided but was flawed in some way. Nevertheless, this division makes it possible to carry out a comparative analysis of two different legal systems, with a focus on remedies and a practical approach.

Before presenting the general law rules providing consumers with remedies for breach of information duties, some general issues need to be briefly looked at. First of all, it is necessary to remember that although terminology and often the very philosophy behind certain solutions in general private law seem to differ importantly between English and Spanish law, sometimes the application of different rules may lead to surprisingly similar results.[139]

For instance, both Spanish and English systems recognise similar defects of consent that potentially occur during contract formation,[140] although in English law defects of consent do not constitute a unitary concept – rather, there are various separate grounds for setting the contract aside.[141] Moreover, one has to be careful with terminology – although at first glance it may seem that we can translate *error* as mistake and *dolo* as fraud, these doctrines are deeply embedded in the traditional

[138] See Ruth SEFTON-GREEN, 'Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)? - A Comparative Account of French and English Law' in Geraint Howells and others (eds), *Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness* (Markets and the Law, Ashgate 2005) 174-175.

[139] BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 131) 43ff; see also observations made by Ewan MCKENDRICK, *Contract law* (11th edn, Palgrave 2015) 219 who notes that '(...) civilian lawyers may well use the doctrine of good faith to reach results which English law would reach by a more narrowly defined doctrine. (...) The difference may be more one of technique than result.'

[140] Cf John CARTWRIGHT, 'Defects of Consent in Contract Law' in Arthur S Hartkamp and others (eds), *Towards a European Civil Code* (4th edn, Kluwer Law International 2011) 537.

[141] See Comment to Notes to Article 4:101: Matters not covered, PECL – in Ole Lando and Hugh Beale (eds), *Principles of European Contract Law, Parts I and II Combined and Revised* (The Hague 2000) and Ole Lando and others (eds), *Principles of European Contract Law, Part III* (The Hague 2003).

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contract law, and their scope, application, limitations and even basic characteristics may be very different. Finally, some concepts, such as misrepresentation in English law, do not have a corresponding doctrine in the other system.[142] The approach of each system to similar situation may be very different, the result, however, may be alike. As Cartwright puts it when analysing responses of various European contract law systems to the problem of defects of consent:

> This does not mean that there is no comparison to be made between such different systems in this area: on the contrary, there may be functional similarities in the operation of various doctrines within the legal systems even if their theoretical basis is very different.[143]

Different policies may underline contract law philosophy:[144] for example, the validity of contract, which corresponds with procedural issues, may or may not take precedence over contractual fairness, which is a question of substance – but even if

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142 This is why the remedial approach, ie investigating the consequences of certain behaviours — in the present study at the consequences of failing to provide information in the B2C electronic contracts, makes it possible to carry out a comparative analysis; cf considerations expressed by SEFTON-GREEN, 'General Introduction' (n 133) 15.

143 CARTWRIGHT, 'Defects of Consent in Contract Law' (n 140) 538.

144 Ibid 539-540 where it is noted that: 'There are competing policies at play. On the one hand, a contract is based on the parties' mutual agreement, intentions or consent; and so the law should protect each party against being bound where his expression of agreement or intention or his consent was imperfect. (...) The law may therefore adopt a policy which is more protective of the apparent consent, in the interests both of the individual party who may, for example, have relied on the contract, and of the system of contracting more generally since an over-generous principle of invalidity of contracts may be perceived as threatening the security of contracts in general. In reality all legal systems, in developing their rules in this area, have been sensitive to these different policies, and have struck a balance. But the particular balance varies between the different systems; and it is often struck by the application of different techniques – using a subtle interrelation of the rules relating to the grounds of invalidity of contracts, the imposition of duties during the negotiating phase, the definition of fault and responsibility, and the rules relating to damages and other remedies.'

The different philosophy underlying the contract law system also influences the mentality of the lawyers and the lawmakers of each system: see Pierre LEGRAND, 'Against a European Civil Code' (1997) 60 The Modern Law Review 44, 45, the Legrand's argument concerning legal mentality – '*mentalité*' – can be related to the ideas expressed in the present study, for instance the different approach to the remedies available in cases of breach of information duties through omission of information and active misinformation, in Spanish and English law and both in the context of specific and general law remedies.

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the law focuses more on standards of behaviour rather than parties' consent,[145] the practical solutions and results it leads to might be very close.

Another important consideration that needs to be born in mind is the fact that the concepts analysed in this study, the remedies for breach of information duties, are in the process of evolution, being brought about by the social changes on the one hand – introduced especially through the rapid development of the technologies allowing the parties to enter into contracts over the Internet, and by the legal reactions to that changes on the other hand – the recently adopted Consumer Protection Amendment 2014 granting consumers private redress rights in the case of (some) unfair commercial practices may constitute an example, especially as it has also an important influence on the general law, as explained below. Sefton-Green points further to the effect the specific sectoral legislation and solutions there adopted have on a change in the underlying legal values of contract in general.[146] Definitely there are certain dynamics and some approximation between different legal families[147] necessarily occurs, especially through the harmonisation process,[148] nevertheless the legal mentality of the legislator and simple lawyers in each system stays quite unchanged,[149] which results in differences in transposition and application of

145 SEFTON-GREEN, 'General Introduction' (n 133) 16-17.

146 Ibid 29 where it is noted that: 'If it is true that mistake, fraud and duties to inform are in the process of evolution, arguably this is a reflection of a change in underlying legal values of contract; (...) One obvious answer [to the question for the reasons of those changes] may lie in the fact that the procedures and the circumstances in which contracts are made are changing, (...) contracts qualified as door-step sales are subject to special protective legislation, and this surely has a profound effect on the requirements of consent in contracting. Another reason for the shift lies in the fact that expectations about contract-making and contracts in general are changing. This may lead to an enquiry into the relationship between contract-dynamics (contract-making) and contract-products (the end result).'

147 Partially because, as LEGRAND, 'Against a European Civil Code' (n 144) 44-45 points out, there are more differences than similarities between the continental civil law systems and the English law, therefore the globalisation of the contracting process must bring about some approximation at least.

148 The process of harmonisation of law within the European Union will now necessarily be stopped in what refers to the English law, when (and if) the UK leaves the Union. How it will be dealt with and whether the process of untangling the English law from the European influences will actually take place is impossible to say; nevertheless up to that moment the harmonisation and approximation between civil and common law within the European Union will still be taking place.

149 Cf LEGRAND, 'Against a European Civil Code' (n 144).

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the European law, as was demonstrated in the context of specific law remedies for breach of information duties. To understand those differences however, some analysis of the general private law is necessary.

The law applicable to the situations where consumer's right to receive information was breached is quite complex, since various specific and general remedies can result applicable.[150] Specific consumer legislation, such as CRA 2015 and TRLDCU, tries to remedy this complexity,[151] however quite unsuccessfully it seems. The reason for such situation is the one expressed above: consumer law cannot exists without the general private law, for it to be independent a complete new system of consumer contracts would need to be devised, and it is neither possible nor really necessary. Improvements are needed, no doubt, in order to make the law easier to apply, but no new coherent and complete system within each national law is really feasible.

Nevertheless, the result is that the system of consequences of breach of information duties by traders and potential remedies available to consumers under English and Spanish law still remain rather complex and unclear.[152] Various statutes establish information requirements in B2C on-line contracts, and generally the existence of statutory remedies does not exclude the application of traditional ones.[153]

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[150] See for instance observations of the Law Commission and Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices (Law Com No 332, 2012 / Scot Law Com No 226, 2012), Outline, xiv, quoted by John CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (3rd edn, Contract Law Library, Sweet & Maxwell 2012) in Preface:

'The current law of misrepresentations provides redress in most cases of consumer detriment but the problem is that the rights are fragmented, complex and unclear. We consider seven possible routes to a remedy that may apply where a trader has misled a consumer. Many of these causes of action depend on proving the trader was fraudulent or negligent, which is difficult in consumer cases. The definition of a misrepresentation is also overly complicated. (...)

Although the statutory remedies for misrepresentation in England (...) provide a good balance of protection, they are perceived as inaccessible. The remedies are uncertain and consumers rarely know what they are entitled to. Overall the current law confuses traders, consumers and their advisers alike and hinders private ordering.'

[151] See eg Explanatory Notes to CRA 2015, note 5: 'There is general agreement across business and consumer groups that the existing UK consumer law is unnecessarily complex. It is fragmented and, in places, unclear, for example where the law has not kept up with technological change or lacks precision or where it is couched in legalistic language. There are also overlaps and inconsistencies between changes made by virtue of implementing European Union ("EU") legislation alongside unamended pre-existing UK legislation.'

[152] See *Figures* 1. – 4.

[153] For more details see Chapter 2 Subsection 2.2.2.1 *Dual nature of information duties and remedies*

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However, in some cases the availability of the general law remedies is barred by the specific legislation, forcing the consumer to rely only on specific remedies. This consideration has been already explored in Chapter 2 Subsection 2.2.2.1 *Dual nature of information duties and remedies for their breach*; some more observations need to be added here.

S 2(4) of the Misrepresentation Act 1967 does not allow the consumer to be paid damages under the Misrepresentation Act 1967 if they have a right to redress under the specific legislation for misleading practice of reg 5 of the UTR 2008.[154] The importance of the traditional law of misrepresentation for consumer contracts is therefore restricted to a great extent; moreover it should be noted that the damages under s 2 of the Misrepresentation Act 1967 are much more generous than the compensation provided for in the UTR 2008.[155] On the other hand, as already mentioned, the law of misrepresentation is quite complex and consumers were less likely to seek redress under the general law.[156] However, the general statutory law of misrepresentation will continue to provide remedies in cases where consumers have no right to redress under the Part 4A of the UTR 2008 introduced in the Consumer Protection (Amendment) Regulations 2014. Those specific provisions require the trader's representation to constitute a misleading commercial practice, which in turn is based on the average consumer benchmark. In consequence, more vulnerable consumers might find themselves with no specific right to redress, with the traditional law of misrepresentation being their only way of private redress. Moreover, s 2(4) of the Misrepresentation Act 1967 excludes only the right to claim damages, without making any reference to other remedies available for misrepresentation, and

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for their breach.

[154] S 2(4) Misrepresentation Act 1967 reads: 'This section does not entitle a person to be paid damages in respect of a misrepresentation if the person has a right to redress under Part 4A of the Consumer Protection from Unfair Trading Regulations 2008 (SI 2008/1277) in respect of the conduct constituting the misrepresentation.'

[155] Damages for misrepresentation seek to put the claimant in a position they would have been in, had they not entered into the contract, and the defendant is liable for all losses flowing directly from the misrepresentation made, regardless of their forseeability (*Royscot Trust Ltd v Rogerson* [1991] 2 QB 297), under the reg 27J.(4) UTR 2008 consumer's right to damages is limited only to damages in respect of loss that was reasonably foreseeable at the time of the prohibited practice.

[156] See footnote 150 above.

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especially contract rescission. Also, the common law of misrepresentation, the tort of negligence, and all the remedies stemming from those rules are still available, albeit they are probably less advantageous to consumers seeking redress than the statutory rights. In conclusion however, it is still necessary to analyse the general law of misrepresentation, also for comparative purposes, as the Spanish legal system does not offer specific consumer law remedies for consumers who were victims of the unfair commercial practices, and because the law of misrepresentation shaped the mentality of the English lawyers and lawmakers to the extent that still can be observed also in the context of specific remedies.

Under Spanish law, the applicability of the specific law of non-conformity of the product with the contract of arts 114ff of the TRLDCU excludes the possibility to apply for the general law of the latent defects of art 1484ff of the *Código civil.*[157] Similarly, provisions of the Sale of Goods Act 1979 dealing with the lack of conformity are no longer applicable to consumer contracts, as they are replaced by the CRA 2015.[158]

Another issue of importance for both Spanish and English law is the compatibility of the specific regime of the non-conformity with the general law rules relative to the breach of contract. The specific scheme of remedies of ss 19ff of the CRA 2015 and arts 114ff of the TRLDCU is governed by a particular hierarchy described in the Section 3.1 *Specific remedies available to consumers* above. The hierarchy of specific remedies has its rationale, precisely defining (not necessarily limiting in comparison to the general law though) situations in which consumers have a right to reject the goods and treat the contract as at an end, aiming at bringing security of transactions and forseeability to the market. It is an argument in favour of excluding the application of the general law rules relative to the breach of contract where consumers can apply for remedies established in the specific regime of non-conformity. Indeed, s 19(12) of the CRA 2015 states that:

> It is not open to the consumer to treat the contract as at an end for breach of a term that this Chapter requires to be treated as included in

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[157] A solutions that is in line with the CISG, which replaces the latent defects regime with the scheme of remedies for non-conformity; see art 117 TRLDCU; this issue in more detail was also raised in Chapter 2 Subsection 2.2.2.1 *Dual nature of information duties and remedies for their breach.*

[158] The CRA 2015 is applicable to all the contracts entered into after 1 October 2015.

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> the contract, or on the grounds that, under section 15 or 16, goods do not conform to the contract, except as provided by subsections (3), (4) and (6).

Therefore the consumer can only treat the contract as at an end for breach of one of the statutory rights established in ss 9-11, 13-16 and 17(1) of the CRA 2015 by exercising a right to reject; it is important to notice that this excludes any common law right to terminate the contract for breach of a term that is implied by these provisions. Nevertheless, consumers will still have available all the general law remedies for breach of an express term of the contract which is not covered by the provisions of the CRA 2015.[159]

Spanish law does not pronounce itself that clearly on this matter, as the art 117 of the TRLDCU only refers to the possibility for the consumer to apply for damages under the general law, however not excluding availability of any remedies, apart from the latent defects regime mentioned above. The position of the academics is against applicability of the general law remedies for breach of contract in the cases covered by the law of non-conformity,[160] while the courts tend to allow consumers to claim damages based on the general law.[161] Nevertheless, the availability of the contract rescission for breach based on the general law rules seems to be limited when the remedies for the lack of conformity are available; indeed the courts do not permit contract rescission prior to exercising primary rights of repair or replacement, as it goes against the hierarchy of the remedies established in the arts 114ff of the TRLDCU.[162]

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[159] See s 19(9)(c) CRA 2015.

[160] See Nieves FENOY PICÓN, *El Sistema de Protección del Comprador* (Col Nal Registradores Propiedad y Mercantiles 2006) 157, 172; Esther TORRELLES TORREA, 'Artículo 117: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 1081-1082 and the literature there cited.

[161] See eg Audiencia Provincial de Pontevedra (Sección 1ª), Sentencia núm.95/2007 de 15 de febrero (AC 2007/1432); Audiencia Provincial de Pontevedra (Sección 1ª), Sentencia núm.337/2009 de 9 de julio (AC 2009/1840), Fundamentos de Derecho, Tercero.

[162] See eg Audiencia Provincial de Murcia (Sección 4ª), Sentencia núm. 153/2006 de 30 de mayo (JUR 2006/187552), Fundamentos de Derecho, Cuarto; Audiencia Provincial de Sevilla (Sección 6ª), Sentencia núm. 563/2006 de 5 de diciembre (JUR 2007/180986), Fundamentos de Derecho,

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The general law remedies for breach of contract including contract rescission for breach are nevertheless of primary importance as in many instances of breach those remedies are applicable. In the context of Spanish law three provisions provide for availability of the remedies for breach of contract as a major consequence of the breach of information duties, and both in the case of provision of false information and information omission, these are arts 61.2 (on including the advertising and other promotional offers as terms of the contract), 65 (on implying terms in the contract in the case of information omission) and 97.5 (on information forming an integral part of the contract) of the TRLDCU. In a great deal of situations of breach of information duties, and especially, but not limited to, when the information other than about the main characteristics of the goods is concerned, those provisions of the TRLDCU provide main remedies – or rather main classification of breach, ie breach of contract, as it is the general contract law especially of *Código civil* that provides remedies. English law relies more on the specific legislation, particularly when the lack of conformity is concerned, however similarly to Spanish law, reg 18 of the Consumer Contracts Regulations 2013 relies on the general contract law remedies for breach of a term it implies (that the trader has complied with the information duties), as the Regulations do not establish specific remedies for breach of terms they imply.

Comparative analysis of the general law remedies, ie defects of consent and remedies for breach of contract as possible consequences of misinformation resulting from breach of information duties needs to take into account various aspects of those concepts which are present in the national law. In what refers to the defects of consent, Cartwright[163] suggests to look primarily at the operation of the defects of consent in relation to the validity of contract, establishing types of mistakes that are legally relevant, existence of any additional requirements, such as a particular degree of seriousness of the mistake, and the potential relevance of the parties' fault – which is where the relationship of mistake and misrepresentation (fraud) needs to be researched. The consequences of the occurrence of mistake or fraud, ie remedies

Segundo; Audiencia Provincial de Zamora (Sección 1ª), Sentencia núm. 237/2009 de 1 de octubre (AC 2009/2255), Fundamentos Jurídicos, Cuarto.

163 CARTWRIGHT, 'Defects of Consent in Contract Law' (n 140) 539.

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available to the aggrieved party, should be the second focus of the analysis. In what refers to the contract rescission, understood as a retrospective contract avoidance, questions should be answered as to how it is effected (eg by act of parties, by court), what might prevent the rescission (eg passage of time, third party's rights) and what further consequences flow from the rescission (such as the restitution of the benefits conferred under the contract). Both Spanish and English law provide a possibility to claim damages in the cases of defects of consent, their basis and assessment need therefore to be established.

Similarly, breach of contract and its consequences in English and Spanish law are to be compared. The analysis will try to determine what constitutes a relevant breach of contract, taking into consideration the trader's[164] fault and/or intentions, the seriousness of the breach and its consequences, ie available remedies, availability of which might also differ depending on the factors listed.

Finally, potential relevance of the tortious or *extra-contractual* liability should be briefly looked at. From the perspective of English law, a claim for misrepresentation, even if brought under the Misrepresentation Act 1967, is a hybrid one, drawing together the laws of contract and tort, since the damages are awarded on a tortious measure.[165] Moreover, an action for a negligent misstatement at common law – an action for misrepresentation in tort – is also possible.[166] The tortious aspect of the misrepresentation claim is discussed together with other defects of consent. Outside misrepresentation, an obligation to inform, breach of which would result in liability in tort is rare.[167] An issue of a breach of statutory duty found in the consumer protection legislation could be mentioned, nevertheless there is a general presumption against a statutory tort, and even more so in situations where the losses

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164 In the context of the present study it is always the trader in the B2C contract who is in breach of their information duties.

165 GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 1) 313.

166 *Hedley Byrne & Co. Ltd.* [1964] AC 465.

167 See GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 1) 314-315, an indirect information duty arising from the Consumer Protection Act 1987: liability may be avoided by the producer if they give a clear warning of any possible dangers, see eg *Worsley v Tambrands Ltd* [1999] EWHC 273 (QB).

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are of economic nature rather than personal injury or property damage,[168] which is generally the case for the breach of information duties in the B2C electronic contracts analysed in this study. Therefore such basis for tortious liability can also be discarded.

In what refers to Spanish law, the defects of consent give rise to contractual liability;[169] potential tortious nature of the consequences of breach of information duties can be sought in the realm of pre-contractual liability or *culpa in contrahendo*. Three possible scenarios can be discussed in relation to the pre-contractual liability:[170] firstly, breaking off negotiations – pre-contractual liability *sensu stricto*[171] which stays outside of the scope of the present study, as no contract is entered into in this situation; secondly, conclusion of a contract that subsequently turns out to be void or avoidable due to the breach of the duty of pre-contractual good faith; and thirdly, conclusion of a valid contract, which is nevertheless disadvantageous to one of the parties as a result of the other acting in a unfair manner in the pre-contractual phase. The second hypothesis will give rise to the remedies for defects of consent,[172] of contractual character as noted above. The third possibility refers to the so-called *dolo incidental* out of art 1270 para II *Código civil*: a party liable for fraud which

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168 COLLINS, 'Harmonisation by Example: European Laws against Unfair Commercial Practices' (n 25) 113-114 notes: '(...) there is a general presumption against the view that a breach of a statutory duty gives rise to any private law cause of action, unless it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. [*X (Minors) v Bedfordshire County Council* [1995] 2 AC 633; *O'Rourke v Camden London Borough Council* [1998] AC188] This presumption against a statutory tort is likely to be stronger in the context of unfair commercial practices where the losses will probably be mostly economic rather than personal injury or property damage.'

169 See Chapter 2 Subsection 2.2.3.2 *Nature of remedies: contractual, tortious or other?*

170 Alberto MANZANARES SECADES, 'La Naturaleza de la Responsibilidad Precontractual o Culpa in Contrahendo' (1985) 38 Anuario de Derecho Civil 979, 979-980; see also María Paz GARCÍA RUBIO and Marta OTERO CRESPO, 'La Responsabilidad Precontractual en el Derecho Contractual Europeo' [2010] InDret: Revista para el Análisis del Derecho 1, 33; José Ramón GARCÍA VICENTE, 'Artículo 1270' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9132.

171 See eg John CARTWRIGHT and Martijn HESSELINK (eds), *Precontractual Liability in European Private Law* (The Common Core of European Private Law, Cambridge University Press 2008) 21ff (case studies).

172 GARCÍA RUBIO and OTERO CRESPO (n 170) 46.

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is of minor seriousness is liable only in damages, the contract formed cannot be rescinded. Here again, *dolo incidental* is an instance of fraud and belongs to the realm of defects of consent, which give rise to a contractual liability.[173] Therefore, both under Spanish and English law, all the potential tortious consequences of a breach of information duties are mainly related to the liability for defects of consent, and will be analysed within such classification.

3.2.2 Omission of the information that should have been provided

When analysing especially the issue of omission of information, one can easily notice very different values underlying English and Spanish rules which grant relief to the party whose right to pre-contractual information was breached. What are those values? Up to what extent do they influence a potential outcome of a case of breach?

The law applicable to the breach of information duties in consumer contracts is rather complex due to the multitude of potentially relevant provisions established both in legislation and case law, not to mention different origins of the duties, which may originate in European law as well as come from national rules. This complexity can be illustrated by the rules regulating situations where trader breached their information duty through omitting certain piece of information.

In what refers to English law, as already pointed out in Section 3.1 *Specific remedies available to consumers*, the consequences of omission amounting to breach of information duties are much more limited than potential effects of providing untrue information. Under the Spanish law provisions, the difference between information omission and active misinformation is less pronounced, although it also exists. Generally speaking, private general law offers various ways of redress in the case of breach of information duties in the B2C e-commerce. The areas that should be looked at in the context of information omission comprise both contractual and extra-contractual doctrines.

Breach of term implied by legislation that was analysed in the previous Section

[173] Against considering *dolo incidental* (together with other defects of consent) as a case of contractual liability see GARCÍA VICENTE, 'Artículo 1270' (n 170) 9134-9135.

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of the present Chapter is most relevant in the case of information omission in the scope of English law provisions, since under English law non-disclosure of material facts is not operational,[174] and therefore remedies for such situation are rather scarce. In contrast, Spanish law provides various possible classifications of breach of information duties through omission – both originating in the breach of contract *ex* art 65 of the TRLDCU and in the defects of consent.

Arguably, the area of law where English law is profoundly different from continental legal traditions, both in its philosophical aspect[175] and in the possible outcomes of concrete cases, is the mistake of facts and non-disclosure.[176] This consideration can be illustrated by the fact that in English law, if one party is labouring under mistake, and the other party is aware of that fact, they are not under duty to rectify the mistake – they can simply take advantage of it.[177] In what refers to the defects of consent (vitiating factors), especially mistake[178] and the law of misrepresentation should be taken into account. In the case of omission, the application of the law of misrepresentation in English law is considerably limited, since it is primarily concerned only with false statements. The Spanish concept of *dolo* in contrast includes fraudulent concealment (*reticencia dolosa*).[179] However, in some cases silence can

[174] See, in addition to case law cited in Chapter 1 Subsection 1.2.2 *General duty to disclose and its breach in national private law*, *Norwich Union Life Ins Co Ltd v Qureshi* [1992] 2 All ER (Comm) 707 at 717; *The Unique Mariner* [1978] 1 Lloyd's Rep 438 at 449; *Lloyds Bank v Egremont* [1990] 2 FLR 351.

[175] See John CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' in Peter Birks and Arianna Pretto (eds), *Themes in Comparative Law: In Honour of Bernard Rudden* (Oxford University PRess 2002) 153, who points out that different values underlying ancient Roman and English conception of contract can be observed from the mere order in which Gaius organised his Institutes.

[176] Hugh BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (Clarendon Law Lectures, Oxford University Press 2012) 12, Beale considers that in general, despite the differences between English and civil law traditions, roughly three quarters of concrete cases reach the same outcome. Neverthless, this is not true for mistake and non-disclosure, since this area of law is fundamentally different in those two legal traditions and the outcomes are more likely to vary.

[177] Ibid 18.

[178] See the analysis of common mistake and unilateral mistake below in Subsection 3.2.2.2 *Defects of consent where information was not provided.*

[179] The Spanish courts that recognise a concept of a fraud by non-disclosure: see Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 263/2009 de 24 de abril (RJ 2009/3167), Fundamentos de Derecho, Cuarto where the words *'reticencia dolosa por ocultación de una información que la*

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amount to the English misrepresentation as well, which is to be analysed in more detail below.[180]

3.2.2.1 Breach of an implied term and contractual liability

Can information requirements imposed on traders through legislation be in certain circumstances treated as terms of contract? If so, their breach might then amount to breach of contract, or at least breach of term. As we shall see below in Subsection 3.2.3.2 *Consumer induced into the contract through misleading information: defects of consent* generally speaking, pre-contractual statements made by the parties can be classified either as terms of contract, representations or mere puffs with no legal effect.[181] Nevertheless, this is relevant in situations where the trader has provided the consumer with some, albeit inaccurate or even untrue, information. What happens if no information was provided?

In such circumstances consumers can rely mainly on specific sectoral legislation, which in addition to specific remedies also provides consumers with other tools. Omission of a piece of information can amount to breach of contract, where there was a contractual term breached by non-disclosure, especially when such term is implied. In the context of consumer on-line contracts reg 18 of the Consumer Contracts Regulations 2013, entitled 'Effect on contract of failure to provide information' states that:

> Every contract to which this Part applies is to be treated as including a term that the trader has complied with the provisions of–
> (a) regulations 9 to 14, and
> (b) regulation 16.

Reg 13 is the one imposing the information requirements, therefore every B2C on-line contract will have an implied term that the trader has provided the consumer

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buena fe le impone suministrar(...)' are used -– negative fraud due to omission; see also Francisca SANCHEZ HERNANZ, 'Discussions - Spain - Case 2: Celimene v. Damien' in Ruth Sefton-Green (ed), *Mistake, Fraud and Duties to Inform in European Contract Law* (The Common Core of European Private Law, Cambridge University Press 2005) 157-158.

[180] See Subsection 3.2.2.2 *Defects of consent where information was not provided.*

[181] MCKENDRICK, *Contract law* (n 139) 145ff.

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with relevant information, as listed in Schedules 2 of the Consumer Contracts Regulations 2013. Moreover, when information concerning the goods in a sales contract was omitted, for example when a consumer was not informed by the trader that the goods are not fit for a particular purpose, which was made known to the trader, or when consumer's attention was not specifically drawn to what was making the quality of the goods unsatisfactory, then specific remedies established in the CRA 2015 will come into play.[182] Moreover, consumer protection rules usually will not exclude application of general private law.[183] This is true for provisions mentioned – s 19(9)(a) states that: 'This Chapter does not prevent the consumer seeking other remedies– (a) for a breach of a term that this Chapter requires to be treated as included in the contract (...).' Nevertheless, as already noted, a remedy of contract rescission for breach (treating contract as at an end) under the general law is not available to consumers for breach of terms that the CRA 2015 implies in contracts.[184]

In what refers to the Spanish law, it is the art 65 of the TRLDCU that needs to be taken into account. The art 65, as already discussed above, implies terms which fill in the omitted information into the contract's content, in accordance with the objective good faith principle. The breach of those implied terms will result in the application of the general contract law remedies, following the general law governing those remedies.[185]

Therefore, apart from application of specific consumer-oriented remedies for breach of an implied term, general private law may also be sought by a consumer whose right to receive pre-contractual information in on-line contracts was breached. In the situations of breach of information duties through information omission it is practically only the breach of implied term that can be taken into account, since if the information was not provided we cannot talk about express terms.

Remedies available for breach of an implied term under Spanish law comprise on the one hand specific remedies for lack of conformity out of arts 114ff, already

[182] See Section 3.1 *Specific remedies available to consumers* above for more on sectoral specific legislation and breach of information duties.

[183] BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 131) 42, footnote 3.

[184] S 19(12) CRA 2015.

[185] CÁMARA LAPUENTE, 'Artículo 65: Comentario' (n 5) 581-582.

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discussed in the previous Section, if the omitted information was relative to the product being the subject-matter of the contract; and on the other general contract law remedies.[186] The general law remedies that need to be taken into account are specific performance, damages and contract rescission for breach; as already noted it seems that if the remedies for non-conformity are applicable then the consumer's access to general law remedies, and especially to contract rescission should be limited, as it goes against the hierarchy of remedies established in arts 114ff of the TRLDCU.

In practice, Spanish courts do apply the art 65 of the TRLDCU when material information is omitted, nevertheless through varying legal reasoning provide consumers with various remedies. In some cases the application of art 65 of the TRLDCU, among other provisions, leads to filling the loopholes in the parties' contract and declaring its breach, serious enough to grant contract rescission on that basis.[187]

However, sometimes after confirming an omissive breach of the information duty the courts might also base their decisions on other claims available, such as the defects of consent leading to the aggrieved party avoiding the contract for mistake[188] or allow to use the art 65 as a defence against the trader's claim for contract performance, stating that the consumer is not bound by the agreement as they lacked material information necessary to enter into the contract.[189] As the *Figures* 3. and 4. demonstrate, remedies for the defects of consent are available simultaneously to the general law remedies for breach of contract resulting from the information omission out of art 65 of the TRLDCU: logically, when material information is omitted

[186] Ibid.

[187] See Audiencia Provincial de Murcia (Sección 4ª), Sentencia núm. 287/2013 de 2 de mayo (JUR 2013/201686); see also Audiencia Provincial de Madrid (Sección 12ª), Sentencia núm. 52/2012 de 30 de enero (JUR 2012/228888); for the significance of the seriousness of breach for the availability of the remedies see Subsection 3.2.3.1 *When misinformation amounts to breach of term and remedies resulting from contractual liability* below.

[188] See eg Audiencia Provincial de Madrid (Sección 12ª), Sentencia núm. 820/2013 de 5 de noviembre (AC 2013/2193); see also Juzgado de Primera Instancia e Instrucción núm. 1 de Segorbe (Provincia de Castellón), Sentencia de 22 de octubre (AC 2012/2201).

[189] See eg Audiencia Provincial de Salamanca (Sección 1ª), Sentencia núm. 245/2011 de 8 de junio (JUR 2011/246306); Audiencia Provincial de Madrid (Sección 25ª), Sentencia núm. 227/2013 de 17 de mayo (JUR 2013/215258).

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contrary to the good faith principle, then the contracting party (the consumer) will also lack information necessary for them to give an informed consent, which might in turn give rise to an action for mistake or fraud or a defence against a trader claiming the contract performance. The courts apply the remedy which bests suits the individual consumer in their particular case, and avoiding the contract is what seems to fit those needs quite often. The remedy of contract rescission for breach of contract under the general Spanish law is not always easily available,[190] hence the commonplace foundation of the decision on the basis of the defects of consent.

Both Spanish and English law provide consumers with various remedies for breach of terms implied by consumer legislation, and it seems that the manner in which those two systems operate in this case is not that different. The English law focuses mainly on the specific remedies for non-conformity established in the CRA 2015, expressly barring the consumer from pursuing contract rescission for a breach of an implied term on the common law basis. The TRLDCU does not contain such provision, however it can be understood that the logic of the rules out of arts 114ff effectively has the same result. The CRA in its s 19(9)-(11) reminds consumers that it is open to them in the circumstances to claim general law remedies – the TRLDCU does not prohibit it, and in practice Spanish courts do provide consumers with general law remedies, founding their decisions on the art 65 of the TRLDCU which deals with information omission. The potentially available remedies for breach of contract are presented in more detail below,[191] in the context of the express terms and their breach.

3.2.2.2 Defects of consent where information was not provided

Another possible response of the legal systems analysed to the situation of breach of information duties are defects of consent. The defects of consent, as Sefton-Green points out, cross the conceptual bridge between the contract formation phase and breach of contract: in many national legal systems, and notably in Spanish and

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[190] The concept of breach of contract and remedies available are analysed in more detail in the context of the breach of an expressed term in Subsection 3.2.3.1 *When misinformation amounts to breach of term and remedies resulting from contractual liability* below.

[191] Ibid.

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English law as well,[192] the remedies under the heads of defective consent and breach of contract overlap.[193] Especially in the context of breach of information duties it is apparent: the remedies for breach of contract respond to situations in which one of the parties, being misinformed, expected a different performance of the contract; the defects of consent play a role when the misinformed party could not give their real consent, due to the lack or inaccuracy of pre-contractual information received.

English law has no uniform theory of defects of consent,[194] which are usually referred to as vitiating factors.[195] Various legal concepts, such as law of misrepresentation, doctrine of mistake, duress and undue influence are often analysed in comparative studies as counterparts of defects of consent present in continental legal systems.[196] However, misrepresentation, mistake and other vitiating factors will be found in separate chapters or parts of English legal textbooks, since they are considered to be different, although sometimes overlapping, grounds that either allow to avoid the contract or make it void *ab inicio*.[197] In what refers to the Spanish system of private law, technically speaking the theory of defects of consent is also a kind of

[192] See Subsection 3.2.3 *Provision of incorrect information* below on differences between pre-contractual representations and terms.

[193] SEFTON-GREEN, 'General Introduction' (n 133) 2.

[194] CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' (n 175) 154.

[195] Ibid: as Cartwright points out in the context of French law, in English law vitiating factors are called so, because they primarily vitiate the contract, and the concept of defects of consent puts more emphasis on the 'consent' of the parties.

[196] See eg CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' (n 175); SEFTON-GREEN, *Mistake, Fraud and Duties to Inform in European Contract Law* (n 129).

[197] The contract being void means that in reality there is no contract and the agreement is flawed to such extent that in the eyes of law it has never actually existed. The contract which is voidable, on the other hand, can be rescinded at the option of the representee, and however it is avoided retrospectively, the contract itself existed until the moment when it was rescinded. The distinction is important especially because of the effect on property rights of a third party both concepts have: if the good being the subject matter of the contract was subsequently sold to a third party, if the first contract was void, that party never acquired the property of the good. However if it was merely voidable, the rights of the third party will not be affected, provided they acquired the good in good faith (Edwin PEEL, *Treitel on the Law of Contract* (14th edn, Sweet & Maxwell 2015) 452) – as already noted in Chapter 2 Subsection 2.2.3 *Types of remedies available.*

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a doctrinal creation based on various casuistically defined defects.[198] Nevertheless, the very fact of the existence of such creation illustrates the difference in approach between Spanish and English law.

For the further analysis of the vitiating factors and defects of consent it is necessary to look at the approach Spanish and English systems take to the contract – agreement itself. In English law the contract – the agreement of the parties – is interpreted strictly objectively –[199]

> To create a contract by exchange of promises between two parties where the promise of each party constitutes the consideration for the promise of the other, what is necessary is that the intention of each as it has been communicated to and understood by the other (even though that which has been communicated does not represent the actual state of mind of the communicator) should coincide.[200]

This approach was confirmed multiple times, for example Steyn LJ stated:

> (...) English law generally adopts an objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men.[201]

Therefore the real, internal consent of the parties is not actually relevant to the formation of the contract, which explains the difference in terminology: English law talks about the factors vitiating the contract as such, and not the consent of the parties, as in Spanish law.

The objective test adopted in English law is nuanced by a subjective element; Blackburn J in *Smith v Hughes* set out the test:

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[198] Luis DIEZ-PICAZO, *Fundamentos del Derecho Civil Patrimonial. Vol.1: Introducción, Teoría del Contrato* (6th edn, Thomson-Civitas 2007) 186.

[199] See CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' (n 175) 156-157; PEEL (n 197) 1, 10.

[200] *The Hannah Blumenthal* [1983] 1 AC 854 at 915.

[201] *G. Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27.

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> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[202]

As the test ignores real intentions, it is strongly objective. However, Blackburn's J words 'upon that belief' reflect also the subjective element.[203]

In what refers to Spanish law, according to article 1261 of the *Código civil* there are three essential elements of the contract – the consent of the contracting parties, a certain object which is the subject matter of the contract and the cause of the established obligation. Without any of those elements contract cannot be formed and therefore does not exist.

Pre-contractual information exchanged between the parties is not only a factor influencing the very decision to enter the agreement, but also often allows the parties to give correctly their free consent, a necessary element of the contract being formed.[204] The consent itself is understood as a combination of three phenomena:

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[202] *Smith v Hughes* [1871] LR 6 QB 597 at 607.

[203] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 608ff, where the elements of the test and different approaches adopted by courts along the way are explained in detail not necessary in the present study; Cartwright finally summarises the test to be applied at 614ff:

'1. The first question is whether the parties were in fact (subjectively) in agreement on the existence and terms of the contract. If they were, that should be determinative.

2. If the parties were not, in fact, in agreement, then – in the case where the claimant is seeking to rely on there being a contract on terms (x), and the defendant is either denying that there is a contract at all, or is asserting that there is a contract on terms (y) – the question becomes whether the claimant can in law hold the defendant to have agreed to a contract on terms (x). He may do so if:

(a) the defendant's words, conduct or (exceptionally) silence would have led a reasonable person in the claimant's position to believe that the defendant was agreeing to (x); and

(b) the claimant in fact believed that the defendant was agreeing to (x).

3. If the claimant succeeds in showing that he can hold the defendant to a contract on terms (x) in accordance with proposition 2, he has established a contract on terms (x) unless the defendant can rebut this by showing that the claimant's conduct, words or (exceptionally) silence would have led a reasonable person in his position to believe that the claimant was agreeing to (y), and that the defendant in fact believed that the claimant was agreeing to (y). In such case, there is no contract.'

[204] I am distinguishing between the notion of 'decision whether to enter the agreement' from the concept of 'consent', the former describing an internal mind process without legal consequences, whilst the latter being its externalisation that makes it accessible and understood by other parties

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first – individual, subjective and internal expression of will, second – objective, external declaration of will visible to others, and finally – common will or intention of both contracting parties, the meeting of minds.[205]

General provisions of Spanish contract law established in the *Código civil* do not impose any direct information duties as such. However, the duty to inform the contracting party about main characteristics of the product or service is implicit in the norms that regulate the defects of consent – mistake (*error*) and fraud (*dolo*), established in arts 1265, 1266 and 1269 of the *Código civil*.[206] The consent is at the origin of any contract and no contract can exist if it is flawed: Diez-Picazo notes that for the contract to exist the consent needs to be serious, spontaneous and free.[207] Art 1265 states that consent given by mistake, or because of duress, intimidation or fraudulent misrepresentation shall be voidable. This list of the vices of consent is considered to be exhaustive.[208]

The defects of consent that are of special importance in the context of breach of information duties are misrepresentation and mistake. As stated in *The Great Peace Shipping*, 'mistake can be simply defined as an erroneous belief.'[209] Cartwright offers further definitions: 'A mistake is a misunderstanding, a misapprehension, a misconception (...).'[210] Diez-Picazo refers to a mistake – *error* – which is a wrong or inexact belief or mental representation that serves to the contracting party as premise for the transactional decision they are making.[211]

Technically speaking, misrepresentation or *dolo*[212] is a sub-category of mistake

participating in the market and therefore necessary for creating binding legal agreements.

205 Luis DIEZ-PICAZO and Antonio GULLÓN, *Sistema de Derecho Civil. Vol. II/ I: El contrato en general. La relación obligatoria* (10th edn, Tecnos 2012) 40.

206 Julio PICATOSTE BOBILLO, 'El Derecho de Información en la Contratación con Consumidores' [2011] Actualidad Civil 372, 376.

207 DIEZ-PICAZO (n 198) 185.

208 Although some express doubts, see ibid 187.

209 [2002] EWCA Civ 1407 at 28.

210 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 578.

211 DIEZ-PICAZO (n 198) 207.

212 Although the concept of misrepresentation is wider – and simply different in many aspects – than that of *dol*o, as it is explained below, and therefore the two are not synonyms, nevertheless

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– a type of induced mistake, which can overlap in some factual scenarios with mistake.[213] According to Cartwright, the meaning of misrepresentation is: '(...) a false statement, by words or conduct (but not silence), of fact which is sufficiently certain to be relied upon by the representee excluding, therefore, statements of opinion and intention, and "sales talk" or "mere puffs".'[214] *Dolo* under the Spanish law is the vast set of dishonest actions, contrary to the rules of honesty, deployed in order to deceive the other party (who is acting in good faith) with a view of own profit.[215] Legal consequences of mistake and misrepresentation are different; misrepresentation and *dolo*, because of the component residing in the actions of the other party that induced the mistake are closer to the hypothesis of breach of information duties, and therefore will be presented first.

From the point of view of English law, the most important vitiating factor is misrepresentation, since bare mistake is quite rarely accepted by the courts.[216] Such policy choice, although may seem unfair and unjust – ultimately, the mistaken party did not actually agree to enter the contract – is justified by other considerations. First of all, as already mentioned in English law an objective test is used to determine if the contract was formed. Secondly, the security of transactions is of primary importance for the English system. In *Bell v Lever Bros Ltd* Lord Atkin observed:

> (...) it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts – i.e., agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.
>
> (...) it is of greater importance that well established principles of contract should be maintained than that a particular hardship should be redressed; and I see no way of giving relief to the plaintiffs in the present circumstances except by confiding to the Courts loose powers

for the sake of simplicity I often refer to the two ideas jointly. Another possible counterpart for misrepresentation is *error provocado*, induced mistake, also referred to below.

[213] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 2.

[214] Ibid 352.

[215] DIEZ-PICAZO (n 198) 198.

[216] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 587ff; CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' (n 175) 154.

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> of introducing terms into contracts which would only serve to introduce doubt and confusion where certainty is essential.[217]

Finally, English law aims at protecting reasonable expectations of the non-mistaken party, who relied on the other party's promise. 'Why should the non-mistaken party *lose* the contract [if they did not actively try to deceive the other party]?' asks Cartwright.[218]

Spanish law, on the other hand, is concerned with protection of individuals who make mistakes to a greater extent than English law.[219] Firstly, mistakes are effectively raised in litigation in the context of breach of information duties in consumer contracts.[220] Moreover, the *Código civil* as such in its art 1266 adopts a perspective focused on subjective will, which has nevertheless been called notorious: the protection of the other, non-mistaken, party's interests and the security of contracts in general is not considered by the provision.[221] Those were the courts that adopted a different angle, out of the necessity to protect the security of transactions, requiring a series of conditions to be fulfilled in order to grant relief in the cases of mistake.[222] Party's mistake must be excusable – it cannot be possible to discover through an average diligence, according to the good faith principle – this way the legal system avoids protecting those labouring under mistake who do not deserve the protection due to their negligent actions, as then it is the trust and security of the other party that needs to be taken into account.[223] Such solution is similar to the English one

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[217] [1932] AC 161 at 224, 229; this passage is cited by CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 588, who observes that the approach adopted by Lord Atkin emphasises certainty, which could be threatened by admitting mistake too widely and in consequence require courts to deal in a discretionary way with individual cases.

[218] CARTWRIGHT, 'Defects of Consent and Security of Contract: French and English Law Compared' (n 175) 159.

[219] However, it is important to note that there were voices in favour of this type of approach, cf *Solle v Butcher* [1950] 1 KB 671, where the judge considered an equitable relief for mistake; nevertheless this case is not good law anymore, see *The Great Peace* [2002] EWCA Civ 1407.

[220] See eg SAP Madrid núm. 820/2013 de 5 de noviembre (AC 2013/2193).

[221] José Ramón GARCÍA VICENTE, 'Artículo 1266' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9102.

[222] Ibid.

[223] Tribunal Supremo (Sala de lo Civil), Sentencia núm. 113/1994 de 18 de febrero (RJ 1994/1096),

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presented above. However, the required diligence depends also on the other party's behaviour: if the party knows, or should reasonably know that the other party is labouring under mistake and do not warn them, then the courts are more likely to grant relief.[224] Moreover, if the mistake in such case can be assimilated to *dolo* – fraudulent misrepresentation – then it will always be excusable. And it needs to be born in mind that the Spanish law of misrepresentation, contrary to the English system, does not really distinguish between situations of providing false information and omitting relevant information; what is more – taking advantage of the other party's error may be considered *dolo* in itself.[225]

In what refers to misrepresentation where information was omitted,[226] the very nature of the claim for misrepresentation under the English law assumes that a false statement was made, therefore generally speaking non-disclosure cannot amount to misrepresentation.[227] Furthermore, as Sefton-Green observes, misrepresentation is distinct from the non-disclosure, because of the point of time at which the duty arises. The duty to inform requires providing material information – making a statement of importance to the other party before entering a contract. Misrepresentation does not require this initial information or statement to be provided, here the duty arises later – once the statement was made, then it has to be true.[228]

As already mentioned, English law classifies pre-contractual statements of traders as mere puffs, from which no legal consequences arise; representations, breach of which amounts to misrepresentation; and finally terms included in the contract

Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 896/1996 de 6 de noviembre (RJ 1996/7912), Fundamentos de Derecho, Segundo; Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 1090/2004 de 12 de noviembre (RJ 2004/6900), Fundamentos de Derecho, Segundo.

224 STS núm. 113/1994 de 18 de febrero (RJ 1994/1096), Fundamentos de Derecho, Tercero.

225 José Ramón GARCÍA VICENTE, 'Artículo 1269' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9126.

226 The law of misrepresentation under English law in particular is of much more relevance for situations where false information was provided to consumers, and it will be analysed in more detail below in Subsection 3.2.3.2 *Consumer induced into the contract through misleading information: defects of consent.*

227 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 3-4.

228 SEFTON-GREEN, 'General Introduction' (n 133) 25.

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between the parties. In what refers to omission of material information, generally it cannot amount to misrepresentation, since the latter is based on the duty not to lie, ie when a representation was made, it has to be true, while the very nature of omission means that no representation whatsoever was made. No statutory remedies will arise for non-disclosure under Misrepresentation Act 1967 – the Act repeats the phrase 'misrepresentation made', making it clear this way that some statement amounting to misrepresentation must be produced.[229]

The false statements that constitute foundation to the claim for misrepresentation can be however made by other means than words. Lord Campbell LC made reference to misrepresentation by conduct in *Walters v Morgan*:

> Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact (...).[230]

Lord Denning in *Curtis v Chemical Cleaning and Dyeing Co.* confirmed:

> In my opinion any behaviour, by words or conduct, is sufficient to be a misrepresentation if it is such as to mislead the other party (...). If the false impression is created knowingly, it is a fraudulent misrepresentation; if it is created unwittingly, it is an innocent misrepresentation (...).[231]

Other actions, not as direct as a nod or a wink, may therefore also amount to misrepresentation. For instance actions of a captain intending to sell a ship (which was in poor condition with worm-eaten bottom), who 'took her from the ways on which she lay, and where the state of her bottom and her keel might easily have been discovered, and kept her constantly afloat, so that these defects were completely concealed by the water.'[232]

[229] PEEL (n 197) 493.

[230] (1861) 3 De GF & J 718 at 724-725.

[231] [1951] 1 KB 805 at 808-809.

[232] *Schneider and Another v Heath* (1813) 170 ER 1462 at 507-508, cited by CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 34, see also other case law cited there in footnote 12.

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Moreover, provision of information that was misleadingly incomplete may also be treated as misrepresentation.[233] For example, in *Dimmock v Hallett*,[234] a farm put up for sale was described with a reference to a rent that was paid by a person lately occupying the property. However, what the advertisement failed to mention was the fact that this late occupier was out of possession for more than a year and in the meantime no one wanted to rent the farm for much less. Therefore the advertisement created an impression that the land was worth much more than it really was at the market as it was then.

This is already very close to omission; the situations where information was completely omitted and this omission induced a consumer to enter a contract with a trader can be hard to delimit from those where part of the material information was omitted; the latter cases can possibly constitute basis for a successful claim for misrepresentation. It is pointed out that the Misrepresentation Act 1967 will turn out to be applicable in the situations where misrepresentation was made by conduct or through misleading omission.[235]

European soft law instruments, as for example DCFR, treat omission of material information in a way more similar to Spanish law. In its article II.-7:205 DCFR provides that a party may avoid a contract when induced to contract by the other party through fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. According to European soft law instrument, non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake. Various circumstances can assist us in determining whether good faith and fair dealing required a party to disclose particular information.[236]

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[233] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 39 talks about partial omission in the context of statements that are true, but in the meantime misleading; see also BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 35.

[234] (1866-67) LR 2 Ch App 21.

[235] Peel (n 202) 494.

[236] Art II.–7:205.(3) DCFR:
(a) whether the party had special expertise;
(b) the cost to the party of acquiring the relevant information;
(c) whether the other party could reasonably acquire the information by other means; and
(d) the apparent importance of the information to the other party.

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Such solution is particularly similar to that of the Spanish system. Although the *Código civil* in its art 1269 relative to the *dolo* refers only to words and 'insidious machinations', which could be understood as active deception tactics at face value, but again the courts' decisions and academic writings interpret the provision in such a manner that it includes as well *dolo reticente*, also called negative fraud – fraud through omission. There are at least two instances of fraud through omission, argues García Vicente: when the fraudulent party keeps silent on the matters relevant to the correct formation of the contracting will;[237] and when the fraudulent party takes advantage of the mistake made by the other party.[238] The latter is in contrast with English law, where the general rule states that a party is under no duty to disclose the fact that a mistake was made, even if they know that the mistaken party would have never entered the contract if it had not been for their misapprehension.[239] According to Blackburn J famous statement in *Smith v Hughes*: '(...) for, whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.'[240] If the consumer directly asks the trader a question concerning the issue and the trader answers, then untrue answer will amount to misrepresentation. But if the consumer does not ask any particular question or the question asked is not formulated precisely enough[241] – no liability on the part of the trader will arise under English law. Cockburn CJ in *Smith v Hughes* states: 'If, indeed, the buyer, instead of acting on his own opinion, had asked the question whether the oats were old or new, or had said anything which intimated his understanding that the seller was

[237] See eg Tribunal Supremo (Sala de lo Civil), Sentencia de 28 noviembre de 1989 (RJ 1989/7914), Fundamentos de Derecho, Cuarto; Tribunal Supremo (Sala de lo Civil), Sentencia de 27 septiembre de 1990 (RJ 1990/6908), Fundamentos de Derecho, Tercero.

[238] GARCÍA VICENTE, 'Artículo 1269' (n 225) 9126; the latter instance may constitute a probable contractual scenario linked to the information omission, in which a party is contracting under mistake as to facts which was not induced by the other party, but that other party knows about it.

[239] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 2.

[240] At 607.

[241] The *caveat emptor* rule assumes that the buyer will ask right questions, see *Sykes v Taylor-Rose* [2004] EWCA Civ 299.

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selling the oats as old oats, the case would have been wholly different (...).'[242] But the buyer did not ask – 'The parties are expected to look after their own interests in all circumstances' as Beale puts it.[243]

It does not mean however that the Spanish law concept of fraud knows no restrictions. There is a certain limit as to what can be considered fraud: not only the information omission needs to take place, but it also has to be insidious, contrary to good faith.[244] In numerous cases the courts confirmed that a negative fraud can result from an omissive breach of an information duty originating in legislation, objective goods faith or custom,[245] among other situations, also linked to the disclosure duty, albeit in a more indirect manner.[246]

Another interesting difference between English and Spanish systems – which after a closer look does not seem to be particularly striking, as simply similar results are achieved through different concepts – is the English law concept of misrepresentation, which includes not only fraud that can be compared to the Spanish *dolo*, but also negligent and innocent misrepresentation. In this study I often refer to misrepresentation and *dolo* together, although the concept of misrepresentation is much broader. However, it does not mean that Spanish law provides for no consequences in situations where a party was induced to enter a contract based on a mistaken belief provoked by the other party's behaviour, negligent or even innocent. In such cases it is on the basis of the law of mistake (*error*) that a relief may be granted. A provoked mistake leads on the one hand to lowering of the standard of diligence, as the mistaken party is not bound to distrust the other party; on the other in such

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242 At 605.

243 BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) Preface v.

244 See eg STS de 28 noviembre de 1989 (RJ 1989/7914), Fundamentos de Derecho, Cuarto.

245 Tribunal Supremo (Sala de lo Civil), Sentencia de 1 octubre de 1986 (RJ 1986/5229), Fundamentos de Derecho, 3; Tribunal Supremo (Sala de lo Civil), Sentencia de 27 marzo de 1989 (RJ 1989/2201), Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 1/2005 de 17 de enero (RJ 2005/517), Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 289/2009 de 5 de mayo (RJ 2009/2907), Fundamentos de Derecho, Quinto.

246 Such as not resolving ambiguities, eg Tribunal Supremo (Sala de lo Civil), Sentencia de 26 octubre de 1981 (RJ 1981/4001); or concealing some data, eg Tribunal Supremo (Sala de lo Civil), Sentencia de 9 septiembre de 1985 (RJ 1985/4257).

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situation all the conditions necessary for the fraud to occur might not be met, eg because the actions of the non-mistaken party were not insidious.[247]

The other relevant vitiating factor – or defect of consent – is mistake (*error*). The law of mistake covers a wide range of different factual situations,[248] therefore first we need to delimit the scope of mistake rules relevant to this study.[249] All types of operative mistakes will render a contract void under English law,[250] whilst Spanish law treats the contract vitiated through one party's mistake as voidable.[251]

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[247] STS núm. 113/1994 de 18 de febrero (RJ 1994/1096), Fundamentos de Derecho, Tercero.

[248] The terminology used by both judges and legal writers also varies especially in what refers to the English law, which makes classifications even more complex, see CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 582ff.

[249] The cases of mistake in English law are classified as either 'common mistake' (also called 'mutual', eg in *Bell v Lever Bros* Ltd [1932] AC 161) or 'shared' mistake (eg in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407). Following CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) I will use the term 'common mistake'. The common mistake nullifies consent of the parties, whilst unilateral mistake negatives it – see PEEL (n 197) 346, as Lord Atkin observed: 'If mistake operates at all it operates so as to negative or in some cases to nullify consent.' (*Bell v Lever Bros Ltd* at 217). CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 585 explains that when mistake negatives consent, it prevents parties from reaching any agreement, so in reality no contract was made between them. If mistake nullifies consent, it means that the agreement was reached by the parties, but on a basis of such a serious mistake that the parties should not be bound by it. In the English common mistake cases parties both operate under a fundamentally mistaken assumption and as explained above the contract made under such share mistake is void at law. However, the doctrine of common mistake applies only if the contract was impossible (see *Great Peace Shipping Ltd* at 76). This is similar to Spanish doctrine of impossibility (see eg Jordi RIBOT IGUALADA, 'La Imposibilidad Originaria del Objeto Contractual' (2015) 2 Revista de Derecho Civil 1) and will not be applicable to cases of breach of information duties, unless both trader and consumer made the same fundamental mistake as to the contract they formed. Nevertheless, the typical situation of breach of information duties will be the one where the trader, knowingly or not, misinforms the consumer or fails to provide relevant information, which will rest outside the scope of application of the common mistake doctrine.

[250] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 585.

[251] GARCÍA VICENTE, 'Artículo 1266' (n 221) 9102, although with some reservations relative to the distinction between two types of mistakes that Spanish legal writers distinguish — see ibid 9103-9104; DIEZ-PICAZO (n 198) 210-211. The mistake of the party may be relative to the external representation of their contracting will or to the very internal contracting will itself. The former type of mistake is not covered by the provisions of the *Código civil*, and it consists in a discrepancy between the expressed will and the real will of the party, and theoretically in such cases there should be no consent and therefore no contract is really formed, ie the contract is void or even non-existent (Tribunal Supremo (Sala de lo Civil), Sentencia núm. 1134/1999 de 22 de diciembre (RJ 1999/9369), Fundamentos de Derecho, Cuarto). Nevertheless, from a practical point of view,

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A unilateral mistake on the side of the consumer is the one relevant in the hypothesis of breach of information duties.[252] In the cases of unilateral mistake, the parties operate at cross-purposes and in reality they never reach an agreement, so technically no contract is formed between them. Therefore many English contract law authors treat unilateral mistake as a matter of contract formation and analyse it together with the rules on offer and acceptance.[253] An actionable unilateral mistake maybe as to the person, as to the subject-matter of the contract, as to the terms of the contract or as to law.[254]

From the point of view of this study the most relevant are mistakes as to the subject-matter; but other types of mistakes should also be mentioned.[255]

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as it is difficult to distinguish between the two types of mistakes in practice, it is generally accepted that mistake (for which all the necessary conditions are met) makes a contract voidable and not void.

252 It is the trader who has the information but does not share it with the consumer, the consumer is therefore labouring under mistake due to the lack of information.

253 See eg MCKENDRICK, *Contract law* (n 139), who analyses unilateral mistake in Part I of his book, dealing with the formation and scope of the contract, whilst the common mistake rules are examined in Part III under the 'Policing the contract' heading, together with frustration doctrine, after a duty to disclose and misrepresentation.

254 PEEL (n 197) 367ff; CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 584ff.

255 In what refers to mistakes as to the person, it can be noted that they are of limited or no relevance in the case of breach of information duties. The Spanish law recognises mistakes to as person in the art 1266 *Código civil* and states that they are only actionable when it is the identity of the person that has been the main motive for entering into the contract. In the context of the B2C electronic contracts, being the focus of the present study, such a mistake is of limited relevance, and will mainly occur in the contracts for the supply of services and provision of false information by a trader pretending to be someone else. Out of various possible mistakes as to the person under the English law only mistakes of identity are actionable – 'fundamental' – and contracts formed under such mistakes are void *ab inicio*. Those cases are typically ones of fraudulent buyers pretending to be someone else (see eg *Cundy v Lindsay* (1878) 3 App Cas 459; *Phillips v Brooks Ltd* [1919] 2 KB 243; *Ingram v Little* [1961] 1 QB 31). Litigation in those cases usually concerns the title to the goods – the rogue buyer who did not pay for the purchase sells the goods to a third party (a sub-buyer) and the effect of that will depend on the misapprehension of the seller in the first contract. If an actionable mistake can be established, this contract is void, and therefore no title to goods had passed. On the other hand, if it was mere misrepresentation, the contract is only voidable, and if the sub-buyer was in good faith, they would be a new owner (PEEL (n 197) 368). In the context of the present study, however, the opposite situation would be of more interest to us – where a trader breaches his information duties, fraudulently providing the consumer with false information relative to trader's identity. Such a situation nevertheless requires provision of false information. One can also imagine a situation when consumer is mistaken as to the identity of the

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Both under English and Spanish law, various conditions have to be met, so that a mistake as to the subject matter of the contract could be actionable.[256] Both systems require the mistake to be fundamental,[257] or essential,[258] meaning serious enough to make the whole transaction deprived of sense for the mistaken party. English law considers mistake to be fundamental 'if one party intends to deal with one thing, and the other with a different one.'[259] The Spanish concept of an essential mistake denotes a situation in which the subject-matter of the contract lacks some attributes associated with it, and particularly attributes which were fundamental to the mistaken party's motives and the contract's purpose.[260] Those requirements are similar in both systems. In addition, under English law mistake must be 'operative', characterised by the fact that one party knows about the other party's mistake, or negligently induced by the other party. Also it is noted that 'there may be such ambiguity in the circumstances that a reasonable person could not draw any relevant inference from them at all.'[261]

Spanish law requires the mistake to be excusable – not attributable to the mistaken party and not avoidable through an average diligence (in accordance with the expertise of the individuals involved and requirements of good faith); in this manner the system will not grant protection to mistaken parties that do not deserve protection because of their negligent behaviour. Finally, both systems recognise as actionable only those mistakes that constituted the factor that induced the contract.[262]

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trader, because the latter omitted information as to their identity. If the trader is fraudulent and takes consumer's money without sending them the good, various possible actions will arise on the side of the consumer, but claiming mistake as to identity will not make much sense to them – no title to goods is involved and the breach of their information rights is consumer's least concern in this scenario.

[256] PEEL (n 197) 369ff; DIEZ-PICAZO (n 198) 213.

[257] Guenter TREITEL, *The Law of Contract* (11th edn, Sweet & Maxwell 2003) 298.

[258] See GARCÍA VICENTE, 'Artículo 1266' (n 221) 9105; DIEZ-PICAZO (n 198) 213-215.

[259] TREITEL (n 257) 303.

[260] Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 829/2006 de 17 de julio (RJ 2006/6379), Fundamentos de Derecho, Primero.

[261] TREITEL (n 257) 307-309.

[262] TREITEL (n 257) 298; art 1266 *Código civil* – see GARCÍA VICENTE, 'Artículo 1266' (n 221) 9102.

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Unilateral mistake results in parties' consent being negatived, as parties intend to deal with different things, ie there is no real agreement between the parties as to the subject-matter of the contract.[263] It is worth noting, however, that mistake as to the quality, unless the quality is a fundamental one by which the thing is identified, will not negative consent under English law,[264] whilst the Spanish system will take into consideration the concrete purpose pursued by the mistaken party in the contract – if the mistake as to the quality prevents the party from achieving the purpose, it may be actionable.[265]

The unilateral mistake as to the facts should be distinguished from that as to the terms of the contract, which occurs when parties are thinking they entered a contract, but on different terms.[266] Under English law, mistake as to terms need not to be fundamental in order to negative consent.[267] According to the classic case of *Smith v Hughes*, the difference between contracting under mistake as to terms and as to facts (quality of the subject-matter) is: '(...) the same as that between buying a horse believed to be sound, and buying one believed to be warranted sound.'[268] The proposition in law is that mere belief as to the quality held by one party is not enough to grant a relief if it is mistaken, however if the mistaken party believes that a contractual promise, a warranty, was made as to the quality – then their mistake might be relevant. It appears that the reason for this distinction that originates from the *Smith v Hughes* case, is that the seller is bound by the warranty, if he behaves so as to induce the buyer reasonably to believe to be contracting on the specific terms.[269]

When the duty to inform becomes a term of the B2C contract, its breach may

[263] *Falck v Williams* [1900] AC 176, *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564.

[264] *Smith v Hughes* [1871] LR 6 QB 597, for more on quality of the thing being fundamental (or not) see PEEL (n 197) 358ff.

[265] DIEZ-PICAZO (n 198) 216-217.

[266] See eg *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] AC 741 or *Felthouse v Bindley* (1862) 11 CB (NS) 869.

[267] PEEL (n 197) 376.

[268] At 608.

[269] PEEL (n 197) 381.

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then theoretically result in consumer's unilateral mistake as to terms.[270] In what refers nevertheless to the breach of information duties in consumer contracts mistakes as to the terms of the contract are of limited relevance, because of the statutory remedies established in consumer contracts and relative to the guarantees in consumer sales law.[271] The Spanish doctrine of mistake is relative mainly to mistakes as to some facts that found the party's transactional decision; a mistake as to contract terms is not distinguished from the factual mistakes.

Also mistakes as to law should be mentioned. The DCFR in its art II.-7:201 treats it the same as mistake of fact.[272] Traditionally, both Spanish and English law distinguished the two concepts and denied actionability to mistakes of law.[273] However, nowadays both systems regard mistakes as to law as identical to mistakes as to facts, requiring the same conditions in order to allow the claim for mistake.[274] In consumer contracts mistakes of law may be relevant: consumers not aware of their rights or duties may enter into contracts believing the law to be different. Nevertheless, there are factors that makes claims in mistake of law difficult to succeed. Under Spanish law it is the requirement of excusability: the law is usually known and one employing average diligence should be able to discover its current state.[275]

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[270] It will also be applicable in 'reversed' situations, where it is the consumer who tries to snap up an offer mistakenly put on the market, see eg *Hartog v Colin & Shields* [1939] 3 All ER 566 or *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502.

[271] See Subsection 3.2.2.1 *Breach of an implied term and contractual liability* above.

[272] Art II.–7:201: Mistake: '(...) A party may avoid a contract for mistake of fact or law existing when the contract was concluded (...).'

[273] The Spanish legal writers would say, basing their argument on the art 6.1 *Código civil*, that not knowing the law does not allow to not follow its rules, see: DIEZ-PICAZO (n 198) 211-212. Under English law, the traditional rule stated that payments made under mistake of law were not recoverable and the mistake of law did not make contract void, see: CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 57-58.

[274] DIEZ-PICAZO (n 198) 212 points out that the traditional argument was wrong: the mistake as to the law is not relevant for situations where one does not follow the law and tries to excuse their breach of the rules, it is relevant when a party tries to avoid a contract they entered into on a mistaken belief regarding a rule of law; see also Tribunal Supremo (Sala de lo Civil), Sentencia de 7 julio de 1981 (RJ 1981/3052); in what refers to the English law a relatively recent decision in *Kleinwort Benson (KB) v Malaysia Mining Corporation BHD (MMC BHD)* [1989] 1 WLR 379 disregarded the traditional standpoint and there is no longer a mistake of law rule in contract, see CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 57-58.

[275] STS de 7 julio de 1981 (RJ 1981/3052).

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In what refers to the English system, the condition of mistake being fundamental might also not be easy to meet. Omission of the information about the right of withdrawal could be an example of a possible mistake as to law: a consumer enters a contract not aware of their right. As we know, the specific legislation provides a statutory remedy to such omission, which is the withdrawal period extension.[276] Is the consumer however able to claim contract avoidance (or being void) for mistake instead of the specific remedy, for instance after the 12 months provided for by the legislation have passed? It will be at least difficult if not impossible, for the right to withdraw would need to constitute the main reason for which the consumer entered into the contract.

Mistakes in general, even if fundamental and inducing the contract, are rarely operative under English law, which stems from the objective principle, brought about by the need of certainty and security in transactions. Common law traditions are primarily concerned with the reliance of contracting parties.[277] Under English law, parties are bound by the contracts, irrespective of their real intentions, if a reasonable man would understand their conduct as an agreement to the other party's terms.[278] The limited cases were mistakes are operative are where one party knew about the other party's mistake,[279] but still all the other conditions have to be met – the mistake being fundamental and concerning the subject-matter of the contract – so that the party could be granted a relief. Under Spanish law, mistakes are also extraordinary, exceptional occurrences: the law balances interests of the two contracting parties, distributing the risk resulting from the defective information, protecting on the one hand the mistaken party's consent, but on the other the reliance of their counterpart.[280] More emphasis is put however on the mistaken party than under the English law, and Spanish courts are actually likely to grant relief in the basis of mistake (*error*) in situations of information omission in consumer

[276] Reg 31 Consumer Contracts Regulations 2013 and art 105 TRLDCU.

[277] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 79.

[278] PEEL (n 197) 1.

[279] TREITEL (n 257) 307-309.

[280] DIEZ-PICAZO (n 198) 208-209.

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contracts.[281]

In what refers to standard form electronic contracts, where the list of information requirements is there, ready to be provided, the rules on mistake might not seem relevant at first glance in the English context. English law requires some minimal personal contact or exchange between the parties, so that the mistake of one party could be appreciated by the other, and therefore be 'operative' – a requirement not present in the Spanish system. However, this contact, even in B2C contracts, is not unusual, hence for instance the rules established in CRA 2015 or TRLDCU concerning goods' fitness for a particular purpose.[282] If the purpose for which consumer is buying goods is known to the trader, the seller will have to inform the buyer if the goods are not fit for this purpose. It is effectively a duty to advise, going beyond mere information provision. The specific rule guarantees that the goods will be adequate to consumer's needs, if the trader knows about them – for instance if the consumer e-mailed the trader before entering the contract. Nevertheless, any other mistaken belief held by the consumer, not concerning the purpose of the goods, even if known to the trader, will not benefit from the protection of the specific rules from the CRA 2015 or TRLDCU. Here, general rules will apply.

Beale points out that various legal systems adopt different approaches to mistake, of which he distinguishes three main trends:

> (...)
> (1) to prioritize the protection of informed consent as an element of autonomy of the will, so that a party who was not fully informed about a vital matter may escape from the resulting agreement;
> (2) to take a similar approach to autonomy of the will, but to balance against it the interest of the other party in the form of legitimate reliance on the contract; or
> (3) to rely on general clauses that raise questions of both substantive and procedural fairness or even purely substantive question, whether the resulting exchange was equal.[283]

In his study, Beale identifies various legal systems, which are not the focus of

281 See eg SAP Madrid núm. 820/2013 de 5 de noviembre (AC 2013/2193).

282 See Section 3.1 *Specific remedies available to consumers* above.

283 BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 42.

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this study however, that follow these models: approach (1) is represented by French law, approach (2) by German and Dutch law and finally approach (3) by the Scandinavian law. Beale's study is focused on researching potential models for reform of English law, therefore he does not include English approach in this division. He does not deal with Spanish law either, however I am inclined to identify the Spanish system with the (2) approach, as I argued above. As for the English system, it is primarily concerned with security of transactions,[284] parties consent is free, but they themselves have to make sure it is informed as well and ask the other party the right questions – *caveat emptor*. Under English law mistake which was not induced by the other party, even if they knew about their contracting partner labouring under mistake, is not actionable.

The contrast between English law and European soft law instruments, such as PECL and DCFR, is stark. For instance the DCFR establishes in its article II.-7:201 that a party may avoid a contract for mistake if the other party:

> (...)
> (ii) caused the contract to be concluded in mistake by leaving the mistaken party in error, contrary to good faith and fair dealing, when the other party knew or could reasonably be expected to have known of the mistake;
> (iii) caused the contract to be concluded in mistake by failing to comply with a pre-contractual information duty or a duty to make available a means of correcting input errors; (...)

Good faith and fair dealing principle influences the approach to the parties' behaviour – if the trader does not correct consumer's mistake, the latter will be entitled to avoid the contract, according to the DCFR. Moreover, non-disclosure through failure to comply with information duties that causes the consumer's mistake and results in contract being concluded in mistake, will have the same outcome in the European soft law.

Civil law traditions, including Spanish law, provide relief for the mistaken party, even if the mistake was not known to the other party. On the other hand, European

[284] As pointed out in Chapter 1 Subsection 1.2.2.2 *General duty to disclose and its breach in national private law* where the lack of general duty to disclose in English law was discussed.

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soft law instruments, such as PECL and DCFR, adopt a middle position between English and civil law rules: the relief for unilateral mistake is granted only where the non-mistaken party knew or should have known about the mistake.[285]

Under English law, as we could see, private redress for mistake is very limited. In those cases, however, where it succeeds the main remedy is declaring the contract void by the court.[286] Usually, the mistaken party, or sometimes a third party, wants to declare the contract non-existent. Sometimes, rectification in equity is also available,[287] when party asks for the contract to be binding, but on the terms they (mistakenly) understood. Generally speaking damages cannot be awarded on the basis of mistake. However, if the claimant can establish that the other party committed a tort of deceit or negligence, then in addition to declaring the contract void the court may award them damages.[288] Under Spanish law, the contract in which one party's consent was vitiated by mistake may be avoided. Moreover, art 1266 of the *Código civil* also allows for correction, rectification, of simple mistakes in calculation.[289]

As Beale puts it: '(...) conduct which on the continent is regarded as fraud is regarded in England as good business.'[290] It is pointed out that English approach, where one party can take advantage of other party's mistake – when they knew about their counterpart contracting under mistake, however they refrained from rectifying it – is often unjust and inefficient.[291] Law turning a blind eye to the possibility of taking advantage of other party's fundamental mistake is also judged immoral. Cockburn CJ himself affirms in *Smith v Hughes*:

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[285] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 72.

[286] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 592ff.

[287] Rectification of contract is an equitable remedy available only in the case of written contracts, see ibid 648ff.

[288] Ibid 595ff. Showing that the contract is void will exclude damages for breach of contract, as there was no contract it could not have been breached, and for misrepresentation, under s 2(1) of the Misrepresentation Act 1967, because the Act applies where the party 'has entered into a contract', which again is impossible since it was declared void.

[289] DIEZ-PICAZO (n 198) 216-217.

[290] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 73.

[291] Hence the propositions to reform English law of mistake, at least in some aspects, as the cited work of BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176).

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> The case put of the purchase of an estate, in which there is a mine under the surface, but the fact is unknown to the seller, is one in which a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the seller; but there can be no doubt that the contract for the sale of the estate would be binding.[292]

Dura lex sed lex, the law is harsh, but it is the law, one would like to say.[293] And it has been the law for centuries, however some changes start to occur, possibly due to the influence of the European Union law and specific sectoral legislation on consumer contracts as well. Moreover, in many situations in practice there have appeared some particular standardized mechanisms that ensure more efficient outcome.[294] The development in consumer law may have influenced English legal system, promoting protection of weaker parties, but the traditional common law, stemming from commercial litigation, 'remains stoutly individualistic when compared to many of its continental counterparts'.[295]

3.2.3 Provision of incorrect information

When the pre-contractual information received relative to the goods or service proved wrong, a consumer will have various remedies, depending on how that information is classified. Discussing the solutions adopted in English law, Woodroffe and Lowe propose six possibilities (of which some may overlap): mere puff, misrepresentation, negligent misstatement, contractual term, collateral warranty and description of goods.[296] Advertising puffs do not entail any legal consequences for

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[292] At 604.

[293] The ideological message sent by the English law is, according to BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 112, 'look out for yourself, don't expect the court to come to the rescue'.

[294] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 26; see also eg Omri BEN-SHAHAR and Eric A POSNER, 'The Right to Withdraw in Contract Law' [2010] John M. Olin Law and Economics Working Paper No. 514 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569753> accessed 15 May 2016 who talk about such mechanisms in practice in relation to the right of withdrawal in the U.S.

[295] BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 106.

[296] Geoffrey WOODROFFE and Robert LOWE, *Woodroffe & Lowe's Consumer Law and Practice* (9th edn, Sweet & Maxwell 2013) 29ff.

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the trader, misrepresentation may result in consumer's right to rescind the contract and/or damages. Breach of contractual term also gives rise to damages and consumer may sometimes additionally treat the contract as at an end. The collateral warranty is given by a third party, eg manufacturer, with whom consumer has no other contractual relationship. Description of goods can usually be classified as contractual term, according to provisions of CRA 2015 discussed above in Section 3.1 *Specific remedies available to consumers*. The law of misrepresentation can overlap with breach of contract, when pre-contractual statements fulfil the conditions necessary to be treated as both representations and contract terms.[297] Furthermore, misrepresentation can naturally overlap with a claim based on mistake – misrepresentation can be described as a qualified type of mistake induced by the other party. Finally, contractual misrepresentation is in a very close relationship with tort law – torts of deceit and negligence are present in many instances of misrepresentation.[298]

Spanish general law also provides various possible classifications for provision of false information: art 61.2 of the TRLDCU allows to consider false information (including advertising) as contract terms; art 97.5 of the TRLDCU establishes that all the pre-contractual information be treated as included in the contract; rules of general law on mistake and fraud will also apply to the information provided prior to the contract formation. All these and some other possible legal consequences of misinformation based on general private law are discussed below.

3.2.3.1 When misinformation amounts to breach of term and remedies resulting from contractual liability

Some terms of contract are implied by legislation, as discussed above,[299] which is especially relevant when important pre-contractual information was omitted by a trader. In what refers to situations where consumer was provided with some false information, the scope of potential action in contract can be broader than in cases of omission. The falsehood of pre-contractual statements made by a trader – the

[297] Ibid.

[298] GILIKER, 'Formation of Contract and Pre-Contractual Information from an English Perspective' (n 1) 313-314.

[299] See Subsection 3.2.2.1 *Breach of an implied term and contractual liability* above.

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representations they made – can amount to breach of contract, because of a contractual term, which can be also implied, that was breached by the provision of false information. Furthermore, the statements made, including advertising, may amount to contractual promises, become express terms in themselves, and therefore their breach will also be treated as breach of contract. Finally, sometimes the aggrieved party may be able to claim the existence of a contractual duty of care on the side of the defendant, when they 'gave a contractual undertaking that [they] were exercising reasonable care and skill in making [their] statement (...).'[300]

Both English and Spanish law contain in their consumer legislation provisions incorporating pre-contractual information in distance contracts into the contract content: art 97.5 of the TRLDCU and ss 11(4) and 12(2) of the CRA 2015, which is a consequence of transposition of art 6.5 of the Directive on consumer rights.[301] The Directive, which is supposed to be without prejudice to the national contract law, does not attribute any status to the information items, leaving it therefore to the Member States' national systems to decide what consequences (if any) the breach of information included in the contract will have.[302]

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300 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 450.

301 Nevertheless, the Directive in its recital (14) states: 'This Directive should not affect national law in the area of contract law for contract law aspects that are not regulated by this Directive. Therefore, this Directive should be without prejudice to national law regulating for instance the conclusion or the validity of a contract (for instance in the case of lack of consent) (...).' NORDHAUSEN SCHOLES (n 116) 223 notes that such a limitation is especially questionable in the context of obligatory inclusion of the information obligations as an integral part of the contract.

302 Cf interesting observations of NORDHAUSEN SCHOLES (n 116) 223 who analyses the potential inclusion of information duties into the contract as *essentialia negotii* in the context of the Directive on consumer rights' proposal (the analysed provision is the same in the finally adopted Directive): 'The statement that the information obligations form an integral part of the contract is a welcome clarification (and in some cases widening) of the status of the information. But does this go far enough? The definition of "an integral part of the contract" remains unclear. It is not clear, and will differ in the national laws of the Member States, which status the information will assume in the contract. It can be assumed that generally the information will become part of the contract terms. But what status will the information be given within the contract terms? Is the information *essentialia negotii* and therefore hinders the valid formation of a contract? This would be a possible, albeit rather strict, interpretation. It would mean that a contract may not be validly concluded at all if the information is not given, or not given in the correct way or at the correct time. It is more likely, especially in connection with the requirement of national contract law remedies, that this will mean that they are not *essentialia negotii* (unless they are included in the *essentialia* under national law anyway), so generally the contract will be valid. Otherwise there would be no room for the required contract law remedies there would simply be no contract at all (which may be seen

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The potential for contractual liability of the trader who breaches information duties under Spanish law resides mainly in arts 61.2 and 97.5 of the TRLDCU. The former provision is more general, applicable to all sorts of consumer contracts, the latter is relative to distance contracts. Art 61.2 states that the content of promotional offers or advertising, special characteristics of the good or service offered and legal or economic conditions and guarantees offered are enforceable by consumers, even if not expressly included in the contract formed between the parties or in the contract confirmation document. Picatoste Bobillo points to various differences between advertising and information, such as different target group (indefinite consumers or a particular contracting consumer) and different purpose (publicizing with the aim of selling or providing factual precise information required by the law); however concludes noting that advertising can also fulfil a function of providing consumers with objective information.[303] Art 61.2 of the TRLDCU is considered to be referring to such type of advertising.[304] Completing the contract contents with what was advertised results from the objective requirements of the security of transactions and reliance of the parties in good faith.[305] Art 61.2 of the TRLDCU, and before that art 8 of the previous Act,[306] has been interpreted widely by the courts, who understand it applies to all different pieces of information provided to consumers prior to contract conclusion.[307] From such a perspective art 97.5 of the TRLDCU

as a contract law remedy as well). The interpretation of the information obligations as *essentialia negotii* (and therefore no valid contract in case of non-fulfilment) could be harsh on the consumer as well, who relied on the contract and may want to affirm the contract regardless of the information deficit. In addition, the proposed Directive states explicitly that the contract law of the Member States shall remain unaffected. It is questionable whether the definition of information obligations as an integral part of the contract is consistent with this limitation. The remedies, however, are not harmonised and can vary significantly between Member States.'

[303] PICATOSTE BOBILLO (n 206) 403.

[304] Ibid.

[305] Sergio CÁMARA LAPUENTE, 'Artículo 61: Comentario' in Sergio Cámara Lapuente (ed), *Comentarios a las Normas de Protección de los Consumidores: Texto Refundido (RDL 1/2007) y Otras Leyes y Reglamentos Vigentes en España y en la Unión Europea* (Editorial Constitución y Leyes COLEX 2011) 516-517.

[306] Ley 26/1984, de 19 de julio, General para la Defensa de los Consumidores y Usuarios. Boletín Oficial del Estado, de 24 de julio de 1984, núm. 176, p. 21686 (repealed).

[307] Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 910/2004 de 29 de septiembre (RJ 2004/5688), Fundamentos de Derecho, Segundo; Audiencia Provincial de Málaga (Sección 5ª),

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seems redundant, as it applies to pre-contractual information received in a distance contract. It was introduced in the TRLDCU through a recent reform implementing the Directive on consumer rights[308] and it seems that its scope is very similar to that of art 61.2. At least now, with art 97.5 it is very clear that all the information items provided in electronic contracts are to be included as terms of contract.

The consequences of breach of information duties through provision of false information out of arts 61.2 and 97.5 of the TRLDCU in consumer contracts are available within two different regimes: the specific scheme of remedies for the lack of conformity of goods with the contract and the general contract law remedies.[309] As already discussed in Subsection 3.2.1 *Overview of the analysis of the general private law remedies* above although the TRLDCU does not exclude the application of general contract law remedies for breach when specific remedies for the lack of conformity are available, it seems reasonable to rule out the availability of at least contract rescission for breach in such cases.[310] Nevertheless, and contrary to the English law scheme of remedies out of the CRA 2015, under the Spanish TRLDCU only information relative to the main characteristics of products being subject-matter of the contract is protected through specific remedies. The CRA 2015 contains a provision of s 12(2) that in connection with the s 19(5) establishes specific remedies also for provision of any other (than about the main characteristics of goods)[311] false information in distance contracts; there is no such provision in Spanish law. Therefore, general law remedies for breach of contract, rescission for breach included, will be of a much more relevance to consumer contracts in Spain than under English

Sentencia núm. 599/2008 de 30 de octubre (JUR 2009/63790), Fundamentos de Derecho, Tercero; Audiencia Provincial de Sevilla (Sección 5ª), Sentencia de 24 julio de 2003, (JUR 2003/220935), Fundamentos de Derecho, Tercero; Audiencia Provincial de Ourense (Sección 2ª), Sentencia de 10 julio de 2001 (AC 2001/1294), Fundamentos Jurídicos, Segundo.

[308] Ley 3/2014, de 27 de marzo.

[309] CÁMARA LAPUENTE, 'Artículo 61: Comentario' (n 305) 515.

[310] As the specific scheme of remedies for non-conformity introduces a strict hierarchy of remedies, in which the remedy of contract rescission for breach is of secondary nature and cannot be exercised without prior exercise of primary remedies of repair or replacement, it would therefore go against the logic of the scheme of remedies to allow claiming general law remedies including contract rescission for breach in such cases where remedies for the lack of conformity are available.

[311] Out of Schedule 2 to the Consumer Contracts Regulations 2013.

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law.

The main remedies of general contract law for breach of contract in Spanish law are specific performance, damages and contract rescission for breach.[312] The availability and characteristics of those remedies depend on the behaviour of the party in breach – in our case the trader's, and on the extent of the breach itself.

Specific performance is arguably the main remedy for breach in Spanish law,[313] according to the principle of maintaining the contractual relationship,[314] implying the fulfilment of what is due, ie through carrying out the obligations under the contract or for example repairing or substituting the faulty product subject-matter.[315] Damages are probably the most common remedy for breach of contract;[316] the measure of damages differs according to various factors. Contract measure of damages (*interés positivo*) intends at putting the aggrieved party in a position they would be, had the contract been performed correctly.[317] The compensation in damages is limited by the art 1107 *Código civil* to the consequences of breach which were foreseeable at the moment the contract was formed and are the direct consequence of the breach of contract.[318] Nevertheless, if the trader's breach is premeditated, voluntary, conscious,[319] then according to art 1107 para II of the *Código civil* the

[312] Nevertheless, Spanish law is said to be lacking a coherent regulation of breach of contract in the current version of the *Código Civil*, the *Propuesta de Anteproyecto de Ley de Modernización del Derecho de Obligaciones y Contratos* opts for the articulate concept of breach, similar to that of the CISG, see Luis DÍEZ-PICAZO, 'La Propuesta de Modernización del Derecho de Obligaciones y Contratos (una Presentación)' (2011) 2130 Boletín del Ministerio de Justicia 1, 6.

[313] See the observations on this point in Chapter 2 Subsection 2.2.3.1 *Main remedies to be considered*; the issue is controversial, see GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 16.

[314] Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 150/2009 de 12 de marzo (RJ 2009/1982), Fundamentos de Derecho, Tercero.

[315] GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 15.

[316] Ibid 19.

[317] Ibid 20; even in situations when damages are combined with a remedy of rescission for breach, see Tribunal Supremo (Sala de lo Civil), Sentencia núm. 833/1999 de 15 de octubre (RJ 1999/7430); Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 325/2005 de 12 de mayo (RJ 2005/6377).

[318] Cf *Hadley v Baxendale* [1854] EWHC Exch J70.

[319] As understood by the Tribunal Supremo (Sala de lo Civil), Sentencia de 21 junio de 1980 (RJ 1980/2726); Tribunal Supremo (Sala de lo Civil), Sentencia de 23 octubre de 1984 (RJ 1984/4972);

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liability in damages of the party in breach is not limited – they are liable for all the damage knowingly resulting from the breach. Moreover, non-material damage may be compensated by the courts with higher probability and wider scope if the party in breach was acting voluntarily.[320]

The remedy of contract rescission for breach is not available for all kinds of breach; Spanish law adopts principles similar to those expressed in the European soft law instruments and CISG.[321] In assessing the extent of breach and if it is fundamental, ie serious enough to allow the court to grant the contract rescission, the court will need to determine whether the breach is definitive, making it impossible to satisfy the contractual interest violated through the breach.[322] The remedy of contract rescission can be combined with damages.[323]

In what refers to English law, the Consumer Contracts Regulations 2013 initially contained a provision of a very similar wording to the art 97.5 of the TRLDCU in reg 13(6), which has however recently been revoked by the Consumer Contracts (Amendment) Regulations 2015,[324] as the provision was considered by the legislator to have been replicated in the CRA 2015.[325] Therefore currently the applicable provisions of the CRA 2015 are ss 11(4) and 12(2) of the CRA 2015. Breach of terms implied by those sections, relative both to information omission and provision of false information, as it is discussed in Section 3.1 *Specific remedies available to consumers*, is subject to specific remedies provided for by the CRA 2015. Nevertheless, s 19(9) of the Act states that it is open to a consumer to claim general law remedies, including those for breach of term, and especially for breach of an express term – particularly relevant in the context of provision of false information – as s 19(9)(c)

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however some authors express the opinion that an intention to harm is also necessary, see GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 10-11.

[320] GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 11.

[321] Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 1180/2008 de 17 de diciembre (RJ 2009/675), Fundamentos de Derecho, Tercero; cf arts 25 and 49 CISG, art 8:103 and 9:301 PECL and III.–3:502 DCFR.

[322] STS núm. 150/2009 de 12 de marzo (RJ 2009/1982), Fundamentos de Derecho, Tercero.

[323] GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 30.

[324] SI 2015/1629.

[325] Explanatory Note to the Consumer Contracts (Amendment) Regulations 2015.

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reads: 'This Chapter does not prevent the consumer seeking other remedies (...) for a breach of a requirement stated in the contract.' The potential availability of general law remedies will then depend on the traditional contract law rules. Nevertheless, there is a notable exclusion introduced in s 19(12) of the CRA 2015: consumers cannot treat the contract as at an end for a breach of term the Act requires to be treated as included in the contract, expect as provided by the Act. It means that the general contract law remedy of termination (rescission) for breach is not available to consumers and they can only treat the contract as at an end through the right to reject as established in the CRA 2015.

English law does not provide for a clear provision similar to art 61.2 of the TRLDCU, and therefore the consequences of various statements made by the trader in the pre-contractual phase, including advertising, need to be looked at. How can a contractual, biding promises be delimited from other statements?

Cartwright observes that in many decisions the word 'warranty' is used, simply meaning 'a contractually binding promise',[326] as Denning LJ explained in *Oscar Chess Ltd v Williams*:

> In saying that he must prove a warranty, I use the word "warranty" in its ordinary English meaning to denote a binding promise. Everyone knows what a man means when he says "I guarantee it" or "I warrant it" or "I give you my word on it". He means that he binds himself to it.[327]

A contractual promise (a warranty) can be relative to the fact that in making their statement, the representor took care, as Lord Denning MR noted:

> Now I would quite agree with Mr. Ross-Munro that it was not a warranty – in this sense – that it did not guarantee that the throughput would be 200,000 gallons. But, nevertheless, it was a forecast made by a party – Esso – who had special knowledge and skill. It was the yardstick (the e.a.c.) by which they measured the worth of a filling station. They knew the facts. They knew the traffic in the town. They knew the throughput of comparable stations. They had much experience and expertise at their

[326] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 427.

[327] *Oscar Chess Ltd v Williams* [1957] 1 WLR 370 at 374.

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> disposal. They were in a much better position than Mr. Mardon to make a forecast. It seems to me that if such a person makes a forecast, intending that the other should act upon it – and he does act upon it, it can well be interpreted as a warranty that the forecast is sound and reliable in the sense that they made it with reasonable care and skill. It is just as if Esso said to Mr. Mardon: "Our forecast of throughput is 200,000 gallons. You can rely upon it as being a sound forecast of what the service station should do. The rent is calculated on that footing." If the forecast turned out to be an unsound forecast such as no person of skill or experience should have made, there is a breach of warranty.[328]

However, the contractual promise it not be presumed by courts. First of all, the aggrieved party will have to be able to show that the parties intended the statement to be incorporated as a term of the contract:[329]

> (...)in respect of the question of the existence of a warranty the Courts have had the advantage of an admirable enunciation of the true principle of law which was made in very early days by Holt C.J. with respect to the contract of sale. He says: 'An affirmation at the time of the sale is a warranty, provided it appear on evidence to be so intended.' So far as decisions are concerned, this has, on the whole, been consistently followed in the Courts of Common Law.[330]

The test of parties' intention is objective, similarly to the general test regarding contract formation.[331] What counts in the eyes of the law is whether the aggrieved party could reasonably believe that the other party was making a binding promise, which is assessed in the circumstances:

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328 *Esso Petroleum Co. Ltd. v Mardon* [1976] QB 801 at 818; in the same case another judge, Shaw LJ confirmed Lord Denning's reasoning, at 832: 'The representations which were admittedly made to Mr. Mardon conveyed and in my view were intended to convey that Esso warranted that information which they had available to them and on which the representations were founded (...).'

329 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 88ff.

330 *Heilbut, Symons & Co. v Buckleton* [1913] AC 30 at 49; The decision which was confirmed to be good law in *Esso Petroleum Co.* at 826: 'In my view, following Lord Moulton in the *Heilbut, Symons* case, at 50, the test is whether on the totality of the evidence the parties intended or must be taken to have intended that the representation was to form part of the basis of the contractual relations between them. *Bisset v. Wilkinson* [1927] AC 177, 180 fits into this scheme.' In *Heilbut, Symons & Co. v Buckleton* it is pointed out that judges sometimes accepted certain representations as warranties (terms of the contract), even though they did not fulfil the test of parties' intention.

331 See above Subsection 3.2.2.2 *Defects of consent where information was not provided.*

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> Lord Moulton made it quite clear that 'The intention of the parties can only be deduced from the totality of the evidence.' The question whether a warranty was intended depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts. If an intelligent bystander would reasonably infer that a warranty was intended, that will suffice.[332]

Advertising can constitute an offer and therefore be contractually binding, just as in Spanish law (ex art 61.2 of the TRLDCU), but only if it is sufficiently clear and a reasonable belief of the aggrieved party in the intention of the other party to be bound by their advertisement can be established.[333]

Secondly, in order to establish incorporation of the representation into the contract the court will look at the seriousness, particular importance of the statement made.[334] Finally, the court will take into consideration other circumstances. In *Andrews v Hopkinson*, a case concerning a contract of hire-purchase of a car, the car dealer said: 'It's a good little bus. I would stake my life on it. You will have no trouble with it.'[335] The court observed:

> I am satisfied (1) applying the principle stated by Holt J. in *Crosse v. Gardner* and *Medina v. Stoughton*, that if the transaction between the plaintiff and defendant had been in law a sale [contrasted with hire-purchase contract actually made], [these] words (...), could properly be held to be words of warranty, i.e., an affirmation made at the time of sale intended to be a warranty; (2) that the words amounted at least to a warranty that the car was in good condition and reasonably safe and fit for use on a public highway; and (3) that the plaintiff acted upon this warranty in the sense that without it he would not have accepted delivery of the car or entered into the hire-purchase agreement.[336]

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332 *Oscar Chess Ltd v Williams* at 375.

333 *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1.

334 *Behn v Burness* (1863) 3 Best and Smith 751 at 759: 'The question on the present charterparty is confined to the statement of a definite fact—the place of the ship at the date of the contract. Now the place of the ship at the date of the contract, where the ship is in foreign parts and is chartered to come to England, may be the only datum on which the charterer can found his calculations of the time of the ship's arriving at the port of load. A statement is more or less important in proportion as the object of the contract more or less depends upon it.'

335 [1957] 1 QB 229 at 230.

336 At 235.

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The third element raised here by McNair J, the fact that the representee acted upon the statement is not a necessary element of claim for breach of contract, as in the claim for misrepresentation discussed below, but nevertheless is a strong guidance indicating to the court that the representor effectively wanted to be bound by the statement – he made it to induce the representee to enter the contract.[337] Another possible factor indicating the intention to incorporate the statement into the contract could be a superior position of the representor, their relatively higher skill or better access to information.[338] Also the fact that the contract was made or recorded in writing can assist court in deciding whether the representations were incorporated into it, however the written contract does not exclude the possible existence of other contractual obligations, not explicitly included in writing.[339] The representor's state of mind is irrelevant for the claim in breach of contract – the statement can be made with or without belief in its truthfulness, the mere fact of a contractual promise being false gives rise to an action for breach of contract.[340] Nevertheless, in the case of a warranty promising duty of care in making the statement, the aggrieved party will have to show that the other party did not exercise care and skill as required by the warranty.[341]

Main remedies for breach of contract through provision of false information will be damages and termination of the contract, nevertheless the possibility to apply for the general law remedy of termination is excluded in many cases by the CRA 2015.[342] The s 19(11)(e) establishes a possibility to treat the contract as at an end – ie terminate – for breach of an express term, nevertheless it results from the provisions of ss 9, 10, 11 and 12 that practically all the pre-contractual information provided by the trader is to be treated as included as terms, thus it is covered by the exclusion out of s 19(12). Nevertheless, there are some possible examples of express terms of

[337] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 435.

[338] Ibid 438ff.

[339] Ibid 446.

[340] Ibid 443, 453; the representor's state of mind will be though of importance when determining remedies available for misrepresentation in tort or under statute, see below Subsection 3.2.3.2 *Consumer induced into the contract through misleading information: defects of consent.*

[341] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 453-454.

[342] See s 19(12) CRA 2015.

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contract, not treated as included by the CRA 2015, which are however included the concept of pre-contractual information. For instance, s 18(1) CRA 2015 entitled 'No other requirement to treat term about quality or fitness as included' reads: 'Except as provided by sections 9, 10, 13 and 16, a contract to supply goods is not to be treated as including any term about the quality of the goods or their fitness for any particular purpose, unless the term is expressly included in the contract.' This is an example of an express term not treated as included by the CRA 2015 and therefore potentially subject to the general contract law remedies for breach, including the remedy of termination for breach.

Contract termination is a 'prospective' remedy, in result of which the contract ceases to exist, but the obligations which have already accrued under the contract can survive the termination.[343] The remedy of termination is only available for breach that was serious enough – breach of a 'condition', which is a term of contract that, usually explicitly, gives the injured party right to terminate the contract,[344] or for so-called 'fundamental breach' – substantial failure to perform the contract.[345] The substantial failure to perform is such that it substantially deprives the injured party of his purpose in making the contract.[346] Such approach is very similar to that of Spanish law. In the context of provision of false information by a trader, the injured party – a consumer in our case – may be able to show that the statement made was not only a term of contract, but also a condition, especially if the statement was about the subject-matter of the contract.[347] Furthermore, the consumer may also be able to show that a substantial failure to perform on the side of the trader took place, which will also entitle the injured party to terminate the contract, if the subject-matter of the contract is so different from what was promised and therefore defective to such extent that the consumer was deprived of the whole benefit from the contract made on the basis of the false statement.[348]

343 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 463.

344 PEEL (n 197) 979ff.

345 Ibid 970ff.

346 Cf arts 25 and 49 CISG.

347 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 472-473.

348 Ibid 473.

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Other remedies for breach of contract, such as specific performance and injunction will often turn out inappropriate – the trader cannot be ordered to perform a promise to make a truthful statement or to take care in making it, when their statement proved to be false. Moreover, there already exists a specific consumer law scheme of remedies for the lack of conformity resulting from the application of the CRA 2015,[349] which practically comprises the situations in which a consumer might want to apply for specific performance.

Similarly to the solution adopted in Spanish law, damages in contract are awarded to put the claimant in the position he would be in, had the contract been performed correctly.[350] In the context of the provision of false information it would then mean to put the aggrieved party in a position they would be in, had the statement made been true. If a contractual promise to take care in making the statement was breached, then the representee should be rather compensated for having entered into the contract in reliance on the statement, therefore they resemble more tortious measure of damages for misrepresentation, which are designed to put the claimant in a position he would have been in, had he not relied on the statement and not entered the contract.

3.2.3.2 Consumer induced into the contract through misleading information: defects of consent

Pre-contractual information plays a major role in consumer contracts, especially influencing consumer's decision on entering a particular contract with a particular trader. This corresponds especially with the rules relative to the defects of consent, where the fact that consumer was induced to enter into the contract by a certain piece of false information is fundamental for the existence of liability or for possibility to avoid the contract[351] – or declare it void[352] – for mistake.

Pre-contractual information provided by trader can be classified as terms of con-

[349] Described above in Section 3.1 *Specific remedies available to consumers.*

[350] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 459.

[351] Under Spanish law.

[352] Under English law.

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tract or as statements that can give rise to actions for defects of consent. Generally speaking, a claim for defects of consent: fraud (*dolo*), misrepresentation in tort or under statute, or mistake (*error*), is less favourable for the aggrieved party than the breach of contractual term.[353] On the other hand, the fact that a pre-contractual statement can be considered a term of contract will not exclude the availability of the remedies for defects of consent.[354]

The distinction between pre-contractual information that can give rise to a claim in contract and for the defects of consent has become even more relevant for the English law of consumer contracts after the adoption of the Consumer Protection Amendment 2014 which introduced the new scheme of private redress for misleading commercial practices, in the meantime excluding the availability of damages for statutory misrepresentation when the specific redress is available. Although the right to terminate the contract for breach of contract under general law is excluded in part by the CRA 2015, the claim for damages for breach of contract under the general contract law rules stays available under s 19(11) of the CRA 2015. In what refers to Spanish law, due to the arts 62.1 and 97.5 of the TRLDCU, which allow to treat a great majority of information provided both in fulfilment of the pre-contractual information duties and in the advertising as contract terms, it is considerably easier for consumer to claim trader's liability in contract under the general rules. Never-

[353] In many aspects, such as the measure and availability of damages: as the contractual measure of damages putting the claimant in the position they would be in, had the contract been performed correctly is often more generous than tortious measure where the claimant is being put in the position they would have been in, had the contract never been entered into in the first place. Moreover the damages are often not available for mistake and innocent misrepresentation. Similarly, in what refers to the availability of specific performance, claim in contract is more advantageous, since it is a remedy basically only available for breach of contract. We should also consider lesser relevance of the traders intentionality and behaviour (ie intention to harm, negligence, innocence) in the case of contractual liability; longer limitation periods for contractual liability under the Spanish law (5 years in contract and one year in tort), although the limitation period to avoid the contract for mistake is 4 years under Spanish law, and under English law, as mistakes make contract void, such claim cannot be barred by the lapse of time.

[354] Under English law, the statement being a term of the contract does not bar the representee from claiming misrepresentation, be it in tort or under statute or mistake, see CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 427; under Spanish law in general it is also allowed to claim remedies under the heads of breach of contract or defects of consent for the same set of facts satisfying both hypotheses, especially when the claimant is a consumer, cf FENOY PICÓN, *El Sistema de Protección del Comprador* (n 160) 247-252.

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theless, a claim for contract rescission for breach may be limited where the scheme of specific remedies for the lack of conformity out of arts 114ff of the TRLDCU is available, therefore some consumers may be willing to claim defects of consent in order to avoid the contract with the trader.

Mistake was already discussed above in Subsection 3.2.2.2 *Defects of consent where information was not provided*. The focus of that Subsection was, however, the mistake relevant in cases of omission of important information. The English law of misrepresentation is practically not applicable in such circumstances. Nevertheless, where the mistake of one of the parties was induced by what the other party said, then mistake and misrepresentation may overlap. This situation is quite common, since often parties say things to induce other party to contract, and if what was said turns out to be untrue, it will give rise to misrepresentation under English law, regardless if the representations made were fraudulent, negligent or innocent. Spanish law treats fraudulent misinformation as *dolo*; cases of negligent and innocent misinformation can be classified as mistakes (*errores*) induced by the other contracting party.

Irrespective of its seriousness, ie whether fundamental or not, misrepresentation under English law will render the contract voidable; the only necessary condition is that the statement induced the mistaken party to enter into the contract, there is no requirement as to the misapprehension of the misrepresentee to be fundamental. What constitutes different types of misrepresentation under English law, corresponds according to the principle of functionality in comparative law to various doctrines of Spanish law, and particularly to the concepts of *dolo* and *error*. For the *dolo* to allow the party to avoid the contract it needs to be of such significance, as to have induced the mistake party to enter into the contract[355] – *dolo grave* – which is the same requirement as in English law. The *dolo* to be actionable however requires a fraudulent intention,[356] negligent or innocently induced mistake is generally not sufficient.[357] Therefore the situations in which one party induces the other into the

[355] Arts 1269 and 1270 para II *Código civil*, see GARCÍA VICENTE, 'Artículo 1270' (n 170) 9130; DIEZ-PICAZO (n 198) 200-201.

[356] Art 1269 *Código civil*.

[357] However, in the context of information omission, a negligent omission of information required by legislation or good faith is considered by the courts to amount to *dolo*; see STS de 1 octubre de

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contract through providing untrue information but without an intention to deceive cannot be treated as *dolo*; they are covered by a concept of a provoked mistake – *error provocado*.[358]

It is worth noting, that although under English law a claim in misrepresentation is the one that can succeed much easier than showing that the contract is void for mistake, the latter claim has some advantages to the aggrieved party. Cartwright points out for example, that rescission of a contract voidable for misrepresentation may be barred by the lapse of time,[359] however there is no limitation period for claiming that a contract is void for mistake.[360] Under Spanish law, the action for fraud is also easier available than the one for mistake, as only mistakes relative to the 'substance of the subject-matter' of the contract, or to its qualities that were the primary motive that induced the contract are actionable, whilst there are no such restrictions in what refers to the claim for *dolo*.[361] Nevertheless, the doctrine of mistake does not require a proof of the fraudulent intentions, which may make it easier to claim. The limitation period for both mistake and fraud is the same under art 1301 of the *Código civil*: four years counting from when the contract was performed.

To be able to claim remedies for breach of contract under English law, the consumer must be able to show that the information provided – statements made before contract was entered into – can be classified as contract terms. Under Spanish law it is easier for consumers because of arts 61.2 and 97.5 of the TRLDCU according to which all the pre-contractual information provided, including informative advertising and promotional offers, is to be considered as contract terms.[362] False

1986 (RJ 1986/5229), Fundamentos de Derecho, 3; STS de 27 marzo de 1989 (RJ 1989/2201), Fundamentos de Derecho, Tercero; STS núm. 1/2005 de 17 de enero (RJ 2005/517), Fundamentos de Derecho, Tercero; STS núm. 289/2009 de 5 de mayo (RJ 2009/2907), Fundamentos de Derecho, Quinto; GARCÍA VICENTE, 'Artículo 1269' (n 225) 9126.

[358] STS núm. 113/1994 de 18 de febrero (RJ 1994/1096), Fundamentos de Derecho, Tercero; GARCÍA VICENTE, 'Artículo 1266' (n 221) 9106.

[359] After 6 years, see *Green v Eadie and Ors* [2011] EWHC B24 (Ch) at 35.

[360] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 594.

[361] Cf arts 1266 and 1269 of the *Código civil*.

[362] Nevertheless, the courts often allow the consumer to avoid the contract for mistake, even though the breach of information duties, including those resulting from art 61 TRLDCU is confirmed,

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pre-contractual statements that do not amount to contract terms, still can entail trader's liability in defects of consent; moreover even if they are considered contract terms, the defects of consent can still be claimed. Nevertheless, not all that is said before contract formation can give rise to any liability at all: it is common practice in trade to exaggerate a bit, to tout one's merchandise – the so-called advertising gimmicks or puffs cannot be relied on and cannot be actually enforced. In practice it may difficult to decide if a particular statement is a puff, representation or a term of contract. All the circumstances must be considered, eg what the seller's intention was and if the buyer relied on the statement.

English law puts a lot of emphasis on defining representations – statements 'relating to the marketed product [that] may be more than (...) puff[s] and less than (...) warrant[ies]: [they] may be so important that [they] may induce a contract, may now amount to (...) negligent misrepresentation(...).'[363] The angle at which Spanish law approaches the issue is different; the law is not concerned with precisely defining pre-contractual statements – breach of pre-contractual duties will often influence the consent of the consumer, thus depriving them from a possibility to form an informed consent. Therefore, the contract can be avoided for an induced mistake, especially if the fraudulent intention of the trader cannot be proved.[364]

As mentioned, English law emphasises the distinction between actionable misrepresentation and mere puff. Puffs are not intended to give rise to legal liability, they can be described as typical sales patter and are usually vague and not specific.[365] The 'puffs' were described in *Kingspan Environmental Ltd v Borealis A/S*: 'There is a category of statement, sometimes referred to as "puffs" and, in more modern language mere sales talk, which will not found a case in representation. This may

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see eg Audiencia Provincial de Islas Baleares (Sección 3ª), Sentencia núm. 457/2010 de 23 de noviembre (JUR/2011/46728), Fundamentos de Derecho, Segundo, Cuarto.

[363] *Lambert v Lewis* [1982] AC 225 at 262.

[364] SAP Islas Baleares núm. 457/2010 de 23 de noviembre (JUR/2011/46728), Fundamentos de Derecho, Cuarto; Audiencia Provincial de Madrid (Sección 12ª), Sentencia num. 820/2013 de 5 de noviembre (AC/2013/2193), Fundamentos de Derecho, Vigesimosegundo.

[365] WOODROFFE and LOWE (n 296) 30; CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 45.

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be so where a statement is in such general terms as to be unverifiable.'[366] The court will also take into account if the statement was seriously meant to become legally binding, ie the intention of the party making the statement,[367] and other circumstances of the contract as a whole – the burden of proof that the statement was sufficient to amount to representation rests on the claimant,[368] ie the consumer in our case.

The Spanish system recognises a concept similar to 'puffs': the so-called *'dolus bonus'*, a good lie. The concept is inspired by art 1270 of the *Código civil*, which distinguishes between serious (*grave*) and minor (*incidental*) fraud, both of which give rise to representor's liability, however minor fraud does not make contract voidable and only entitles the aggrieved party to damages. The existence of a scale of seriousness implies therefore that there also is a type of fraud, which in reality is not one, as it is a lie consisting of exaggeration acceptable in advertising, providing that it is contained within the limits tolerated in trade and its advertising character is evident.[369]

The English system requires various conditions that have to be met for a statement to become a potentially actionable misrepresentation. First of all, as already repeated on various occasions, there must be some statement made to the claimant,[370] because mere silence cannot constitute a representation. Secondly, the statement must be a false statement of fact. Statements of opinion, belief, about future facts or

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366 *Kingspan Environmental Ltd v Borealis A/S* [2012] EWHC 1147 (Comm) at 420; the court then goes on at 421 to cite the classic case of *Dimmock v Hallett* [1866] LR 2 Ch App 21: 'Thus in *Dimmock v Hallett* (...) a description in auction particulars that a farm's land was "fertile and improvable" was said to be "a mere flourishing description by an auctioneer" which could not, save in extreme cases, be regarded as a misrepresentation, and a statement that the land "in course of time may be covered with warp and considerably improved at moderate cost" was said to put "a purchaser on inquiry, and if he chooses to buy on the faith of such a statement without inquiry, he has no ground of complaint".'

367 See eg *Mallan v Radloff* (1864) 17 CB (NS) 588 at 597.

368 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 45ff.

369 Audiencia Provincial de Valencia (Sección 9ª), Sentencia núm. 81/2003 de 4 de febrero (JUR 2003/93495), Fundamentos Jurídicos, Segundo; Audiencia Provincial de Toledo (Sección 1ª), Sentencia núm. 365/2008 de 5 de noviembre (JUR 2009/146067), Fundamentos de Derecho, Primero; DIEZ-PICAZO (n 198) 201-202; GARCÍA VICENTE, 'Artículo 1270' (n 170) 91309131.

370 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 33, the statement can be also made to the representee's agent.

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intentions are not relevant. However, if there is a significant information asymmetry between the contracting parties, the courts are likely to find an implied statement of fact.[371] Statements of law were also traditionally distinguished from statements of fact,[372] although similarly to the mistake of law rule mentioned above[373] it can be said that recent developments show that the fact *versus* law distinction is not pertinent anymore. Spanish law, as mentioned above, does not have such an elaborated doctrine of statements inducing the party to contract, nevertheless it can be noted again that the Spanish system does not differentiate between providing false information or providing no information at all.

In both England and Spain the courts will always require representee's reliance on the statement – the reliance has to be reasonable and must have influenced the decision-making process of the representee, ie induced them to enter the contract.[374] The English position emphasises that once a statement was made, the representee can safely rely on it, thus promoting security of transactions, therefore in many cases of misrepresentation it will be irrelevant if the representee had had a chance to verify if representor's statement was true. The remedy of rescission has long been available even if the representee could discover the truth[375] and the damages for fraudulent misrepresentation cannot be barred by the fact that representee could have checked the truth of the statement. Nevertheless, a defence of contributory negligence is available for the tort of negligence and may be also used against a

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[371] *Smith v Land and House Property Corp.* (1884) 28 Ch D 7 at 15: 'It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is in a sense a statement of a fact, about the condition of the man's own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.'

[372] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 58ff.

[373] See Subsection 3.2.2.2 *Defects of consent where information was not provided* above for mistake of law, the misrepresentation of law rule was also ablolished after the *Kleinwort Benson* decision, see *Pankhania v Hackney LBC* [2002] EWHC 323 (Ch).

[374] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 91ff, 139ff; DIEZ-PICAZO (n 198) 201.

[375] *Redgrave v Hurd* (1881) 20 ChD 1.

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claim under section 2(1) of Misrepresentation Act 1967.[376]

Spanish law does put relatively more emphasis on the deceived party's conduct.[377] Although the general rule is similar to that of English law: the fraudulent conduct of the representor prevails over the lack of diligence of the deceived party,[378] the principle of the responsibility in transactions – *caveat emptor* – also needs to be pondered against the conduct of the aggrieved party.[379] There are two aspects of the diligence of the party against the fraudulent conduct of the other party: the diligence in discovering the fraud and the necessity of a certain degree of mistrust.[380] For instance, certain qualities of the deceived party: experience, professionalism in certain field, can prevent the contract from being voidable for *dolo*.[381] On the other hand, a particular vulnerability of the deceived or apparent trustworthiness of the fraudulent party make it easier for the claim to succeed.[382] In the context of information duties and their breach, it is considered that if the information is provided by one party, then the duty of the other party to check the information for themselves is limited.[383] Such position seems to be echoing the English approach.

The remedies available for misrepresentation under English law, and for *dolo* and mistake in the Spanish system as well, will depend on the behaviour of the representor – the trader. Three main instances need to be considered: fraud, negligent misrepresentation and innocent misrepresentation. The situations in which one of the parties provided knowingly untrue information to the other contracting party, treated as fraudulent misrepresentation in English law and as fraud in Spanish law, produce similar results in both legal systems – the contract can be avoided and damages can be recovered.

[376] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 365.

[377] Tribunal Supremo (Sala de lo Civil), Sentencia de 26 octubre de 1981 (RJ 1981/4001).

[378] Tribunal Supremo (Sala de lo Civil), Sentencia de 15 julio de 1987 (RJ 1987/5494).

[379] GARCÍA VICENTE, 'Artículo 1269' (n 225) 9128.

[380] Ibid.

[381] Tribunal Supremo (Sala de lo Civil), Sentencia de 7 junio de 1989 (RJ 1989/4348), Fundamentos de Derecho, Segundo.

[382] Tribunal Supremo (Sala de lo Civil), Sentencia de 27 febrero de 1989 (RJ 1989/1403), Fundamentos de Derecho, Tercero.

[383] GARCÍA VICENTE, 'Artículo 1269' (n 225) 9129.

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For fraudulent misrepresentation the aggrieved party can claim rescission and damages under statute – section 2(1) of the Misrepresentation Act 1967 or in tort of deceit. The action in fraud of deceit was created by English courts in late eighteenth century.[384] The elements of the tort of deceit are: a false representation made to the representee by the representor, the fact that the representor intended the represetee to act upon the representation, the representation was a factor that induced the representee to enter the contract with representor, and finally, the particular state of mind of the representor – representor's lack of honest belief in the truth of the statement they made.[385] In the case of fraudulent misrepresentation, the statement to be actionable does not have to be necessarily one of fact – any fraudulent statement which was intended to act upon by the representee, be it of fact, law, opinion or intention, will suffice.[386] The core concept for the tort of deceit is 'fraud' – the representor's state of mind, composed of two elements. First, the lack of honest belief that the statement made was true – Lord Herschell in *Derry v Peek* observed that 'To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.'[387] Secondly, the representor must intend the statement be acted upon by the representee.[388] The statutory liability for fraudulent misrepresentation is easier to claim, as there is no need to prove the representor's lack of honest belief in the statement's truthfulness, however the tort of deceit might prove useful again to consumers denied claim for damages under s 2 of the Misrepresentation Act 1967 due to the availability of private redress under UTR 2008.[389]

Spanish law requires two main conditions for the fraud to be actionable: the use of deceptive 'machinations' by one of the parties and the effect of those machinations consisting in inducing the other party to enter into the contract.[390] A subjective

[384] *Pasley v Freeman* (1789) 100 ER 450.

[385] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 190ff.

[386] Ibid 193.

[387] (1889) 14 App Cas 337 at 374.

[388] *Barton v County Natwest Ltd* [1999] Lloyd's Rep Bank 408 at 419, 420.

[389] See Section 3.1 *Specific remedies available to consumers* above.

[390] Tribunal Supremo (Sala de lo Civil), Sentencia de 1 octubre de 1986 (RJ 1986/5229), Fundamentos de Derecho, 3.

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deliberate intention to deceive and harm on the side of the fraudulent party is not strictly necessary, the *Tribunal Supremo* considers it is sufficient if the party accepts that they may deceive the other party and tries to take advantage of the situation.[391] The vast spectrum of possible fraudulent machinations includes false statements, concealment, tactics of baiting the other party suggesting an opportunity of profit, creating an atmosphere of pressure, simple omission of information and active hiding of unfavourable facts.[392] An emphasis is put on the seriousness of the fraud, ie its potential to induce the other party to contract.[393] Finally, it is considered that the deceptive conduct of both parties deprives them from respective claims.[394] The remedies available for *dolo* comprise contract rescission (avoidance) and/or damages.[395]

Under English law rescission is available in any case of misrepresentation.[396] If the rescission is granted, the contract will be voidable, and not void *ab inicio* as in the mistake cases. The contract is avoided retrospectively, from the beginning, and any performance made under the contract has to be reversed.[397] Rescission takes effect

391 STS de 1 octubre de 1986 (RJ 1986/5229), Fundamentos de Derecho, 3.

392 Court decisions describing those and some more possible actions or omissions constituting *dolo*: Tribunal Supremo (Sala de lo Civil), Sentencia de 18 julio de 1988 (RJ 1988/5727), Fundamentos de Derecho, Séptimo; STS de 27 febrero de 1989 (RJ 1989/1403), Fundamentos de Derecho, Tercero; STS de 27 marzo de 1989 (RJ 1989/2201), Fundamentos de Derecho, Tercero.

393 Art 1270 *Código civil*; GARCÍA VICENTE, 'Artículo 1269' (n 225) 9124; DIEZ-PICAZO (n 198) 201.

394 Art 1270 *Código civil*; GARCÍA VICENTE, 'Artículo 1270' (n 170) 9131.

395 See art 1270 *Código civil*.

396 It is an equitable remedy for misrepresentation developed by courts in the nineteenth century, while the common law remedy was only damages; sometimes the remedy of rescission was available, but only when fraud could be proved. Nowadays in practice the aggrieved party can just claim rescission of the contract in any case of misrepresentation, and it will actually be the equitable remedy, see CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 101ff.

397 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 106 explains: 'In the case of misrepresentation there was a sufficient agreement between the contracting parties to form a contract (and so the contract was not void *ab inicio*), but on the representee's side it was based on a false assumption which was created or perpetuated by the representor's statement. The remedy therefore operates back to the time at which the defect arose: the moment of formation.' The remedy of rescission has to be contrasted with a prospective remedy of termination of the contract, where the contract is 'rescinded' but only with future effects.

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through an act of election by the aggrieved party, a court order is not necessary,[398] and the representee has to communicate his intention to the representor. Until that moment the latter will be entitled to treat the contract as continuing.[399] There are several bars to rescission, of which the lapse of time is the most interesting in the context of consumer law, as well as comparative analysis. In what refers to fraudulent misrepresentation, the time runs against the representee only from the moment when he discovered that the fraud was committed,[400] and not from the time the contract was made, as in non-fraudulent instances of misrepresentation.

The contract formed under *dolo*, as well as under *error*, is voidable according to art 1301 of the *Código civil*.[401] The limitation period[402] is of 4 years counting from the contract performance.[403] Contract rescission operates at the instance of the aggrieved party and is retroactive.[404]

The aim of the remedy of rescission is to put the aggrieved party in the same position they were before they entered the contract. Sometimes however, it is not possible – then the representee has to claim other possible remedies: indemnity or damages.[405] Indemnity is an equitable remedy, a compensation to a party who undertook obligations in favour of third parties under a contract which is now rescinded, available only in addition to contract rescission. If the aggrieved party incurred other general losses, which cannot be recovered under indemnity, then they will be able

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398 'The right to set aside or rescind the transaction is that of the representee, not that of the court.' – *T.S.B. Bank Plc. v Camfield* [1995] 1 WLR 430 at 438.

399 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 124.

400 Ibid 144ff.

401 Tribunal Supremo (Sala de lo Civil), Sentencia núm. 549/2000 de 5 de junio (RJ 2000/3587), Fundamentos de Derecho, Tercero.

402 Which seems to be of the *'prescripción'* regime, rather than *'caducidad'* – see José Ramón GARCÍA VICENTE, 'Artículo 1301' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil. Vol. VII* (Tirant Lo Blanch 2013) 9253-9254; the difference between two types of limitation periods is that *'prescripción'* can be interrupted and needs to be invoked by the interested party, *'caducidad'* extinguishes the right subject to it after the time lapse *ipso iure*.

403 Tribunal Supremo (Sala de lo Civil, Sección Unica), Sentencia núm. 569/2003 de 11 de junio (RJ 2003/5347), Fundamentos de Derecho, Segundo.

404 Ana COLÁS ESCANDÓN, 'Artículo 1301' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1545.

405 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 120.

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to claim damages.

In the case of fraudulent misrepresentation, these will be damages in tort of deceit. Damages are awarded to compensate the representee for the loss they suffered because of their reliance and are designed to put the representee in a position they would have been if the representation had not been made, according to the tortious measure of damages.[406] Damages in tort of deceit can include a potential, probable benefit lost,[407] for instance because of a lost opportunity to engage in a profitable business, since the recoverable loss is the one suffered due to the fact that the representee had entered into a contract in the first place: 'in cases of fraud a plaintiff is entitled to any loss which flowed from the defendant's fraud, even if the loss could not have been foreseen: see *Doyle v Olby (Ironmongers) Ltd.* [1969] 2 QB 158.'[408] The representee who suffered loss due to the fraudulent misrepresentation can also claim damages under the Misrepresentation Act 1967,[409] which is more attractive

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[406] As explained by Balcombe LJ in *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 at 304: '(...) the tortious measure, [operates] so as to put the representee in the position in which he would have been if he had never entered into the contract, or the contractual measure, so as to put the representee in the position in which he would have been if the misrepresentation had been true, and thus in some cases give rise to a claim for damages for loss of bargain.'

[407] See *East v Maurer* [1991] 1 WLR 461.

[408] *Royscot Trust Ltd v Rogerson* at 305.

[409] Which nevertheless is a controversial question and may be overturned by the Supreme Court, should a case on the issue arise. As of now, s 2(1) Misrepresentation Act 1967 is interpreted as incorporating all the aspects of the claim in tort of deceit, except for the representor's state of mind (however the intention that the statement be acted upon still has to be proved). The problem arises in what refers to the measure of damages, especially whether it is the measure of damages as in tort of deceit or as in tort of negligence, since apart from the scope mentioned above, the remoteness of damage rule is also different. S 2(1) Misrepresentation Act 1967 states that: '(...) if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently (...).' The words 'so liable', according to the law as it now stands, are interpreted this way that the measure of damages is in tort of deceit – in *Royscot Trust Ltd v Rogerson* at 305 Balcombe LJ explained: 'in my judgment the wording of the subsection is clear: the person making the innocent misrepresentation shall be "so liable," i.e., liable to damages as if the representation had been made fraudulently.' However, CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 378ff points out that it appears likely that the Supreme Court will overrule those decisions changing the measures of damages to be the same as in tort of negligence. Lord Steyn in *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 at 283 observed: 'The question is whether the rather loose wording of the statute compels the court to treat a person who was morally innocent as if he was guilty of fraud when it comes to the measure of damages. There has been trenchant academic criticism of the Royscot case: see Richard

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to the representee, as the measure of damages is the same for both actions, under the Act there is no need to prove the representor's state of mind.

In what refers to Spanish law, the nature of liability for fraud and mistake as well is not clear, some treat it as contractual, others are inclined to consider it to be tortious.[410] The courts seem to be in favour of the contractual measure of damages in the case of defects of consent arising from fraud and mistake.[411] Such approach is based on the second para of art 1270 of the *Código civil*, stating that a minor fraud (*dolo incidental*) gives rise only to liability in damages, and not to contract rescission. Hence, the contract stands despite the fraud that took place. Moreover, the *Tribunal Supremo* decided that the action in contract rescission for fraud and the action in damages are independent, meaning that the aggrieved party can claim one of the actions or both at the same time, up to their discretion.[412] Thus the party may be awarded damages for fraud but the contract will stay valid. The standpoint of Spanish law is therefore different to that of English law: contract rescission is not available in all instances of fraud and damages are subject to the contractual measure. Such discrepancy between the two systems may partly stem from the fact that fraud under English law vitiates the contract, ie the agreement of the parties suffer and therefore the system tries to remove such transactions. On the other hand, Spanish law considers it is the party's consent that has been vitiated, so if they so

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Hooley, "Damages and the Misrepresentation Act 1967" (1991) 107 L.Q.R. 547. Since this point does not directly arise in the present case, I express no concluded view on the correctness of the decision in the *Royscot* case.'

410 In favour of the contractual liability see eg Germán BERCOVITZ ÁLVAREZ, 'Artículo 1270' in Rodrigo Bercovitz Rodríguez-Cano (ed), *Comentarios al Código Civil* (3rd edn, Thomson Reuters Aranzadi 2009) 1503; GÓMEZ POMAR, 'El Incumplimiento Contractual en Derecho Español' (n 5) 20; in favour of the liability of tortious (*extracontractual*) nature: GARCÍA VICENTE, 'Artículo 1270' (n 170) 9134-9135; Antonio Manuel MORALES MORENO, 'El Dolo como Criterio de Imputación de Responsabilidad al Vendedor por los Defectos de la Cosa' (1982) 35 Anuario de Derecho Civil 591, 629.

411 See eg: Tribunal Supremo (Sala de lo Civil), Recurso de Casación núm. 1929/1992, Sentencia de 14 de diciembre 1995 (RJ 1995/9101), Fundamentos de Derecho, Segundo; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 396/2000 de 19 de abril (RJ 2000/3185), Fundamentos de Derecho, Septimo, Noveno; Tribunal Supremo (Sala de lo Civil), Sentencia núm. 671/2000 de 30 de junio (RJ 2000/6747), Fundamentos de Derecho, Tercero; Tribunal Supremo (Sala de lo Civil, Sección 1ª), Sentencia núm. 1/2007 de 18 de enero (RJ 2007/529), Fundamentos de Derecho, Tercero; STS núm. 289/2009 de 5 de mayo (RJ 2009/2907), Fundamentos de Derecho, Sexto.

412 STS núm. 1/2007 de 18 de enero (RJ 2007/529), Fundamentos de Derecho, Tercero.

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desire, the contract can stand whilst the loss suffered needs to be compensated. Now if the contract is not set aside, the logical measure of damages is the contractual one, putting the party in the position they would be, have the contract been performed correctly, as this is what the party needs.[413]

Tort of negligence differs from fraudulent misrepresentation primarily because the claim in the former is based on representor's failure to take reasonable care, as opposed to intentional fraud. In English law, the development of the action for careless statements (misrepresentation) in tort of negligence started in early twentieth century,[414] but it was finally created as late as in 1963 in the decision *Hedley Byrne*.[415] The elements of the claim in tort of negligence are: the representor owing a duty of care to the representee in making the representation, the representor being in breach of that duty by failing to take reasonable care, the representee suffering loss of a kind that is within the scope of the duty and not too remote in consequence of the representor's breach of the duty.[416] The tort of negligence as such is not specifically aimed at careless statements, and all the elements of a claim in tort of negligence are to be present.[417] It was not until the *Esso Petroleum Co.* that the responsibility in tort of negligence for pre-contractual misrepresentation was confirmed.[418] In the action in tort of negligence for careless statements the factor of representee's reliance on the statement made takes primary importance. There is

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413 STS núm. 289/2009 de 5 de mayo (RJ 2009/2907), Fundamentos de Derecho, Sexto.

414 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 248ff where various cases marking this development are cited.

415 [1964] AC 465, until that time in practice only representors making fraudulent representation could face liability.

416 CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 254.

417 This is not the aim of this study to discuss the tort of negligence in general, for more on tort of negligence see eg Paula GILIKER, *Tort* (5th edn, Textbook Series, Sweet & Maxwell 2014).

418 *Esso Petroleum Co. Ltd. v Mardon* [1976] QB 801 at 820: 'It seems to me that *Hedley Byrne & Co. Ltd. v Heller & Partners Ltd.* [1964] AC 465, properly understood, covers this particular proposition: if a man, who C has or professes to have special knowledge or skill, makes a representation by virtue thereof to another—be it advice, information or opinion—with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.'

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no distinction between statements of fact, opinion, law or intentions. The test is whether in the circumstances the particular representee was reasonably entitled to rely on the statement.[419]

Remedies for negligent misrepresentation can be claimed either in tort of negligence or on the basis of statutory liability out of s 2(1) of the Misrepresentation Act 1967. The Act uses a so-called 'fiction of fraud' – the representor will be liable under the Act if he would have been liable in damages in the tort of deceit, if he was fraudulent.[420] Therefore the representee will have to prove all the elements of the tort of deceit in respect of the statement made to them, except for the fraud, which is the most difficult one to establish in the context of the tort of deceit. Although the Act technically speaking does not use the term 'negligence', in practice the liability imposed is for statements where the representor cannot prove that he was both honest and reasonable in his belief that the statement he made was true, which is therefore the liability for negligence. The action under s 2(1) of the Act places the burden of proof on the representor to establish that they had reasonable grounds to believe and actually did believe that their representation was true. This is a significant advantage for the aggrieved party in comparison with both tort of deceit and tort of negligence, where the representee has to prove the breach of duty of care. Moreover, damages under the Act are more generously awarded than in tort of negligence, since to the former the same measure as in tort of deceit applies, as the law now stands.[421]

Spanish law distinguishes between fraud and provoked mistake (*error provocado*) both in theory[422] and practice.[423] Breach of information duties by one party leads to

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[419] *Hedley Byrne & Co. Ltd.* at 503: '(...) if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person who, as he knows or should know, will place reliance upon it, then a duty of care will arise.'

[420] See CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 360 who explains where this 'curious device' comes from.

[421] See footnote 409 above.

[422] DIEZ-PICAZO (n 198) 216.

[423] SAP Madrid núm. 820/2013 de 5 de noviembre (AC 2013/2193), Fundamentos de Derecho, Vigesimoprimero, Vigesimosegundo.

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the other party's misapprehension which induces that party to enter into the contract – an element of both fraud and mistake actions under Spanish law.[424] Nevertheless, for the *dolo* to be actionable, a fraudulent intention discussed above must be present. If it is not, as for instance in the case described in the SAP Madrid núm. 820/2013 de 5 de noviembre (AC 2013/2193), then the court will consider the existence of *error provocado*. In such case, the elements of *error*, ie essentiality (fundamentality) and excusability, must be proved. The defandant's behaviour has influence on the latter condition – that the mistake must be excusable, meaning not attributable to the mistaken party. If the defandant had provoked the mistake, it is more probable that the mistaken party will obtain the relief.[425] The *error provocado* is independent from the subjective intentions of the party that induced the mistake – if they do not amount to fraud, then it does not matter if they provoked the other party's *error* negligently or innocently.

Remedies available to the aggrieved party in the case of negligent misrepresentation will be rescission, together with indemnity and damages. In what refers to damages in negligence, their scope is more limited than the scope of damages in tort of deceit, since it depends on the scope of the duty of care, in Cartwright's words: '(...) the recoverable loss is limited to that which flows from the information being inaccurate, and does not extend, for example, to other losses which flow from [representee's] entering into the contract.'[426]

General losses incurred can also be recoverable under s 2(1) of the Misrepresentation Act 1967.[427] Damages under the Act are also calculated in tort measure, although the remedy is restricted only to contracting parties, while under the tort of negligence it is available in all cases where the representee can establish the existence of the duty of care. On the other hand, the extent of damages is higher, according to the current law, under the statute and the elements of the claim under the Act are easier to establish, as mentioned above, therefore especially in the context of pre-contractual statements the action under the Act will be more attractive

[424] See arts 1266 and 1270 *Código civil*.

[425] GARCÍA VICENTE, 'Artículo 1266' (n 221) 9106.

[426] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 382.

[427] Ibid 121.

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to the representee. Nevertheless, as we shall remember, the action in damages for misrepresentation under s 2 of the Misrepresentation Act 1967 is excluded when the consumer can apply for private redress for a misleading commercial action under the UTR 2008.[428]

The rescission is limited by the lapse of time, in the case of non-fraudulent misrepresentation, the representee should not delay too long after the contract was made — an action for misrepresentation has to be brought 'within a reasonable time.'[429] Misrepresentation Act 1967 provides the courts with statutory discretion to refuse rescission in the case of non-fraudulent misrepresentation and to award damages instead.[430] Although the right to damages is excluded in many consumer cases, the right to rescind a contract is not affected by this provision, therefore the court even in such instances will keep the discretion to refuse rescission. However, as Peel points out, it is unlikely to so refuse, as it will be no longer able to award damages in lieu.[431]

Negligently or innocently induced error under Spanish law will give rise to the same remedy as mistake in general, ie contract rescission. Even though the mistake may be induced by the other party in a negligent manner, the legal system does not provide for compensation of losses incurred.

Under English law, also an innocent misrepresentation may be actionable. It occurs when the false statement, which induced the injured party to enter the contract, was made neither fraudulently nor negligently by the representor. Remedies for innocent misrepresentation are more limited than those available in the instances

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[428] S 2(4) Misrepresentation Act 1967.

[429] See *Leaf v International Galleries* [1950] 2 KB 86 at 92; CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 152.

[430] S 2(2) Misrepresentation Act 1967 reads: 'Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.'

[431] PEEL (n 197) 437.

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where the representor was negligent or fraudulent. The main remedy is rescission.[432] The victim of innocent misrepresentation will be also entitled to indemnity, so that they could be restored to the position before making the contract, nevertheless, there is no remedy of damages for innocent misrepresentation. Under section 2(2) of Misrepresentation Act 1967 the court will however have a discretion to award damages in lieu of rescission. If the right to rescission is lost, then there will be no available remedy for innocent misrepresentation.[433]

3.3 Problem of adequacy of general remedies to particularities of B2C electronic contracts

3.3.1 Problems resulting from application of general remedies

Figures 1. – 4. illustrate the role of the general law remedies in the context of the breach of information duties in consumer contracts. In many cases, it is mainly the general law system that provides remedies, which is true even in the case of electronic contracts. Nevertheless, in spite of the availability of those remedies, both systems: English and Spanish, have also introduced specific statutory remedies for consumer contracts. If the general law doctrines analysed above in Section 3.2 *General private law and remedies it offers*, mainly breach of contract based on incorporation of information into the contract and defects of consent, are efficient in protecting the interest of the consumer in receiving certain information from the trader, it should be considered redundant to introduce additional information duties together with specific remedies for their breach.[434] On the one hand, the proliferation of informa-

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[432] According to *Derry v Peek* at 359, rescission in equity is available for innocent misrepresentation: 'Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand.'

[433] See eg *Zanzibar v British Aerospace* [2000] 1 WLR 2333.

[434] EIDENMULLER (n 134) 1112-1113.

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tion duties at the European level and their necessary transposition into the national systems is definitely to blame for the quantity of the specific duties and remedies in the national law,[435] however on the other hand the national legislators also adopted some specific schemes of remedies – as the example of the new private redress rights under Part 4A of the UTR 2008 in English law shows.

The question arises if the general private national laws can fulfil a meaningful function in the scheme of remedies available for breach of information duties and therefore if the introduction of specific statutory redress rights is necessary.[436] As already discussed, the amount of information duties established in the European *acquis* and implemented into the national laws causes concern, similarly creating new remedies available only to parties considered consumers can also have negative effect on the legal system and market functioning.[437]

Provision of an excessive amount of information leads to information overload, a phenomenon which results in consumers not understanding any of the information items provided.[438] In such cases, consumers' transactional decisions cannot be taken on a rational informed basis. Nevertheless, remedies for lack of appropriate information are of little help here: firstly, because the information is effectively received, and secondly, even if provision of excessive information can be considered as breach

[435] See Chapter 2 Subsection 2.2.2 *Major problematic issues related to the remedies for breach.*

[436] EIDENMULLER (n 134) 1119 consider that the Member States should be particularly cautious about incorporating the specific information duties originating in the European law 'into their general contract laws and thus subjecting them to the standard contractual remedies, as it is by no means obvious that the application of such remedies fulfils a meaningful function.'

[437] EIDENMULLER (n 134) 1113; the issue needs to be approached from at least two angles: 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 law systems, should assist answering questions about the extent of protection through information duties in the e-commerce – see GILIKER, 'Regulating Contracting Behaviour: The Duty to Disclose in English and French Law' (n 127) 639.

[438] Proliferation of information duties in consumer contracts is a widely criticised issue, as noted in Subsection 1.1.2.3 *Issues relative to information duties in consumer contracts.* It seems however, that at least in some areas, the legislator has started to take into consideration the problem of information overload and its influence on consumer's transactional decision – see for instance Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L352/1.

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of information duties, the remedies for breach also present the same negative characteristic as the duties themselves – they are established in a rather chaotic manner. Therefore, despite the fact that, at least in some cases of breach, the remedies are abundant, the consumers still might find it difficult to access the remedies.

It can be pointed out that the availability of too many remedies, and especially of different character, ie stemming from general traditional rules or from specific consumer legislation, either does not contribute to clarity of the legal framework. The lack of clarity in turn is detrimental to consumers who cannot effectively access their rights, as they simply do not understand them.[439]

It needs to be noted that the 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 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.[440] On the other hand, the continental law, especially French and Spanish systems, but also other 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.[441] The economics of such contracts, be it B2B or C2C, are very different from those of B2C transactions where consumers are bargaining with traders. From the regulator's point of view, businesspersons market behaviour is more predictable, rational, their main goal being maximising their profit.[442]

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439 Cf observations expressed by GILIKER, 'The Consumer Rights Act 2015 — a Bastion of European Consumer Rights?' (n 14) 8-9 in the context of the CRA 2015 and (the lack of) transposition of the Directive on consumer rights through the Act.

440 See BEALE, 'Pre-contractual Obligations: The General Contract Law Background' (n 131) 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 Paula GILIKER, 'A Role for Tort in Pre-contractual Negotiations? An Examination of English, French, and Canadian Law' (2003) 52 International and Comparative Law Quarterly 969, 970.

441 However, parties are considered to be reasonable, knowledgeable men that know law well, see Elias N STEBEK, 'Zweigert and Kotz on West European Legal Traditions' (2008) 2 Mizan Law Review 353, 361; PICATOSTE BOBILLO (n 206) 374.

442 Klaus MATHIS and Ariel David STEFFEN, 'From Rational Choice to Behavioural Econom-

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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.[443] Moreover, consumers' distinct motivation in contracting together with the moderate value of effectuated purchases, especially in the context of the e-commerce, logically decreases their inclination to take part in litigation. The particularities of consumer contracts and the necessity of special treatement of those contracts brought about the development of consumer law as a distinct from the general contract law field, which has been appreciated by the legislators at the European level, but also at the national level, hence the adoption of the TRLDCU in Spain and the recent CRA 2015 in the UK.

The first issue linked to the use of general law remedies in consumer contracts is the fact that the traditional private law claims for defects of consent and breach of contract involve traditional court proceedings as means of enforcement. It does not mean that the specific remedies are enforced differently: the specific consumer law remedies also need to be enforced through the courts proceedings, however the way they operate in what refers to the burden of proof and lesser complexity of actions needs to be noted.[444] Private redress rights for a misleading omission constituting an unfair commercial practice[445] compared with the law of misrepresentation in England can constitute an example. Law Commission in their report regarding the potential establishment of private redress rights in consumer contracts recommended the adoption of a specific scheme due to issues concerning the law of misrepresentation; it was noted that:

> (...) consumers must rely on existing private law doctrines, such as the law of misrepresentation and duress. This is problematic: the law of

ics: Theoretical Foundations, Empirical Findings and Legal Implications' in Klaus Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer 2015) 35.

443 Richard A POSNER, 'Rational Choice, Behavioral Economics, and the Law' (1997) 50 Stanford Law Review 1551, 1553ff; see also observations made in Chapter 1 Subsection 1.1.2.2 *The model of consumer in the e-commerce law.*

444 See art 6.9 of the Directive on consumer rights, which states: 'As regards compliance with the information requirements laid down in this Chapter [on consumer information and right of withdrawal for distance and off-premises contracts], the burden of proof shall be on the trader.'

445 See reg 5 and regs 27Aff UTR 2008.

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misrepresentation is complex and uncertain;[446]

> (...) In private law, misleading actions fall within the law of 'misrepresentation,' which is a large and varied set of rules. In theory the law provides redress for most misleading trade practices where consumers suffer detriment, but it is fragmented, complex and unclear. It is particularly difficult to apply in a consumer context, because the law primarily evolved to deal with business disputes.[447]

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.[448] 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. 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.[449] Furthermore, disputes that finally end up in courts in their great majority are those concerning consumer contracts of a significant value, as the Spanish courts' decisions cited in the present study show; these are concerning for example property purchase,[450] cars,[451] or mort-

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446 Law Commission and Scottish Law Commission, Consumer Redress for Misleading and Aggressive Practices (Law Com No 332, 2012 / Scot Law Com No 226, 2012) Summary para S.2.

447 Ibid para S.12.

448 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 Alberto UREÑA and others, *Estudio sobre Comercio Electrónico B2C 2013: Edición 2014* (Observatorio Nacional de las Telecomunicaciones y de la SI 2014)).

449 See Commission, 'Consumer empowerment' Special Eurobarometer No. 342 (2011), 184, 204 <http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf> Accessed 10 January 2016, for the reasons consumers themselves give for avoiding court proceedings.

450 SAP La Rioja núm. 396/2011 de 1 de diciembre (AC/2011/2394); SAP Madrid núm. 52/2012 de 30 de enero (JUR/2012/228888); SAP Madrid núm. 709/2010 de 10 de noviembre (AC/2011/668).

451 SAP Almería núm. 38/2015 de 3 de marzo (JUR/2015/172394); SAP Ourense de 10 de julio 2001 (AC/2001/1294); SAP A Coruña núm. 404/2007 de 24 septiembre (AC/2008/435); SAP Barcelona núm. 100/2008 de 22 de febrero (AC/2008/660).

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gages and financial instruments of high value and complexity,[452] although some court decisions relative to contracts of lower value can be found as well, mainly in the context of the lack of conformity.[453] Also, when general law remedies are invoked, the burden of proving the damage caused by the lack of relevant information stays on the consumer. In conclusion, general law remedies may therefore be not effective as deterrent in the mass standard form adhesion contracts.[454]

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, the Directive on consumer ADR and the Regulation on Online Dispute Resolution were adopted.[455] 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 certainty.[456] 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,

452 SAP Islas Baleares núm. 457/2010 de 23 de noviembre (JUR/2011/46728); SAP Madrid núm. 820/2013 de 5 de noviembre (AC/2013/2193).

453 Disputes concerning contracts relative to eg: phone bill – SAP Alicante núm. 118/2002 de 4 de marzo (AC/2002/825); special breed dogs – SAP Granada núm. 485/2008 de 21 de noviembre (JUR/2009/60612); quad motorbike – SAP Ourense núm. 340/2008 de 22 de septiembre (JUR/2009/81438); vitroceramic cooktop and oven – SAP Pontevedraa núm. 337/2009 de 9 de julio (AC/2009/1840).

454 Gisela RUHL, 'Alternative and Online Dispute Resolution for Cross-Border Consumer Contracts: a Critical Evaluation of the European Legislature's Recent Efforts to Boost Competitiveness and Growth in the Internal Market' (2015) 38 Journal of Consumer Policy 431, 432.

455 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/01; for a comment on those texts see Agustín MADRID PARRA, 'Directiva 2013/11 (ADR) y Reglamento 524/2013 (ODR): una Apuesta Europea por la Solución Alternativa de Litigios y en pro del Comercio Electrónico Transfronterizo' (2013) 18 Spain arbitration review: revista del Club Español del Arbitraje 37, 37ff.

456 For comprehensive analysis of disadvantages of ADRs in consumer cases see RUHL (n 454) 443, and the studies cited there.

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other defects of consent or breach of contract. Apart from the compensation available when material damage can be proved, consumers whose contractual right of information has been breached, would often benefit from a simple contract rescission. As far as the market efficiency is concerned, this solution 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 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.[457]

Moreover, also in misrepresentation – or fraud and provoked mistake cases – consumers may find it difficult to obtain a remedy of contract avoidance or rectification. This is because the burden of proof is on them to establish that they would not have entered into the contract at all, or only on different terms, had the information duties been fulfilled correctly. The relevance of many information items established in the Schedule 2 of the Consumer Contracts Regulations or arts 60 and 97.1 of the TRLDCU might not be sufficient for the consumer to show they would not have concluded the contract, had they been provided those information items.[458]

Legislative burden of proof reversal, as established for example in the art 6.9 of the Directive on consumer rights, and transposed through art 97.8 of the TRLDCU in Spanish law and reg 17 of the Consumer Contracts Regulations 2013 in English law, makes it easier for consumers to claim various specific remedies for information requirements breach – and especially those established directly in the Directive. Nevertheless, in some cases of specific remedies, as for instance those arising out of reg 27A of the Unfair Trading Regulations 2008 or claims for the lack of conformity, it is the consumer who needs to prove that their transactional decision was influenced by the trader's misleading action or that they failed to receive information that would make the product conforming to the contract. As already discussed in Subsection3.1.1*Specific remedies available to consumers*, such placement of the burden of proof may effectively bar consumers' access to some remedies. Consequently,

[457] CARTWRIGHT, *Misrepresentation, Mistake and Non-Disclosure* (n 150) 587ff.

[458] EIDENMULLER (n 134) 1122.

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burden of proof reversal may constitute a useful measure in widening the availability of the remedies for breach of information requirements. However, it is understandable that in some cases it may be impossible for a trader to prove for instance that his actions could not influence consumer's decision. It seems appropriate in the first place, therefore, to require traders to provide proof of having complied with information duties, also those of an indirect character. Furthermore, in the respect of specific claims arising out of misleading actions ex reg 27A of the Unfair Trading Regulations 2008 or relative to the lack of conformity of the product with the contract, effectively at least the burden of proving that the misleading action was not likely to induce an average consumer to contract or that the product was conforming to the contract, should be placed on the trader. Clearly in what refers to the general law and rules relative to the defects of consent and breach of contract, the onus is on the consumer-claimant.

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 the 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.[459] 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.[460] Moreover, it is also argued that non-disclosure can be justified as increasing general welfare, as

[459] See Richard A EPSTEIN, 'Behavioral Economics: Human Errors and Market Corrections' (2006) 73 The University of Chicago Law Review 111, 116-117, who 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).'

[460] Eric A POSNER, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?' [2002] John M. Olin Program in Law and Economics Working Paper No. 146 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304977> accessed 20 September 2016, 15.

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it promotes investing in information.[461] Finally, each system needs to balance the protection of the mistaken party with the fact that it will inevitably increase uncertainty. Beale notes that the application of general standards, such as good faith and fair dealing principle has such effect, and for instance in the context of English law, an increase in uncertainty is highly undesired: certainty of transactions is one of the most important ‘export’ values of English law, hence in so many commercial relationships parties choose the law of England and Wales to govern their contracts.[462] Nevertheless, the position of numerous continental legal traditions, of which Spanish law can constitute an example, is that generally speaking the mistaken party was not sufficiently informed, and therefore the contract should not be binding on them[463] – either because it is immoral, since their promise was based on false assumptions, or because it will not be good for the contract as means of wealth exchange – parties will not be better off after such transaction.[464]

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.[465] 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.[466] Therefore legal remedies

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461 BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 92; in consequence however disclosure should be mandatory if the information was or could be acquired at no cost or at very low cost, see Robert B COOTER and Thomas ULEN, *Law and Economics* (6th edn, The Pearson Series in Economics, Addison-Wesley 2011) 358.

462 BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 116.

463 See eg Tribunal Supremo (Sala de lo Civil), Sentencia núm. 1134/1999 de 22 de diciembre (RJ/1999/9369), Fundamentos de Derecho, Cuarto, where different types of mistake – mistake as a defect of consent and mistake making the contract non-existent, are discussed.

464 BEALE, *Mistake and Non-Disclosure of Fact: Models for English Contract Law* (n 176) 77ff.

465 Oren BAR-GILL, ‘The Behavioral Economics of Consumer Contracts’ (2007) 92 Minnesota Law Review 749, 790-791 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.’

466 Cf observations made in Chapter 1 Subsection 1.1.2.2 *The model of consumer in the e-commerce law*.

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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.[467] 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.[468] 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.[469]

Currently, in both English and Spanish law, specific and general law remedies do depend to a certain extent on the importance of the information duty breached. Nevertheless, as observed above, they do not cover the whole spectrum of possible instances of breach. In addition to the excessive information duties established mainly in the specific consumer law [470] this leads to a rather chaotic regulation of the issue. Therefore, it would be appropriate to consider deregulating the question of information duties, through limiting the information duties only to information items that allow the duties to fulfil their main function, ie that directly influence the consumer's transactional decision. Other information items, which a consumer may need for instance at a later stage of the contractual relationship, eg if the contract is breached by the trader, could be provided on a durable medium at the very

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467 Hans-W MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (2013) 32 Yearbook of European Law 266, 316 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.'

468 See ibid 272, where it is pointed out that: '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.'

469 Stefan HAUPT, 'An Economic Analysis of Consumer Protection in Contract Law' (2003) 4 German Law Journal 1137, 1148.

470 Cf Section 1.1.2.3 *Issues relative to information duties in consumer contracts.*

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moment of contract formation – the consumer actually does not need to read those pieces of information before entering a contract. Introduction of such a distinction between key information items and other information would then allow to reorganise the scheme of remedies for breach of information duties. Breach of key information should be mainly protected through a remedy of contract rescission – if we consider that this information induced a consumer into the contract, therefore if it is false or lacking (creating a false impression), the consumer should be able to recover their money and satisfy their needs somewhere else. Breach of other information items, however, could be subject to other remedies, depending on the importance of the information in question and the reasons for its breach. Moreover, simplification of the information duties and remedies for their breach should be complemented through public enforcement, especially when provision of adequate means of redress is possible, as eg established in s 219A of the Enterprise Act 2002. This way, consumers who suffered loss due to trader's lack of compliance with the information duties, will be able to avoid the necessity of asserting their rights individually through court proceedings.

3.3.2 Right of withdrawal as an example of a specific remedy

The right of withdrawal – or cancellation – goes against the traditional principle common to all the European systems of contract law: *pacta sunt servanda*.[471] Nevertheless, it has been present from the very beginning of consumer protection directives, and is recognised by the DCFR.[472]

Efficiency of establishing specific remedies is hindered by the ever expanding list of information requirements. Firstly, information items 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 to the breach of each requirement. An often proposed solution is to create certain groups of re-

[471] Horst EIDENMULLER, 'Why Withdrawal Rights?'' (2011) 7 European Review of Contract Law 1, 2-4.

[472] DCFR arts II.–5:201 and II.–5:202.

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quirements that would be protected with the same remedy, for instance information duties 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.[473] 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 the cooling-off period. The right of withdrawal is a special case of a remedy restoring contractual balance in B2C distance and especially electronic contracts.[474]

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. As discussed in Chapter 1 Subsection 1.1.2.1 *The role of pre-contractual information in the European consumer policy*, search goods may often become experience goods in the distance selling.[475] The right of withdrawal allows to restore the balance. From an economic perspective, the consumer will only return the good if they value it less

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[473] MICKLITZ, 'Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought-Provoking Impulse' (n 467) 316-317.

[474] 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.

[475] EIDENMULLER (n 471) 8 explains what risks for the market functioning can be linked to experience goods: 'as is well-known, information asymmetries with respect to experience goods can lead to market failure because of adverse selection. Buyers who are uncertain about the quality of the good purchased will assume a medium quality standard. High quality vendors will not be able to charge high prices for their goods, as buyers will not be willing to honor such high quality since they are incapable of recognizing it. Hence, the average quality of the goods offered deteriorates, and the market for a particular good may even break down.'

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then the trader does.[476] 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.[477]

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 consumers to participate in transactions without physical presence of the trader.[478] 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. Therefore, the ample exclusions list concerning various consumer rights granted by the Directive on consumer rights, and notably concerning the right to withdraw, as well as information requirements, should be criticised.[479]

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 received prior to contracting. The consumer

476 BEN-SHAHAR and POSNER (n 294) 2.

477 See Pamaria REKAITI and Roger van den BERGH, 'Cooling-off Periods in the Consumer Laws of the EC Member States. A Comparative Law and Economics Approach' (2000) 23 Journal of Consumer Policy 371, 381, where it is pointed out that: '(...)granting of cooling-off periods works as an incentive for sellers to set product prices that correspond to products' actual quality.'

478 BEN-SHAHAR and POSNER (n 294) 4.

479 The exclusions of art 3.3 of the Directive, transposed in art 93 TRLDCU and reg 6 COnsumer Contracts Regulations 2013, have been criticised as concerning products often offered online, such as eg plane tickets, see Patricia MÁRQUEZ LOBILLO, 'Contratación Electrónica de Viajes Combinados: Reflexiones tras la Propuesta de Directiva de julio de 2013 y el Proyecto de Reforma del TRLGDCU de octubre 2013 sobre el <<Derecho de desistimiento>>' [2015] La Protección de los Consumidores en Tiempos de Cambio. Ponencias y Comunicaciones del XIII Congreso de la Asociación Sainz de Andino; Luís María Miranda Serrano and others (eds) 141.

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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.[480] 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. When the cooling-off period is fixed, as in European rules, there is a risk of inefficiency, as the traders might suffer high depreciation costs, and thus increase the prices.[481]

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 – credence goods – consumers are not able to verify if the information provided on the product was accurate, or as Hermalin and others put it, 'the beneficiary of a contractual promise may be unable to determine whether the promise has been kept or broken'.[482] During the course of the cooling-off period a 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 either on specific remedies for example for the lack of conformity, or on traditional remedies such as misrepresentation or vices of consent, with all their shortcomings. In such cases it will be up to the consumers to demonstrate that the good was effectively flawed or malfunctioning, and doing so may quite often be impossible at a reasonable cost.

The right of withdrawal is certainly an important tool in promoting correct market functioning in respect of electronic contracts, aiming at restoring the contractual

[480] See eg Commission, 'Digital contracts for Europe – Unleashing the potential of e-commerce' (Communication) COM(2015) 633 final.

[481] BEN-SHAHAR and POSNER (n 294) 5-6.

[482] Benjamin E HERMALIN and others, 'Contract Law' in AMitchell Polinsky and Steven Shavell (eds), *Handbook of Law and Economics. Vol.1* (Elsevier BV 2007) 11-12.

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balance affected by the information asymmetries. The European legislator opted for a mandatory withdrawal period in distance contracts;[483] an alternative solution of a voluntary cancellation period has been adopted in on-premises contracts.[484] In relation to the other remedies, the main advantage of the withdrawal right is the fact that it operates without court intervention, although obviously might be enforced by courts if need be. The balance between the consumer protection and promoting of trade has to be carefully struck, as too high costs of granting cancellation periods to consumers may constitute an obstacle to market functioning, while too complicated performance of the right can bar consumers from accessing it.[485]

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483 Art 10 Directive on consumer rights.

484 See EIDENMULLER (n 471) 10.

485 Ibid 18-22.

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***Figures* 1.–4.**

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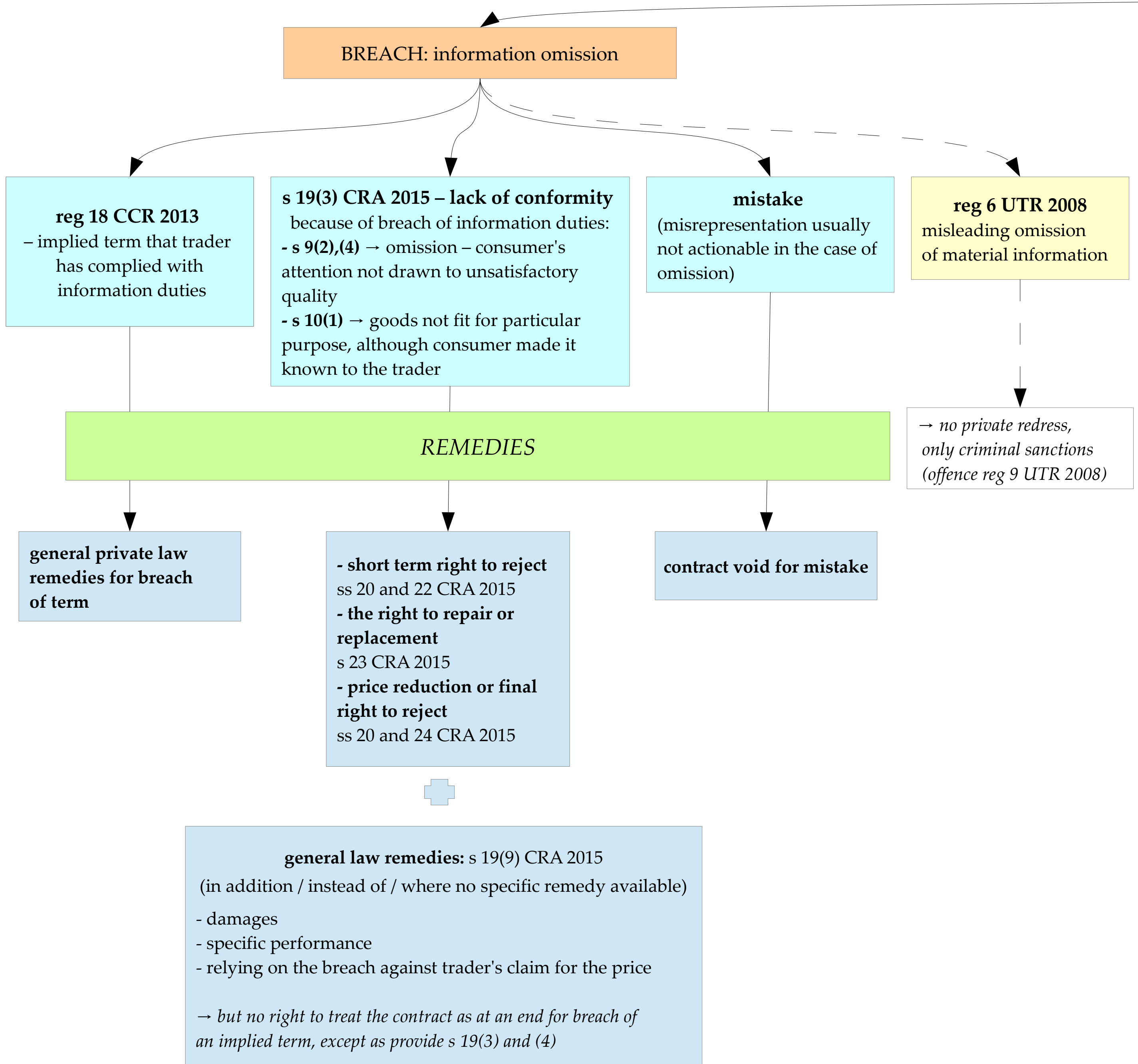
Figure 1.

<u>ENGLISH LAW:</u> INFORMATION ABOUT THE GOODS

ABBREVATIONS USED:

- CCR 2013 – the Consumer Contracts Regulations 2013
- CRA 2015 – the Consumer Rights Act 2015
- UTR 2008 – the Unfair Trading Regulations 2008



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INFORMATION BECOMES A TERM

→ s 9 CRA 2015: goods to be of satisfactory quality
→ s 10 CRA 2015: goods to be fit for particular purpose
→ s 11 CRA 2015: goods to be as described
→ s 11(4) CRA 2015 – Sch.2(a) CCR 2013: main characteristics of goods
→ reg 18 CCR 2013: trader complied with information duties

PRIVATE REDRESS FOR MISLEADING COMMERCIAL PRACTICE

→ regs 27Aff UTR 2008: private redress rights

BREACH: provision of false information

reg 18 CCR 2013 – implied term that trader has complied with information duties

s 19(3) CRA 2015 – lack of conformity
s 11(4) → any information provided about the goods relative to main characteristics of goods becomes term of the contract (Sch.2(a) CCR 2013)

s 19(3) CRA 2015 – lack of conformity because of breach of information duties:
- s 9(2) → satisfactory standard, taking Into account eg description (s 9(2)(a)) and advertising (s 9(2)(c))
- s 10(1) → goods not fit for particular purpose if it is made known to the trader

s 19(4) CRA 2015 – breach of requirements stated in the contract

misrepresentation, mistake

reg 27A UTR 2008 redress for **misleading action** that influences consumer's transactional decision - false information about main characteristics of the product (reg 5(4)(b),(5) UTR 2008)

REMEDIES

general private law remedies for breach of term

- short term right to reject ss 20 and 22 CRA 2015
- the right to repair or replacement s 23 CRA 2015
- price reduction or final right to reject ss 20 and 24 CRA 2015

- the right to repair or replacement s 23 CRA 2015
- price reduction or final right to reject ss 20 and 24 CRA 2015

damages and/or rescission for misrepresentation; **contract void** for mistake

- right to unwind the contract regs 27E,27F UTR 2008
- right to a discount reg 27I UTR 2008
- damages reg 27J UTR 2008

general law remedies: s 19(9) CRA 2015
(in addition / instead of / where no specific remedy available)
- damages
- specific performance
- relying on the breach against trader's claim for the price
- right to treat the contract as at an end for breach of an express term

→ but no right to treat the contract as at an end for breach of an implied term, except as provide s 19(3) and (4)

general private law remedies
reg 27L UTR 2008, eg:
redress for breach of term, mistake, Misrepresentation

→ but no damages for misrepresentation, if consumer has the right to redress under Part 4A UTR 2008 (s 2(4) Misrepresentation Act 1967)

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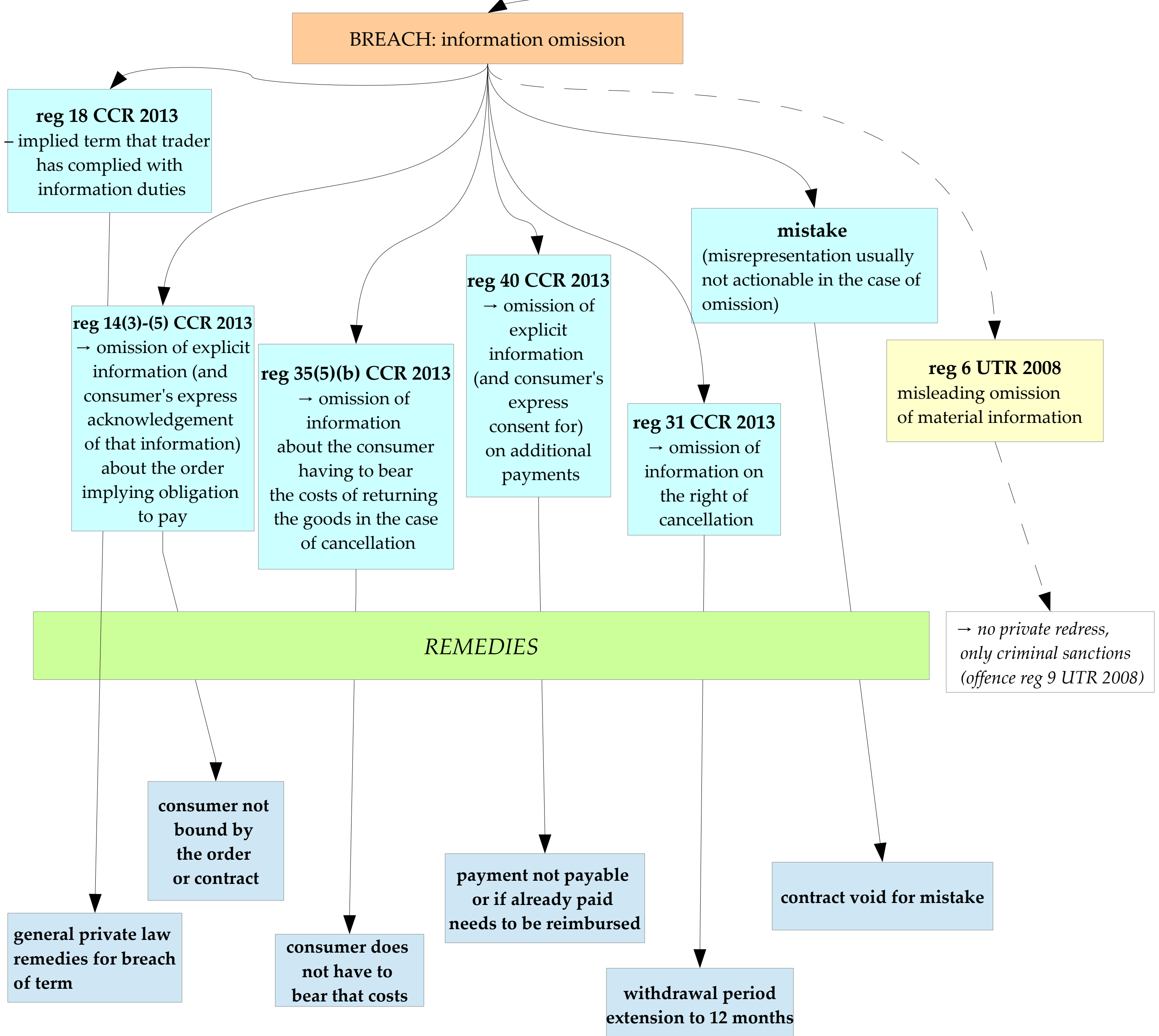
Figure 2.

ENGLISH LAW: INFORMATION OTHER THAN ABOUT THE GOODS

ABBREVATIONS USED:

- CCR 2013 – the Consumer Contracts Regulations 2013
- CRA 2015 – the Consumer Rights Act 2015
- UTR 2008 – the Unfair Trading Regulations 2008



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PRIVATE REDRESS FOR MISLEADING COMMERCIAL PRACTICE

→ regs 27Aff UTR 2008: private redress rights

CONSUMER NOT BOUND BY CONTRACT

→ reg 14(3)-(5) CCR 2013: order implying obligation to pay

→ reg 35(5)(b) CCR 2013: additional payments

→ reg 40 CCR 2013: costs of returning the goods

RIGHT TO CANCEL

→ regs 29 CCR 2013

BREACH: provision of false information

reg 18 CCR 2013
– implied term that trader has complied with information duties

s 12(2) CRA 2015
→ any information provided other than about the to main characteristics of goods becomes term of the contract
(Sch.2 CCR 2013)

misrepresentation, mistake

reg 27A UTR 2008
redress for **misleading action** that influences consumer's transactional decision

REMEDIES

general private law remedies for breach of term

s 19(5) CRA 2015:
breach of term that s 12 requires to be included
→ **right to recover from the trader the amount of any costs** incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods

damages and/or rescission for misrepresentation; **contract void** for mistake

- right to unwind the contract
regs 27E,27F UTR 2008
- right to a discount
reg 27I UTR 2008
- damages
reg 27J UTR 2008

general law remedies: s 19(9) CRA 2015
(in addition / instead of / where no specific remedy available)

- damages
- specific performance
- relying on the breach against trader's claim for the price
- right to treat the contract as at an end for breach of an express term

→ but no right to treat the contract as at an end for breach of an implied term, except as provide s 19(3) and (4)

general private law remedies
reg 27L UTR 2008, eg:
redress for breach of term, mistake, Misrepresentation

→ but no damages for misrepresentation, if consumer has the right to redress under Part 4A UTR 2008
(s 2(4) Misrepresentation Act 1967)

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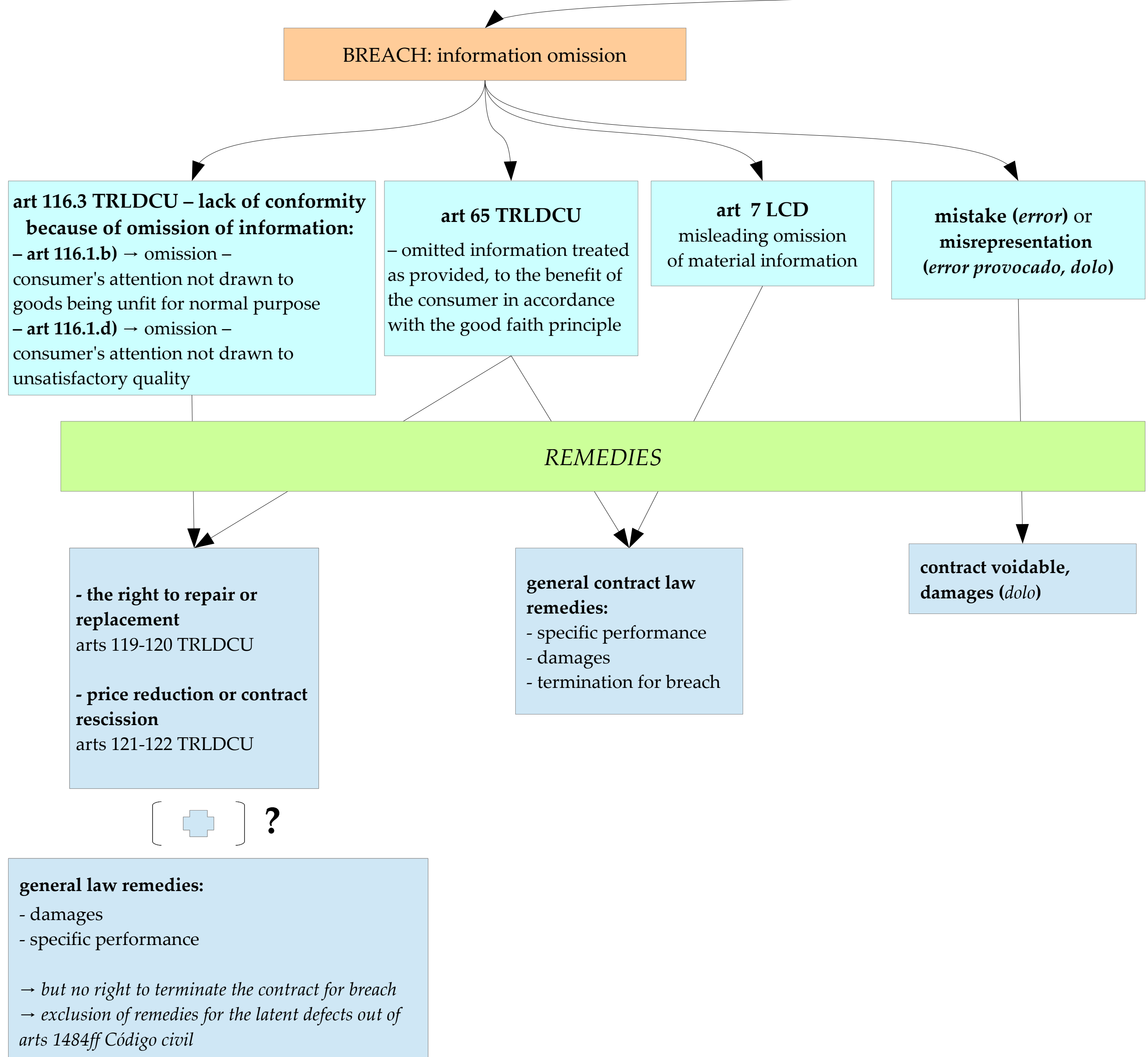
Figure 3.

SPANISH LAW: INFORMATION ABOUT THE GOODS

ABBREVATIONS USED:

- TRLDCU –Texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios
- LCD – Ley de Competencia Desleal



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INFORMATION AS PART OF CONFORMITY OF GOODS WITH THE CONTRACT

→ art 116.a) TRLDCU: goods to match trader's description

→ art 116.b) TRLDCU: goods to be fit for normal purpose

→ art 116.c) TRLDCU: goods to be fit for particular purpose made known to the trader

→ art 116.d) TRLDCU: goods to be of satisfactory quality

+

INCORPORATION OF INFORMATION IN THE CONTRACT

→ art 61.2 TRLGDCU: advertising and other commercial communications

→ art 65 TRLGDCU: as terms in accordance with the good faith principle, also in cases of information omission

→ art 97.5 TRLDCU: information treated as an integral part of the contract

BREACH: provision of false information

art 116.1 TRLDCU – lack of conformity:

- art 116.1.a): taking into consideration trader's description of goods

- art 116.1.c): goods' fitness for particular purpose – consumer made it known to the trader who then needs to confirm goods' fitness for that purpose

- art 116.1.d): goods to be of satisfactory quality; also taking into consideration public statements made by the trader

art 61.2 TRLDCU

content of advertisements or special offers and promotions is to be included in the contract

art 97.5 TRLDCU

pre-contractual information treated as an integral part of the contract

art 5 LCD

misleading commercial action

mistake (*error*) or **misrepresentation (*error provocado, dolo*)**

REMEDIES

- the right to repair or replacement
arts 119-120 TRLDCU

- price reduction or contract rescission
arts 121-122 TRLDCU

[+] ?

general law remedies:

- damages
- specific performance

→ but no right to terminate the contract for breach
→ exclusion of remedies for the latent defects out of arts 1484ff Código civil

general contract law remedies:
- specific performance
- damages
- termination for breach

contract voidable, damages (*dolo*)

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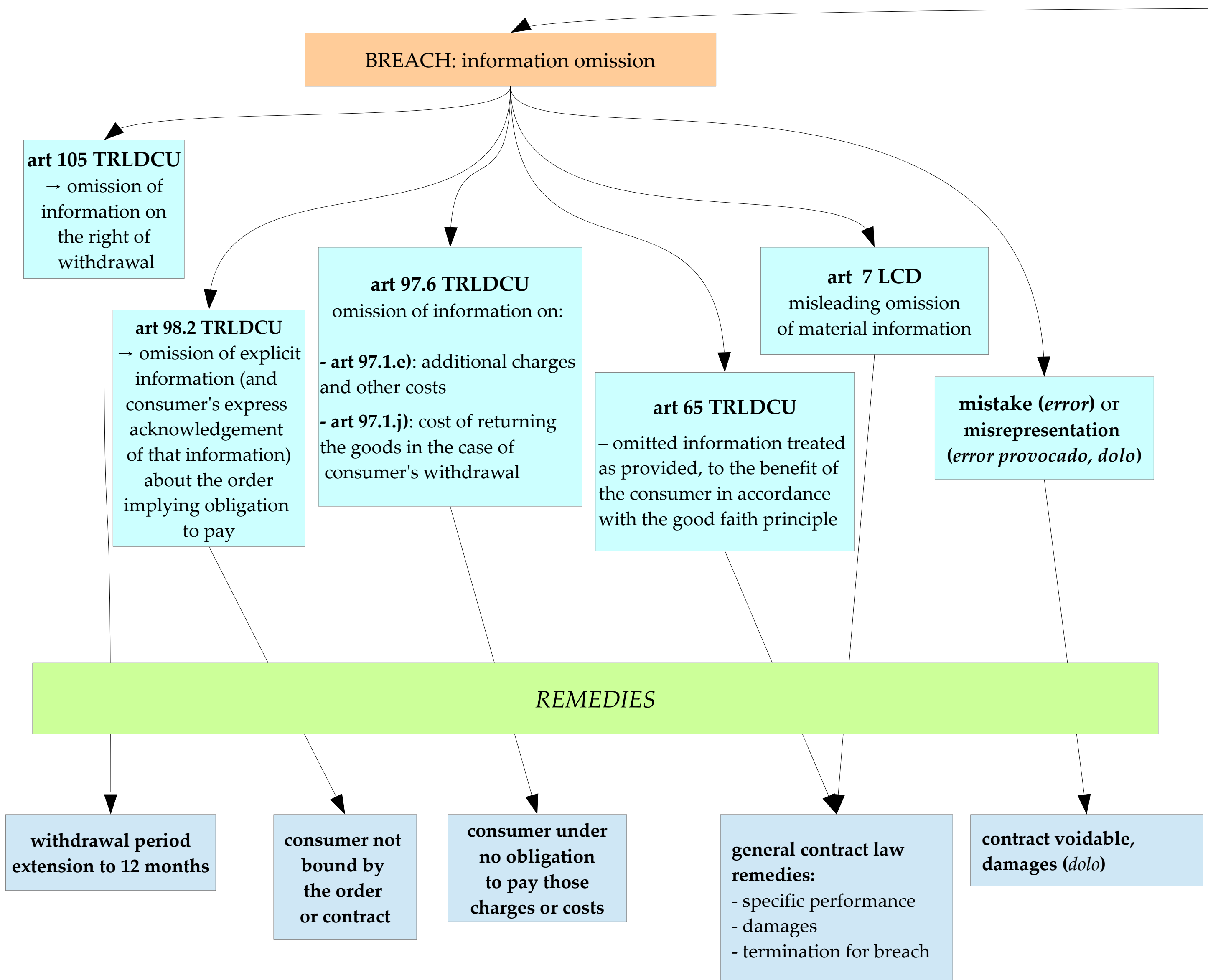
Figure 4.

SPANISH LAW: INFORMATION OTHER THAN ABOUT THE GOODS

ABBREVATIONS USED:

- TRLDCU –Texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios
- LCD – Ley de Competencia Desleal



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INCORPORATION OF INFORMATION IN THE CONTRACT

→ art 61.2 TRLGDCU: advertising and other commercial communications

→ art 65 TRLGDCU: as terms in accordance with the good faith principle, also in cases of information omission

→ art 97.5 TRLDCU: information treated as an integral part of the contract

+

CONSUMER NOT BOUND BY CONTRACT

→ art 97.6 TRLGDCU: additional costs or charges

→ art 98.2 TRLDCU: order implying obligation to pay

+

RIGHT OF WITHDRAWAL

→ arts 102ff TRLDCU

BREACH: provision of false information

art 61.2 TRLDCU

content of advertisements or special offers and promotions is to be included in the contract

art 97.5 TRLDCU

pre-contractual information treated as an integral part of the contract

art 5 LCD

misleading commercial action

mistake (*error*) or misrepresentation (*error provocado, dolo*)

REMEDIES

general contract law remedies:
- specific performance
- damages
- termination for breach

contract voidable, damages (*dolo*)

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Conclusions

I.–

Information duties, as well as adequate redress mechanisms for their breach, are an issue of great importance for consumer contracts; a fact which is widely accepted by both national, English and Spanish, and European legislators. In the context of the digital online market, the significance of information is even greater than in the traditional trade: consumers cannot examine in person the product they are purchasing, nor can they establish a direct face-to-face contact with the trader or their agent with whom the contract is formed.

The breach of information duties is a complex issue needing in depth analysis due to its potential influence on the market on the one hand, and its importance for the individual rights of consumers on the other. Although institutional remedies stemming from administrative or competition law allow to meet the effectiveness requirement for implementing EU directives, they do not provide individual redress mechanisms for consumers whose pre-contractual information rights were breached. It is the private law – both general law and specific consumer legislation – that makes various remedies available to consumers in such situations. The private law redress mechanisms and availability of efficient remedies contribute to correct regulation of the market of online consumer contracts through boosting consumers' confidence and promoting correct market functioning.

II.–

The European consumer policy is in a great measure founded on the information paradigm putting much emphasis on the role of the information duties in consumer protection and market economy: protecting consumers helps contributing

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to promoting consumption which in turn keeps the market healthy and the economy developing. Such is also the approach adopted in the directives relative to the B2C e-commerce: the Directive on consumer rights and the Directive on the electronic commerce.

Information asymmetry between consumers and traders is considered to be the most important among various market failures; its consequences might be potentially damaging for the market, as higher quality products and producers might simply be pushed out of the market due to the adverse selection mechanisms. In the context of the e-commerce environment the means of distance communication used imply a natural restriction of the availability of information about goods and services to consumers, due to the lack of simultaneous physical presence of the parties, impossibility of product inspection prior to purchase and complex purchasing process. These characteristics of the online trade bring about the need to establish and fulfil the information duties correctly: their main aim is to restore the information balance in the relationship of the parties. Correct provision of information prior to contract conclusion can influence consumers' choices and the ultimately successful outcome of the transaction to a higher extent than in traditional physical trade.

Nevertheless, pre-contractual information plays also an important role in the period posterior to contract formation, especially through providing consumers with knowledge regarding their contract and its potential breach. From such perspective, information duties are an instrument providing consumers with means of redress in the event of an unsatisfactory performance of their contract by the trader. In addition, information provision prevents the breach, if it should occur, from being unobservable for the consumer.

III.–

Information requirements imposed on traders can fulfil their functions both relative to the consumers' transactional decisions and redress option in the case of breach of contract only if a certain model of consumer is presumed: an active, circumspect and knowledgable consumer who can make actual use of the information received from the trader, basing on it their rational decisions.

This information empowerment concept, based on the assumption that provided with correct information consumers will make rational choices promoting market

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development, has attracted criticism as not taking into consideration the needs of more vulnerable passive consumers.

Nevertheless, vulnerable consumers who do not reach the active and well-informed standard model still seem to stay outside of the main focus of the European consumer protection, which can be demonstrated by the recently adopted measures. The Directive on consumer rights in its art 8.1 and 8.7 requires the information to be 'provided' or even 'made available to the consumer' — the concepts that according to the CJEU decisions imply an active behaviour on the side of the consumer, who might need to engage in a certain action in order to get the information, in contrast with a situation in which the consumer 'receives' the information in a passive way.

IV.–

The criticism towards information duties as main means of consumer protection within the EU is growing. The list of concerns regarding the proliferation of information requirements is extensive, the main being the effectiveness of mandated disclosure in consumer protection and its undesired effects potentially harming the market functioning.

High quantity of information requirements has a negative impact on the swiftness of transactions, given that information duties constitute a significant, yet not always necessary, intervention into the contractual balance – even though they are designed to reduce transaction costs of a supposedly weaker, less informed party, ie the consumer, they will almost certainly increase the costs for the other party. Information duties become thus a double-edged sword: putting more burden on traders will lead to them trying to compensate the costs resulting from mandatory rules through an increase of the prices of their products, resulting in consumers paying for their own protection.

Another line of criticism towards information duties in the B2C contracts originates in the behavioural trend in economic analysis of law. Behavioural law and economics, basing its findings on empirical research, questions the premise of rationality, arguing that consumers do not always behave rationally. Consumers whose rationality is bounded, even when provided with information, will not be able to exercise choice in a desired manner.

Furthermore, when combined with the speed of transactions being one of the

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main features of the online market, where offers are sometimes available for a limited time only, the information overload will almost certainly lead to consumers simply not reading all the pre-contractual information provided. E-commerce makes choice available to consumers practically limitless, however ironically the genuine free consent and choice is hindered due to oversupply of pre-contractual information.

V.–

Breach of the information duties is an issue mainly dealt with at the level of national law: the European law imposes only information duties which are transposed into the national systems. The approach of the legal systems of England and Spain to the information duties differs, both in what refers to the requirements introduced through implementation of the European law integrated into the national contract law, and those traditionally existing in the national private law. In general terms, English law approaches information duties with scepticism, whilst Spanish law provides for exchange of essential information by the contracting parties at the pre-contractual stage basing such requirement on the principle of pre-contractual good faith.

English system regards the contracting parties as being in adversarial positions and there is no obligation on them to disclose any information to the other party. The fact that non-disclosure is not viewed negatively does not mean however that the parties can mislead each other providing false information. There are various reasons for rejection of the general duty to disclose by English law: potential financial value of information, vagueness of the general disclosure duty making it hard to determine in each case the exact scope of the duty, which in turn could undermine transactional certainty, finally the prevalence of the freedom of contract principle.

Spanish law in contrast promotes the active co-operation between the contracting parties. Both parties are bound to communicate to each other all the circumstances known to them, which they believe that if known to the other party as well could influence their decision as to the contract itself or at least as to some of its terms. The parties shall not take advantage of each other, conduct going against the good faith and trust between the parties is inadmissible. The Spanish courts assume that the co-operation of the parties at the pre-contractual stage contributes to achieving the best

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outcome, increasing the general wealth and reducing litigation. The pre-contractual good faith principle is understood as an objective criterion used to evaluate the behaviour of the contracting parties; the general principle needs to be specifically applied in each situation, thus giving the concrete information duties precise scope and meaning.

VI.–

There are two main types of information duties established in both of the legal systems analysed. Direct information duties are introduced in usually long lists in provisions that expressly state the information items that are to be provided to a consumer before the contract is concluded. Indirect information duties are obligations arising from vaguer terms, not laid down as positive, clearly specified duties. Often the indirect duties will arise from the legal rules that establish some negative consequences of the non-disclosure, thus encouraging information disclosure.

Specific direct and general indirect information duties often overlap, which makes it possible to treat breach of a concrete direct duty as breach of an indirect more general obligation, thus providing the aggrieved party with various remedies.

VII.–

Information duties relevant to consumer electronic contracts, of both direct and indirect nature are established mainly in the specific consumer legislation, although general contract law doctrines should also be considered.

In what refers to the direct specific duties, two main groups can be identified. The requirements applicable generally in the e-commerce are established in arts 10, 19-22, 27 LSSICE in what refers to the Spanish legislation, and in regs 6-9 of The E-commerce Regulations 2002. Furthermore, the consumer protection legislation introduces other information duties in arts 60 and 97 of the TRLDCU in Spain and regs 13, 14 and Schedule 2 to The Consumer Contracts Regulations 2013 in England and Wales.

Indirect duties can be found both in the specific sectoral legislation and in general private law. Firstly, we should consider the consumer law provisions relative to the conformity of goods (products) with the contract, out of arts 114ff TRLDCU (Spain) and ss 9ff CRA 2015 (England and Wales). Also, indirect information duties result

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from the rules on the unfair commercial practices. The Spanish Ley Competencia Desleal in its arts 5-7 deals with the unfair trading practices, however it needs to be noted that it does not give rise to any specific rights of individual redress. In contrast, prohibition of misleading commercial actions in English law, out of reg 5 in relation to Part 4A UTR 2008, makes concrete individual redress rights available to consumers.

In what refers to the general private law, indirect information duties can be found in rules relative to the defects of consent in both systems, with particular emphasis on misrepresentation in English context, and additionally in the Spanish system in the general principle of pre-contractual good faith.

VIII.–

The content and scope of the information duties imposed on traders determines the consequences of their breach. Pre-contractual information duty is an obligation (more than mere incentive or encouragement) on the side of the trader resulting from legal rules requiring in a direct or indirect manner that information be provided to the other party. Private rights of redress on the side of consumers will usually not arise until the contract has been entered into, therefore information duties, although pre-contractual, belong to the realm of contract law. The content of the pre-contractual information includes information provided through advertising, if it is sufficiently precise and the trader's intention for it to be relied upon can be established (art 61 TRLDCU and *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 in general and s 9(2) CRA 2015 in what refers to the description of goods), however informative advertising needs to be distinguished from mere puffs and exaggerated statements accepted in trade by both systems. Furthermore, pre-contractual information provided is subsequently treated as terms of the contract (if it is formed): art 97.5 TRLDCU and ss 11(4), 11(5) and 12 CRA 2015 in relation to goods; 36(3), 36(4) and 37 in relation to digital content and s 50(3) and (4) in relation to services.

IX.–

The manner in which the information has been provided to the consumer is also directly linked to the breach of information duties and its extent. In this context the

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transparency requirement, recognised both in English and Spanish law (s 68 CRA 2015 and art 80 TRLDCU) needs to be taken into account.

Interestingly, although this requirement is a direct consequence of transposition of the art 5 of the Directive on unfair terms, it is laid down differently in the national systems analysed: the Spanish provision is limited only to standard-form contracts, where the terms were not individually negotiated, while provisions of the CRA 2015 apply to all B2C contracts; moreover the TRLDCU is more specific than the CRA 2015 not only requiring the terms to be precise, clear and plain, but also easily accessible and legible, so that the consumer is able to familiarise themselves with the terms before entering into the contract, regulating even the size of the letters and colour of font used in the contract terms.

Furthermore, other provisions refer to the clear and comprehensible manner of providing information (arts 60 and 97 TRLDCU and regs 13 and 14 The Consumer Contracts Regulations 2013) and a form and manner which is easily, directly and permanently accessible (regs 6(1) and 9(1) The E-commerce Regulations 2002 and arts 10.1 and 27 LSSICE), the Spanish legislation also adding the requirement of the information being available for free.

Both systems, English and Spanish, use a variety of slightly different concepts, such as 'clear', 'prominent', 'comprehensible', 'intelligible' – a situation for which there is no convincing rationale, the explanation being the terminology chaos present at the European level; those concepts being of relevance in the process of determining the fulfilment of the information duties and the extent of a potential breach.

X.–

Breach of information duties can be treated in different ways by the national law; these possible legal classifications of the situation of breach need to be distinguished from the remedies, as the same or similar remedies may be available under different classifications.

The most obvious consequence of breach of information duties is the application of specific remedies resulting directly from the specific consumer law provisions (eg withdrawal period extension or consumer not being bound by their order if no information on the obligation to pay), established in reg 14, 31, 35 and 40 The Consumer Contracts Regulations 2013 and arts 97.6, 98.2 and 105 TRLDCU, how-

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ever there is no such consequence established for the great majority of the direct information requirements.

Breach of information duties, especially relative to the information about the goods (or under Spanish law — products) subject-matter of the contract may result in application of the rules relative to the non-conformity (arts 114ff TRLDCU and ss 9ff CRA 2015). Furthermore, and only under English law, due to the recently adopted Consumer Protection Amendment 2014, private law remedies for a misleading action out of reg 5 UTR 2008 may come into play.

Also, breach of information duties can be classified as breach of term — express or implied — on the basis of inclusion of the pre-contractual information items in the contract content, as established in arts 61.2, 65 and 97.5 TRLDCU and ss 11(4), 11(5) and 12 CRA 2015.

Finally, in general private law of both England and Spain indirect information duties can be found, providing other possible consequences of breach through the laws of defects of consent (or vitiating factors). In the Spanish context also the general principle of good faith is to be considered, however it does not stand alone as a separate ground for remedies, but rather is taken into account mainly in application of art 65 TRLDCU and defects of consent.

XI.–

Breach of information duties produces consequences even when the contract does not materialise, however private redress rights for the breach of information duties being the focus of this study depend on the subsequent contract formation. The fact that a contract has been formed does not nevertheless automatically imply that the remedies will be of contractual nature: both contractual (*responsabilidad contractual*) and tortious (*responsabilidad extracontractual*) nature of the remedies should be considered.

Determining whether contract or tort law applies is of significance for the length of limitation periods, for the law applicable in the case of potential cross-boarder dispute, or for the measure of damages.

Having said that, the remedies relative to the breach of contract naturally belong to the realm of contract law both in Spanish and English law. The liability for the defects of consent presents some more complexity. Under English law the

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defects of consent traditionally give rise to liability in tort, although the remedy of contract rescission is of contractual nature; the adoption of the Misrepresentation Act 1967 introduced statutory liability for misrepresentation, nevertheless the measure of damages stays tortious. In what refers to Spanish law, art 1270 of the *Código civil* gives no clear indication as to the nature of the liability; the *Tribunal Supremo* seems to be inclined to treat the liability arising out of fraud – *dolo* – as contractual. In what refers to specific remedies, the remedies for lack of conformity are definitely of a contractual nature, since the regime of non-conformity is relative to the consumer sales law.

In what refers to the measure of damages, the tortious measure of damages (*interés negativo*) is the one best fitting consumer contracts: the aggrieved party is put in a position they were before the contract conclusion and are able to allocate they assets again — purchase a similar product from a different trader, therefore keeping the market functioning. The compensation resulting from an action in misrepresentation (or defects of consent) will be of such character. Nevertheless, the damages available under both Spanish and English law for the breach of contract and lack of conformity will be of contractual measure.

XII.–

In many instances consumers will have both specific and general law remedies available due to the potential overlapping classifications of breach in a given set of facts. Generally speaking, both English and Spanish law will allow the aggrieved consumer to claim general law remedies in spite of availability of the specific statutory remedies, instead of or in addition to them, however clearly not so as to recover twice the same loss.

Nevertheless, there are some notable exclusions of the application of the general law remedies in both systems. There is a particular hierarchy of remedies for the lack of conformity of goods (products) with the contract, in which the remedy of contract termination for breach (also referred to as rejection of goods or rescission for breach) is only a secondary remedy that cannot be exercised unless other remedies have been sought previously. This is true for both systems analysed, although English law recognises an additional short-term right to reject. Except for that right however, there is a great similarity between English and Spanish law, due to the fact that the

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scheme of remedies for the lack of conformity originates in the European Directive on the sale of consumer goods.

Therefore, it is logical to assume that allowing to claim a general contract law remedy of contract termination for breach where the remedies for non-conformity are available would be inappropriate, as it would go against the rationale of the hierarchy of remedies. Indeed, s 19(12) CRA 2015 expressly bars the consumer from pursuing contract termination for a breach of a term relative to the conformity of goods implied by the CRA 2015 on the common law basis. In what refers to Spanish law, the TRLDCU does not establish any rules preventing consumers from seeking contract rescission for breach under the general law, and although the prevailing opinion is that it should be barred, the courts seem to approach the issue in an unorthodox manner, sometimes allowing the aggrieved consumers to claim remedies not established in the arts 114ff TRLDCU.

It should be added however that the TRLDCU does expressly exclude the availability of the general law remedies for latent defects (*vicios ocultos*) in the cases of lack of conformity. Another notable exclusion concerns the availability of the damages for misrepresentation under s 2 of the Misrepresentation Act 1967 when the consumer is entitled to the remedies for a misleading action under Part 4A UTR 2008; an exclusions which is of significance due to the statutory damages under Misrepresentation Act 1967 being particularly generous to the aggrieved party.

XIII.–

Despite a variety of specific statutory remedies available in both systems, English and Spanish laws still rely in an important extent on the general law as providing means of redress to consumers. As s 19(10) CRA 2015 states, general law remedies are available in addition to specific remedies, instead of them and where no such remedy is provided for.

The English law landscape of specific law remedies for breach of information duties is more developed than the Spanish one, especially due to the private redress rights of Part 4A UTR 2008 and s 12 CRA 2015 providing specific remedies for breach of any information item provided according to the Schedule 2 to The Consumer Contracts Regulations 2013.

In contrast, Spanish law relies more on general law remedies, as through provi-

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sions of arts 61.2, 65 and 97.5 TRLDCU the statute provides a possible classification of breach, ie breach of an implied or express contract term, however the remedies must be sought in general contract law (the remedy of specific performance, compensation in damages or contract rescission for breach).

The comparative analysis based on the functional approach needs to take into account the rules that are applicable in both systems in the same set of facts. Therefore, the English law of private redress for misleading commercial actions out of regs 27Aff UTR 2008 should be compared against the general private law of fraud and induced mistake in the Spanish system.

The reasons for adoption of a specific scheme of remedies in English law are well known, the main being the inadequacy of the complex law of misrepresentation to the disputes arising out of consumer contracts. In the Spanish system however it seems that the general law secures the rights of the parties to a sufficient extent, which is also confirmed by the amount of judicial decisions concerning consumer contracts where the relief is provided through the law of mistake or fraud.

XIV.–

The provisions establishing information duties, such as Schedule 2 to The Consumer Contracts Regulations 2013, art 97.1 TRLDCU, art 10 of the LSSICE or any other analysed, do not distinguish information requirements of higher or lesser importance.

However, the remedies available for breach of different duties do correlate with the significance of the information items. The discussion relative to the disclosure duty in the general law revolved around 'material information'; for example for the defects of consent to be actionable, a common condition is for the information item breached to have induced the consumer into the contract. Such requirement of 'materiality' can also be noted in the context of specific statutory remedies under the English law of misleading action: the third condition out of reg 27A UTR 2008 requires the information to have constituted an important factor in the consumer's decision on entering into the contract.

In what refers to other specific information duties, the duties relative to the main characteristics of goods, and also digital content – products – subject-matter of the contract are also clearly akin to the 'material information' concept. Remedies

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of a different types are available for breach of information items relative to the main characteristics of goods: the scheme of remedies for non-conformity of arts 114ff TRLDCU and ss 19ff CRA 2015 includes repair, replacement, discount and contract termination for breach. Also other very particular information items, as the information on the right of withdrawal, are protected through specific remedies.

However in general, if breach was relative to information items other than about the goods, then s 19(5) CRA 2015 provides only for the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid. Spanish law provides for no specific remedies in such case, relying solely on the inclusion of the information in the contract through arts 61.2, 65 and 97.5 TRLDCU and general contract law remedies. General law remedies in both English and Spanish law are only available for breach of a certain seriousness (relative to the 'material information'), therefore it can be assumed that some instances of breach, concerning information items of lesser importance, are not protected through private law individual remedies.

XV.–

A difference in availability of the remedies depending on how the breach occurred: through omission of certain information items or through provision of false information, presumed in the research questions, has been confirmed by the detailed analysis. The distinction originates in the general contract law especially in English law due to the doctrine of misrepresentation, according to which only false statements made and not silence can amount to actionable misrepresentation. The Spanish general law recognises no such distinction, treating fraud through provision of false information and through omission practically equally.

The divide between active misinformation and omission is relevant also to the specific statutory remedies under English law: the English regulator provided for private redress rights only for misleading actions out of reg 5 UTR 2008, but not for misleading omissions out of reg 6 UTR 2008, which is not surprising nevertheless given the similarities between the law of misrepresentation and the newly introduced redress rights. The distinction between non-disclosure and provision of false information reaches however further: for instance, s 12(2) CRA 2015 considers any information other than about the goods provided to the consumer to be a term

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of the contract, however non-disclosure only results in application of reg 18 Consumer Contracts Regulations 2013 implying that the trader has complied with their information duties.

Spanish law provides in many cases different remedies in the cases of active misinformation and information omission, however such distinctions are natural and due to the characteristics of information duties and their breach. A remedy of consumer not being bound by an order, when they were not clearly informed about it implying an obligation to pay can illustrate such natural distinction. In such case the only misinformation logically possible would be that of not informing about the obligation to pay. The distinction observable in English law however is a product of policy choices.

In my opinion, the traditional approach of English law to disclosure duties and their breach described in this paragraph adapts well to the reality of the B2C e-commerce, as one can observe a significant practical difference between non-disclosure and provision of false information. The fact that the trader omitted some or all pre-contractual information creates a need on the side of the consumer to either try to find the information themselves, or to look for another offer, which as we know are abundant on the Web, where the information they are interested in is provided. Nevertheless, provision of false information will induce the consumer to purchase a product which probably does not fit their needs. Here, not only the interests of the consumer are not satisfactorily fulfilled, but also, even more importantly, the market functioning suffers, as the consumer cannot just easily allocate their assets with a different – honest – trader.

XVI.–

Observations made above illustrate the influence the traditional law and the legal mentality of the regulators have on the specific statutory solutions adopted in the field of consumer law and often the implementation of the harmonised measures. Specific remedies for breach of information duties, although directly influenced by European directives, still maintain various national characteristics, such as: distinction between active misinformation and non-disclosure or accepting the information omission as giving rise to the same liability as provision of false information; introduction of an additional short-term right to reject in the English law in the context

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of a scheme of remedies originating in a directive adhering to continental principles putting more emphasis on maintaining the contractual relationship of the parties than allowing contract rescission.

The extent of the influence of the general law on the specific rules needs to be noted and taken into account in the process of adopting new harmonised measures at the European level. From a practical point of view, the example of remedies shows that consumer law constitutes an inherent part of the national general private law and neither cannot nor should not be treated as a self-standing completely independent area of law. The courts interpret consumer law provisions according to the general legal spirit of the national law; the consumer law provisions introduced through harmonisation measures shape in turn the contract law of each system.

The influence of the general law on the application and interpretation of the consumer law provisions adds to the complexity of the consumer protection law, which becomes an issue needing urgent reaction, as the consumer law itself is far from being clear and easy to apply. The legislative measures recently adopted in both English and Spanish law rely heavily on cross-references between different pieces of legislation. The CRA 2015 on various occasions cross-references to the Consumer Contracts Regulations 2013, and especially to the Schedule 2 where the information requirements are listed. The LSSICE refers to the information duties established in the TRLDCU, which in turn excludes their application to various distance contracts as listed in the art 93. Such solutions make it definitely more difficult for the consumers to access their rights.

XVII.–

The rather chaotic legislation adds to what is probably the most burning problem linked to the remedies for breach of information duties: no clear list of remedies applicable exists at any legislative level – neither in the European Union law, nor in the Spanish or English national systems.

At the European level, casuistic character of information duties leads to market fragmentation, due to the proliferation of information requirements in the *acquis communautaire* on the one hand, and their different implementation by the Member States, as the example of English and Spanish law illustrates, on the other.

Furthermore, casuistic character of the duties is also an important issue further

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hindering the effective and logical application of the remedies for breach of those duties. The availability of various types of remedies on the basis of the same set of facts brings about problems relative to the possibility of claiming remedies under different heads and their potential hierarchy and exclusions. The issue is pertinent especially under Spanish law as there is no clear provision regulating this question similar to s 19(9)-(12) CRA 2015 and s 2(4) Misrepresentation Act 1967. The abundance of the information duties of different character and the rather chaotic scheme of remedies increase the complexity of the legal framework of the breach of information duties, which in turn may lead to decrease of consumers' trust in the market.

The rules that apply to the pre-contractual information duties in the B2C e-commerce in both English and Spanish law originate on two different levels, in the European law and in the national law. The traditional contract law influences the scope of the duties and remedies available in each system, in consequence a problem may arise in connection to the general duty of fair dealing and good faith present in the national internal legal system. Situation in which it implies a wider than a maximum harmonisation Directive on consumer rights scope of the duty to inform could be even considered a violation of the full harmonisation principle.

A significant diversity of the remedies potentially available to consumers for the breach of information duties can be demonstrated; the aggrieved party may be entitled to various remedies of different types, such as: remedies linked to ineffectiveness of the contract (or payment); monetary remedies; and remedies forcing the trader to do something. In addition, a remedy *sui generis* of the withdrawal period extension common to both English and Spanish law should be mentioned.

XVIII.–

Although the *status quo* described above leaves much to be desired, a uniformity of remedies for breach, as proposed in art II.–3:109 DCFR neither seems appropriate. The available remedies should correspond with the purpose of the information duty that was breached: the effect on the contract of omission of information relative to the main characteristics of the good subject-matter of the contract is evidently different than that of a small detail in trader's address if they are still easily identifiable. Moreover, local preferences of consumers influence the design of remedies, as the example of the short-term right to reject available only under English law, non-

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existent in Spanish law shows.

It should be mentioned nevertheless, that in many cases the remedy of contract rescission consisting in consumer returning the product to the trader and recovering the sum paid is adequate to consumer contracts allowing the consumer to relocate their money in exchange for more suitable product. Clearly, it goes against trader's interests, especially in what refers to the SME.

XIX.–

The scheme of remedies for breach of information duties could be simplified through tackling the information excess issue. As pointed out above, information items are not expressly classified into groups according to their importance by the legislator, however the remedies available for certain information requirements, such as information relative to the main characteristics of goods, demonstrate that some information items are undoubtedly of more importance. Those are mainly the information items that directly influence the consumer's contracting decision, which in turn is the main goal of information provision at the pre-contractual stage. The rest of the information provided, although potentially serving other functions, for example at a later stage if the contract is not correctly fulfilled, leads to information overload resulting in consumer not being able to absorb and understand any of the information received. It would therefore seem appropriate to curb the quantity of the information consumers receive, or at least clearly identify the information of key importance for their transactional decision.

Together with effective remedies for breach reasonable information requirements could correct, at least to some extent, undesired asymmetries in bargaining power of the parties. A balance between an excessive regulation which hinders the development of the e-commerce on the one hand, and establishing rules improving consumers' trust and promoting the use of the e-commerce on the daily basis on the other, should be sought by the regulator. Consumers should be able to focus on the information items which are of true relevance to them, such as information relative to the trader they are entering a contract with, the good or product they are purchasing, the price that needs to be paid and the remedies available in the case of breach of contract.

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XX.–

Moreover, an effective scheme of remedies for breach of information duties, including private law means of individual redress for consumers, could contribute to tackling the issue of information overload. Remedies adequate to the information items breached shift focus from the necessity of finding an optimal level of information to the functions it fulfils.

Mandated disclosure from such a perspective serves market transparency and honesty, not because the information is read carefully and taken on board by consumers before they enter a given contract, but due to the fact that they receive the pre-contractual information together with contract terms on a durable medium and trader's compliance with it is secured thanks to effective remedies for breach in place. Consumers' transaction costs are lowered, since they do not need to read the whole list of information provided to them, they can only focus on a few variables of key importance, such as the price for example, to compare offers available on the market an choose the optimal one.

XXI.–

Despite the problematic issues that arise out of the specific consumer legislation presented above, specific statutory remedies resulting from consumer law are more adequate to consumer contracts disputes, particularly because they are created with this kind of issues in mind.

The problems with application of the general contract law to the consumer cases include the low value of the disputes, length of court proceedings, burden of proof on the side of the claimant – the consumer, conditions including the necessity for the contract to have been induced through the information provided or hidden and the the proof of the damage caused by the misinformation.

Although specific remedies in great measure also need to be enforced through the judicial systems, they still present various important advantages for the consumers. Various remedies are of 'automatic' application and can be used as defence against trader, eg when a consumer is not bound by their order due to not having received the information about their obligation to pay: it is the trader who would need to claim contract enforcement. Remedies often provide for burden of proof reversal, and the fact that information was material enough to have induced the consumer to

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contract often does not need to be established. Specific remedies are also designed in a clear manner, defining the hierarchy of their application and other details, such as a percentage of discount for instance.

The right to withdraw, although strictly speaking not a remedy for breach of information rights, is closely linked to information duties both from the economics and legal perspectives. A consumer who feels that the information they had received about the product they purchased turned out to be inaccurate or misleading, is entitled to return the good without specifying the reason within 14 days time period. The existence of the cancellation right promotes traders who provide truthful information about the products they offer and allows consumers to evaluate the fitness of the purchase for the use they intend to give it. In a case where they judge it not satisfactory, there is no necessity of court proceedings, nor of proving the misinformation caused by the trader. Clearly, the way the right of withdrawal works needs to be examined and optimised; however it can constitute an example of a remedy adequate to electronic consumer contracts fitting the mechanisms and particularity of those.

XXII.–

The aim of the present study was to illustrate the significance of the information duties and remedies for their breach in the context of the B2C e-commerce and present mechanisms governing the application of the duties and remedies. The analysis has made it clear that the national rules are connected to the inherent features of the systems, which inevitably makes it a difficult task for the transnational regulator to harmonise the rules.

Information duties as such cannot constitute in any case a sole protective measure in consumer contracts; their effectiveness depends to an important extent on the existence of adequate remedies for their breach. As argued, the general private law does not always offer optimal solutions in the context of consumer protection. Regulators, both at the European and national level, should be aware of the particular characteristics of the e-commerce and adopt provisions tackling the issue in a relevant manner. Excessive information duties and chaotically established remedies for their breach constitute an obstacle to the market development and consumer protection, rather than a necessary improvement.

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While the adoption of the Directive on consumer rights contributed to the development of consumer protection, it is still early to be able to assess the real influence its transposition, as well as other recently adopted national measures (such as CRA 2015 or Consumer Protection Amendment 2014), will have on the national and European B2C e-commerce. The newly adopted laws confirm the trend of establishing detailed rules, without however a general vision of how the issue of information duties should be tackled. A deregulation of certain extent would be a welcomed move: for consumers oversupply of information has similar consequences to provision of no information, whilst traders would benefit from less stringent regulation. An improvement of this kind should mainly consist of identifying the key information items that consumers need to receive in the e-commerce environment in order to be able to correctly form their transactional decision, the superfluous information could only be provided on a durable medium for further reference. Breach of any of the key information items should result in contract rescission, of a similar character to the short-term right to reject established within the scheme of the remedies for lack of conformity in the CRA 2015, should the consumer request so, thus simplifying the scheme of remedies and limiting the excessive information consumers receive.

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Conclusiones

PRIMERA

La importancia del deber de información, en las relaciones contractuales de consumo, ha sido puesta de relieve tanto por el legislador comunitario, como por los legisladores nacionales, español e inglés. Ambos inciden, además, en la necesidad de establecer mecanismos adecuados tendentes a paliar las graves consecuencias que pueden derivarse del incumplimiento del deber que hemos analizado.

Si en el Mercado *off line* la información al consumidor se considera trascendental, en aras de conseguir su consentimiento informado, en el Mercado *on line* la misma se convierte en elemento imprescindible para la obtención del de un consumidor que no tiene la posibilidad física de examinar aquello que está adquiriendo, caso de la adquisición de productos, o que no tiene la posibilidad de entablar relación directa con el empresario o su representante, caso, por ejemplo, de la adquisición de contenidos digitales.

Nos enfrentamos a una materia compleja, que necesita un análisis profundo debido a su potencial influencia, por un lado, sobre el Mercado, en general; y, por otro, sobre el ejercicio de los derechos individuales de los consumidores, en particular.

Aunque los remedios institucionales derivados de la transposición de las Disposiciones comunitarias, plasmados fundamentalmente en normas de Derecho administrativo sancionador y de Derecho de la competencia, proporcionan la adecuada satisfacción de los intereses del Mercado y contribuyen a su correcto funcionamiento, no permiten alcanzar la protección directa del consumidor, o mejor dicho, no facilitan remedios contractuales directos para los consumidores que han visto infringidos sus derechos de información precontractuales. La satisfacción de dichos intereses habrá de buscarse, si quiera parcialmente, en otras vías y, concretamente,

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en las normas de Derecho Privado, incluyendo tanto las normas de Derecho general, como las específicas en materia de comercio electrónico o de consumo.

Debemos ser conscientes de la relevancia del cumplimiento del deber de información, especialmente en los contratos de consumo electrónicos, así como de la importancia de establecer mecanismos-remedios adecuados que garanticen su cumplimiento y aplicación, en tanto son esenciales para regular el Mercado de los contratos electrónicos con consumidores, fomentando la confianza de los mismos y promoviendo su correcto funcionamiento.

SEGUNDA

En esta línea se orienta la política europea de los consumidores, armonizada en 2011 en la Directiva en la materia y, consagrada en 2002, en lo que a servicios de la sociedad de la información y comercio electrónico se refiere, en la correspondiente Directiva.

De hecho, se considera que la asimetría informativa entre los consumidores y los empresarios constituye uno de los fallos más importantes del Mercado de la comercialización a distancia, y potencialmente, puede resultar perjudicial para el propio Mercado, si tenemos en cuenta que, conforme a los mecanismos de selección adversa, el incumplimiento de las obligaciones informativas, puede generar que productores y productos de mejor calidad sean eliminados del mismo.

Y es que el fundamento último para el establecimiento de los deberes precontractuales de información, en el ámbito del comercio electrónico, se encuentra en la necesidad de restablecer el equilibrio en la relación entre las partes contratantes, pues, como todos sabemos, las transacciones *on line* se caracterizan, como no puede ser de otra forma, por el hecho de que se llevan a cabo a distancia, sin que las partes se encuentren presentes simultáneamente en el mismo lugar; porque el consumidor se enfrenta a la imposibilidad de realizar una inspección del producto o servicio antes de su adquisición; por el empleo medios técnicos de contratación, incidiendo la dificultad de su manejo en el proceso de compra. Elementos todos ellos que redundan en la defensa de la importancia del establecimiento y cumplimiento de los deberes de información. No debemos olvidar, además, el importante papel que adquiere la información precontractual en el período posterior a la formación del contrato, especialmente como mecanismo para que los consumidores conozcan su contenido, las

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obligaciones que se derivan de la relación entablada y las consecuencias que pueden generarse de su potencial incumplimiento.

Desde esa perspectiva, los deberes de información precontractual son una herramienta útil para proporcionar a los consumidores posibles vías de recurso o medios de reparación (*means of redress*) ante el cumplimiento contractual insatisfactorio por la parte del empresario. Tanto es así que la infracción de dichos deberes puede suponer, especialmente en los contratos electrónicos, que el consumidor no sea consciente del incumplimiento por parte del empresario de las obligaciones que se derivan del concreto acuerdo celebrado, o dicho de otra forma, que la falta de información pueda llevarle incluso a ignorar que el contrato está siendo incumplido, por no saber que sea lo que se está incumpliendo.

TERCERA

Las funciones atribuidas a los deberes de información impuestos sobre los empresarios, sea como mecanismos idóneos para influir en la toma de las decisiones transaccionales por el consumidor, o como cauce para proporcionarle los remedios contractuales a los que acogerse ante la falta de cumplimiento o el incumplimiento defectuoso del contrato, solo tendrán sentido si tomamos como referencia un concreto modelo de consumidor, el consumidor activo, capaz de utilizar adecuadamente la información recibida del empresario, y de actuar racionalmente basando su decisión en ella.

Este concepto de empoderamiento a través de la información, fundado en la idea de que si el consumidor recibe información correcta tomará, sobre la base de la misma, una decisión transaccional adecuada, lo que promoverá, además, el desarrollo del Mercado, ha sido objeto de duras críticas por entenderse que no toma en consideración las necesidades de los consumidores más débiles y vulnerables (los pasivos).

Dichas críticas no han tenido reflejo, sin embargo, en el Texto comunitario sobre Derechos de los consumidores de 2011, toda vez que el legislador europeo parece tomar como sujeto a los que dirige los mecanismos de protección que regula a un consumidor activo, informado, frente al consumidor pasivo que parece quedar al margen de la política europea de protección de los consumidores. Así podría deducirse, por ejemplo, de la interpretación jurisprudencial comunitaria de la exigencia de puesta a disposición de la información, consagrada en los artículos 8.1 y 8.7 del

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Texto de 2011, conforme a la cual, se exige una actitud activa al consumidor, una acción de acceso a la información por su parte, frente a la pasividad propia del mercado *off line*.

CUARTA

La imposición de los deberes precontractuales de información tiene, como no podría ser de otra forma, una vertiente negativa, puesta de relieve por aquellos que critican su utilización como mecanismos principal para la protección de los consumidores en el marco de la Unión Europea.

Son varios los argumentos que se esgrimen al respecto. Por un lado, se relaciona la elevada cantidad de información que ha de proporcionar el empresario con la funcionalidad del Mercado, manifestando la incidencia negativa que tiene sobre la celeridad y la rapidez del mismo. Por otro, se afirma que la imposición de los deberes que analizamos constituye una intervención significativa, que no siempre necesaria, en el equilibrio contractual, pues si bien la imposición de los deberes tiene como objeto reducir los costes de transacción para la parte supuestamente más débil (el consumidor), es obvio que contribuye al incremento de los costes que ha de soportar la otra parte (el empresario).

Así las cosas, la imposición de los deberes precontractuales se convierte en un arma de doble filo. Si bien es cierto que proporcionan una mayor protección al consumidor, no lo es menos que el consumidor termina asumiendo los costes económicos de su propia protección, pues es evidente que el empresario va a repercutir en el precio final de los productos o servicios el montante de los gastos que le supone el cumplimiento de las exigencias legislativas relativas a la información.

Además, tomando como referencia la pauta conductista del análisis económico del Derecho, y los resultados empíricos de la investigación, se cuestiona la premisa de la racionalidad, argumentando que los consumidores no siempre ajustan su comportamiento a la misma. Es más, en determinados casos el suministro de toda la información precontractual exigida legalmente, no va a garantizar su comportamiento racional, ni que la elección del producto o servicio se lleve a cabo en la forma que más convenga a sus intereses.

No podemos olvidar, por otro lado, la realidad de la Red, la celeridad y rapidez propia del Mercado *on line*, el hecho de que en el mismo las ofertas tengan una

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vigencia determinada e incluso en ocasiones muy limitada en el tiempo, acontecimientos que llevan al consumidor, que desea acogerse a las mismas, a la toma rápida de decisiones, pulsando en los iconos *ad hoc* que contienen la información sin acceder a la misma, sin leerla, sin almacenarla.

Es irónico, en este sentido, como el exceso de información precontractual se convierte en un mecanismo de desprotección de los consumidores, que abrumados, terminan adquiriendo los productos y servicios ofertados en el Mercado electrónico "a ciegas", hablándose ya de los efectos negativos de la denominada "infoxicación".

QUINTA

Sentadas estas bases, relativas al fundamento de la existencia de deberes precontractuales de información, predicables tanto del Derecho español como del inglés, como no debería ser de otra manera si tenemos en cuenta su origen comunitario, nuestra Tesis Doctoral ha tenido como objetivo el examen comparativo del sistema jurídico de información y de remedios frente al incumplimiento de los deberes de información, consagrado en ambos ordenamientos.

El régimen jurídico que los ordenamientos inglés y español establecen para legislar los deberes de información es diferente, porque diferentes son las exigencias al respecto tradicionalmente existentes en el Derecho nacional privado, y, sorprendentemente, porque difieren también los requisitos introducidos en los regímenes nacionales cuando se han transpuesto a los respectivos ordenamientos las Normas comunitarias.

Como regla general, el Derecho inglés aborda el tema de los deberes de información con escepticismo, mientras que el Derecho privado español, al sustentarse sobre el principio de la buena fe precontractual, consagra un sistema más exigente.

El ordenamiento inglés considera que las partes contratantes están en una posición adversaria, y, en consecuencia, no impone a ninguna de ellas una obligación de suministrar información a la otra, sin que ello suponga el reconocimiento del derecho a facilitar información falsa o abra el camino a la posibilidad de fundar las transacciones sobre la base del engaño. Varios son los argumentos que se esgrimen para fundamentar esta posición. Así, por un lado, el potencial valor económico de la información. Por otro, la imprecisión a la hora de establecer un deber general de in-

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formación, que dificulta la determinación del ámbito exacto del mismo en cada caso, y que puede resultar perjudicial para la seguridad jurídica. Por último el predominio del principio de la libertad contractual.

El Derecho español, por el contrario, promueve la cooperación activa entre los sujetos que intervienen en la relación contractual, obligándoles a comunicar todas las circunstancias que conozcan y/o consideren que podrían influir en su decisión acerca de la conclusión del contrato o de la aceptación de las cláusulas contractuales. Una parte no puede aprovecharse de la falta de información a la otra, es más, la conducta contraria atentaría contra el principio de buena fe y confianza que ha de presidir la relación que los une, pudiendo entenderse incluso que el contrato es nulo por quedar el cumplimiento del mismo al arbitrio de la parte que omite la información. En este sentido, los Tribunales españoles consideran que la cooperación en la fase precontractual, contribuye a garantizar un resultado idóneo y ventajoso para ambas partes, aumenta la riqueza general y permite reducir la litigiosidad. El principio de la buena fe precontractual se entiende como un criterio objetivo usado para evaluar el comportamiento de las partes contratantes. No obstante, debe ser concretado en cada caso específico, proporcionando así un ámbito y un contenido preciso a los deberes de información.

SEXTA

A pesar de la diferente concepción que, de base, tienen ambos ordenamientos en cuanto a la finalidad y consagración de los deberes de información, a la que hemos hecho referencia anteriormente, ambos prevén dos tipos de deberes informativos, aunque lo hagan también estableciendo algunas diferencias.

Los deberes de información directos, impuestos así en las normas, mediante detallados listados enumerando la información que obligatoriamente hay que suministrar al consumidor antes de la conclusión del contrato.

Los deberes de información indirectos, establecidos mediante referencias genéricas, más imprecisas, e incluso mediante la consagración de consecuencias negativas frente al incumplimiento del deber de facilitar la información.

La consagración de este doble sistema de suministro de la información puede provocar, en ocasiones, el solapamiento, propiciando que pueda tratarse el incumplimiento de un deber concreto directo como el de la obligación más general indirecta,

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y dando entrada a que la parte perjudicada pueda recurrir a varios remedios distintos frente, en definitiva, al mismo incumplimiento.

SÉPTIMA

Estos deberes de información para los contratos electrónicos, sean de naturaleza directa o indirecta, se imponen, de forma específica, en las normas sobre comercio electrónico, que se remiten, además, a tuitivas de los derechos de los consumidores, y como no podría ser de otra manera, a las previstas en el Derecho general de contratos.

En cuanto a la consagración de deberes directos de información, hemos de remitirnos a las disposiciones contenidas en los artículos 10, 19 a 22 y 27 de la LSSICE, en el derecho español, y en los regs 6 a 9 de los E-commerce Regulations 2002, en el derecho inglés. Deberán tomarse en consideración además las exigencias previstas en los artículos 60 y 97 del TRLDCU en España, y en Inglaterra y Gales en los regs 13 y 14 y en la Schedule 2 de los Consumer Contracts Regulations 2013.

Los deberes indirectos se consagran tanto en la normativa específica de consumo, como en el Derecho privado general. En primer lugar, hay que mencionar las disposiciones relativas a la conformidad de los bienes (productos) con el contrato, de los artículos 114 y siguientes del TRLDCU (España) y de las secciones 9 y siguientes del CRA 2015 (Inglaterra y Gales).

Encontramos igualmente imposición de deberes de información indirectos en las normas sobre las prácticas comerciales desleales. En España, en concreto, en los artículos 5 a 7 de la Ley de Competencia Desleal, que si bien abordan la prohibición de las prácticas desleales, no proporcionan, remedios individuales a los consumidores, diferenciándose así de las normas sobre prohibición de las prácticas comerciales engañosas establecidas en el derecho inglés (reg 5 en relación con la Part 4A de los UTR 2008) que sí otorga unos remedios contractuales concretos a los consumidores víctimas de las prácticas desleales.

En lo que se refiere al Derecho privado general, los deberes indirectos en ambos ordenamientos resultan de las normas sobre los vicios del consentimiento, en particular de las relativas al error provocado (*misrepresentation*) en el contexto inglés, y adicionalmente, en lo que se refiere al sistema español, del principio general de la buena fe precontractual.

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OCTAVA

El contenido de los deberes de información impuestos a los empresarios determina las consecuencias de su incumplimiento. No podemos olvidar que deber precontractual de información es una obligación, no un simple incentivo o estímulo, que incumbe al empresario porque así se impone, como hemos tenido oportunidad de analizar, tanto en las normas generales como en las específicas. Se trata, además, de un deber que pertenece al ámbito de la relación contractual, exigible sobre la base de la misma, y ello aun cuando los remedios privados individuales de naturaleza contractual estarán disponibles una vez el consumidor haya concluido el contrato.

Partiendo de esta premisa, consideramos conveniente recordar el importante papel que en el cumplimiento de los deberes precontractuales de información se atribuye a la publicidad, pues en la mayoría de los casos constituye el cauce o medio para el suministro de la información previa al contrato. Somos conscientes de que no cualquier publicidad va a reunir los requisitos de una verdadera oferta contractual y, en consecuencia, no cualquier publicidad va a ser considerada lo suficientemente precisa y constitutiva de la voluntad del empresario de vincularse por la misma (artículo 61 del TRLDCU y *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256).

Debemos distinguir, en este sentido, la publicidad de carácter informativo de la exageración y declaraciones excesivas aceptadas en el comercio por ambos ordenamientos, pues una vez formalizado el contrato, solo aquella información que ostente el carácter de verdadera oferta contractual, publicitada o no, formará parte ineludible del clausulado del contrato, conforme a las previsiones contenidas en los artículos 97.5 del TRLDCU y secciones 11(4), 11(5) y 12 del CRA 2015 [en lo que se refiere a bienes], secciones 36(3), 36(4) y 37 [en cuanto a los contenidos digitales], y secciones 50(3) y (4) [en lo concerniente a servicios].

NOVENA

La forma de proporcionar la información al consumidor también se vincula, de forma directa, con el incumplimiento de los deberes de información y su alcance.

En este contexto hay que tomar en consideración el requisito de la transparencia, reconocido tanto en el derecho inglés como en español (sección 68 del CRA 2015 y artículo 80 del TRLDCU).

Curiosamente, aunque este requisito es una consecuencia directa de la trans-

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posición del artículo 5 de la Directiva sobre las cláusulas abusivas, su incorporación a los ordenamientos que hemos analizado se ha efectuado de forma distinta. El alcance de la norma, en el Derecho español, está limitado a los contratos de adhesión que utilicen cláusulas no negociadas individualmente, mientras que las disposiciones del CRA 2015 se aplican a todos los contratos B2C.

Además, en el TRLDCU se regula la cuestión de manera más específica que en el CRA 2015, no solamente requiriendo que las cláusulas se redacten de forma precisa, clara y sencilla, sino también que las mismas sean fácilmente accesibles y legibles, para que el consumidor pueda conocerlas previamente a la celebración del contrato, regulándose incluso el tamaño de la letra y el color de la fuente que ha de usarse para la redacción de las mencionadas cláusulas.

La exigencia de comprensibilidad y claridad se plasma en los artículos 60 y 97 del TRLDCU y regs 13 y 14 de los Consumer Contracts Regulations 2013. La exigencia de acceso fácil, directo y permanente se encuentra en las regs 6(1) y 9(1) de los E-commerce Regulations 2002 y en los artículos 10.1 y 27 de la LSSICE. Se impone también por el legislador español la gratuidad en el suministro de la información, sin que hayamos encontrado regla parangonable en el Derecho inglés.

La exagerada proliferación de disposiciones legales al respecto, la diferente terminología utilizada para la imposición, en definitiva, de los requisitos de claridad, concreción, transparencia, o para el establecimiento de la forma en que ha se suministrarse la información, tanto en las normas comunitarias sobre comercio electrónico, como en las tuitivas de los consumidores, y, por ende, en las de transposición, inglesas o españolas, son un elemento en contra del propósito perseguido con las mismas. El empleo de términos, en ocasiones incluso incompatibles, genera el efecto contrario: la desprotección del consumidor.

DÉCIMA

Tanto el ordenamiento inglés como el español han abordado las consecuencias del incumplimiento de los deberes precontractuales de información, como no podía ser de otra manera, a fin de dar respuesta a las exigencias de transposición del Derecho comunitario.

No procede entrar en un análisis detallado de las distintas clasificaciones o formas de establecer las consecuencias del citado incumplimiento, pues el mismo se ha real-

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izado en las páginas precedentes a estas conclusiones. Queremos poner de relieve simplemente la carencia, en muchos casos, de un remedio o consecuencia directa.

Decíamos al principio que el recurso al Derecho administrativo sancionador puede ser suficiente para satisfacer las necesidades del Mercado. Sin embargo, imponer una sanción por incumplimiento de un deber precontractual de información es un remedio poco satisfactorio para un consumidor.

Habrá casos, en los que la consecuencia del incumplimiento de los deberes de información sea la aplicación de los remedios específicos previstos en la concreta disposición de consumo, como sucede por ejemplo, con la ampliación del plazo del derecho de desistimiento, cuando no se ha informado sobre el mismo; o con la falta de vinculación del consumidor con el contrato cuando no ha recibido la información sobre la obligación del pago, en los supuestos de adquisición de productos que la conlleven.

Sin embargo, para gran mayoría de los deberes de información directos no se han establecidos consecuencias de la misma naturaleza, lo que obliga a que la búsqueda de los remedios frente a su incumplimiento haya de realizarse mediante el recurso a consecuencias indirectas. Así, en el caso de incumplimiento de los requisitos de información relativos a las características principales de los bienes (productos) objeto del contrato, habrán de tomarse en consideración las disposiciones relativas a la falta de conformidad (artículos 114 y siguientes del TRLDCU y secciones 9 y siguientes del CRA 2015). En Derecho inglés, además, podría recurrirse a los remedios privados individuales previstos para las prácticas comerciales engañosas en el reg 5 de UTR 2008, en virtud del recientemente adoptado Consumer Protection Amendment 2014.

Otra vía de solución puede hallarse recurriendo a artículos 61.2, 65 y 97.5 del TRLDCU y secciones 11(4), 11(5) y 12 del CRA 2015. El incumplimiento de los deberes de información precontractuales puede generar el de una cláusula contractual, prevista expresamente en el contrato o que puede deducirse implícitamente del contenido del mismo *ex lege*. El recurso a la anulación del contrato por adolecer el mismo de vicios en el consentimiento, propiciados por el incumplimiento de los deberes que hemos analizado, constituye otro remedio indirecto a tener en cuenta.

UNDÉCIMA

Aunque es evidente que del incumplimiento de los deberes precontractuales de

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información pueden derivarse consecuencias en los supuestos en los que no se haya concluido el contrato, los remedios contractuales a los que hemos dedicado nuestra Tesis entran en juego una vez el contrato se ha perfeccionado. Ahora bien, este hecho, no implica automáticamente que los remedios aplicables sean de naturaleza contractual, pues como hemos indicado algunos de ellos vienen, incluso, determinados *ex lege*.

Debemos tener en cuenta, por tanto, el carácter de la responsabilidad que asume el empresario, pues la naturaleza de la misma, contractual o extracontractual, va a condicionar, por ejemplo, el plazo de prescripción de las acciones, el derecho aplicable en el caso de litigios transfronterizos o el importe de los daños y perjuicios.

Partiendo de esta base, es obvio que los remedios relativos al incumplimiento contractual naturalmente pertenecen al campo de la responsabilidad contractual, tanto en el Derecho español, como en inglés.

El recurso, como remedio, a la responsabilidad derivada de los vicios del consentimiento presenta, sin embargo, más complejidad. En el derecho inglés, de la existencia de vicios del consentimiento tradicionalmente surge la responsabilidad extracontractual (*liability in tort*), aunque el remedio de la rescisión del contrato es de la naturaleza contractual. La adopción del Misrepresentation Act 1967 introdujo la responsabilidad de carácter reglamentario (*statutory liability*) por el error provocado (*misrepresentation*), no obstante, los daños se calculan conforme al interés negativo.

En el ordenamiento español, el legislador en el artículo 1270 del Código civil no determina claramente la naturaleza de la responsabilidad por dolo, aunque el Tribunal Supremo parece pronunciarse a favor de su carácter contractual.

En lo que se refiere a los remedios específicos por falta de conformidad, los mismos son claramente de la naturaleza contractual, dado que el régimen de la misma es el previsto para la compraventa de consumo.

El recurso a la indemnización de daños y perjuicios se sustenta sobre el principio de interés negativo (*tortious measure of damages*), consagrado en ambos ordenamiento, por entenderse que el mismo se adapta mejor a los contratos de consumo, al restablecerse a la parte perjudicada en la posición que ocupaba antes de la conclusión del contrato.

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DUOÉCIMA

Como hemos indicado anteriormente, en la mayoría de los ocasiones los consumidores tendrán a su disposición tanto los remedios específicos como los generales, con el consiguiente solapamiento de los mismos. En términos generales, ambos ordenamientos permiten al consumidor perjudicado recurrir, de manera adicional o en lugar de los específicamente previstos, a los remedios del Derecho general, y ello, a pesar de la existencia de remedios reglamentarios específicos. No obstante, hay exclusiones notables de la aplicación de los remedios generales en ambos sistemas.

Por ejemplo, se contempla una particular jerarquía de los remedios por falta de conformidad de los bienes (productos) con el contrato, proveniente de la Directiva sobre venta y garantía de los bienes de consumo, conforme a la cual el recurso a la rescisión del contrato tiene carácter secundario y no está disponible salvo que se hayan utilizado otros remedios, excepción hecha del derecho de rescisión a corto plazo disponible solamente en el derecho inglés.

Así las cosas, sería inadecuado permitir el recurso a la rescisión, aplicando el Derecho general, cuando conforme a la norma comunitaria se impone otra jerarquía de remedios. De hecho, la sección 19(12) del CRA 2015 expresamente prohíbe al consumidor pedir la rescisión del contrato sobre la base del Derecho general por el incumplimiento de una cláusula relativa a la falta de conformidad de bienes implícita por el CRA 2015.

En Derecho español no encontramos norma equivalente a la inglesa, lo que quizás ha llevado a la doctrina a pronunciarse mayoritariamente a favor del sistema jerárquico europeo al que hacemos referencia. No obstante, el pronunciamiento de los Tribunales no es uniforme, pues en ocasiones, han permitido que los consumidores recurran a los remedios de Derecho general, en detrimento de los previstos en los artículos 114 y siguientes del TRLDCU.

Otra exclusión la encontramos en el TRLDCU cuando prevé la imposibilidad de recurrir a los remedios generales por vicios ocultos en el caso de falta de conformidad.

Referencia expresa queremos hacer también a la exclusión prevista en el Derecho inglés y referente al recurso a la indemnización por daños y perjuicios en caso de error provocado (*misrepresentation* en sección 2 del Misrepresentation Act 1967), al contar el consumidor con la posibilidad de solicitar la compensación por una acción engañosa bajo las disposiciones de la Part 4A UTR 2008, y ello, incluso, cuando los

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resultados o beneficios que el consumidor va a obtener de aplicarse el primero de los remedios son mayores que los derivados del segundo.

DÉCIMO TERCERA

No obstante, las exclusiones puestas de relieve y a pesar de la significante variedad de remedios específicos de consumo disponibles en ambos ordenamientos, tanto el Derecho español como el inglés se apoyan considerablemente en el Derecho general como fuente para la fijación de los remedios frente al incumplimiento a que puede acogerse el consumidor.

En Derecho inglés, de hecho, se prevén de forma expresa (sección 19(10) del CRA 2015) como recurso general, ante la carencia de remedios específicos, o como recurso adicional a los específicamente establecidos. Y ello, a pesar de que el panorama de los remedios específicos por el incumplimiento de los deberes de información está más desarrollado en el Derecho inglés que en el Derecho español. Así, por ejemplo, encontramos en Derecho inglés remedios específicos por el incumplimiento de cualquier requisito de información incluido en el Schedule 2 de The Consumer Contracts Regulations 2013, mediante los previsto en la Part 4A UTR 2008 y también la sección 12 del CRA 2015.

En Derecho español, por el contrario, el incumplimiento de las disposiciones contenidas en los artículos 61.2, 65 y 97.5 del TRLDCU, solo es resarcible por los cauces previstos en el Derecho general, sea cumplimiento forzoso, la indemnización de daños y perjuicios, o la rescisión del contrato.

El análisis comparativo basado en el planteamiento funcional tiene en cuenta las normas que se aplicarán en cada sistema frente a los mismos hechos. Por lo tanto, las disposiciones del Derecho inglés relativas a las prácticas comerciales engañosas de los regs 27A y siguientes de UTR 2008 deberían compararse con el Derecho general español relativo a los vicios del consentimiento (dolo y error).

El fundamento de la adopción de un esquema específico de remedios en Derecho inglés para los contratos de consumo no es otro que la constatación de la compleja aplicación a los mismos de las normas generales relativas al error provocado (*misrepresentation*). Sin embargo, analizando los pronunciamientos de los Tribunales españoles, podemos observar el preferente recurso a los remedios que el Derecho general proporciona para solucionar los problemas derivados del consentimiento viciado

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(dolo y error).

DÉCIMO CUARTA

La importancia del deber de información incumplido no constituye, en ningún caso, el elemento objetivo determinante del remedio que se pone a disposición del consumidor.

A esta conclusión puede llegarse analizando el contenido de la Schedule 2 de The Consumer Contracts Regulations 2013, del artículo 97.1 del TRLDCU, del artículo 10 LSSICE o de cualquier otro precepto que hemos tomado como referencia.

Ninguno de ellos alude a que información es la realmente importante o no, parece que se trata más de cantidad que de calidad, y, en consecuencia, ninguno de ellos determina que remedio sea el más conveniente ante la falta de una concreta información precontractual.

Sin embargo, si analizamos los remedios específicos previstos en algunas disposiciones, llegamos a la conclusión contraria. Es la norma que prevé el remedio, la que termina concretando la importancia del deber.

Si entramos en la discusión relativa al deber general de información, en el Derecho general esta se concreta en la denominada "información material", sin embargo, este concepto no está reconocido por los deberes específicos de información. Si nos centramos en los requisitos de información relativos a las características principales del bien (producto) objeto del contrato observamos que son claramente semejantes al concepto de "información material". En el caso del incumplimiento de estos requisitos de información se aplicará el régimen de remedios previsto en los artículos 114 y siguientes del TRLDCU y secciones 19 y siguientes del CRA 2015, que incluye reparación, sustitución, rebaja del precio y la rescisión del contrato.

Si el incumplimiento recae sobre otros deberes, no relacionados con la información sobre los bienes (productos) objeto del contrato, en el Derecho inglés la sección 19(5) del CRA 2015 solo proporciona al consumidor el derecho a recuperar el valor de los gastos en que incurrió hasta el importe del precio pagado. El Derecho español, por el contrario, no proporciona ningún remedio específico en estos casos, limitándose el legislador en los artículos 61.2, 65 y 97.5 del TRLDCU a establecer la integración contractual conforme al principio de la buena fe y la inclusión de la información en el contrato, abriendo la posibilidad de recurrir a los remedios del Derecho general.

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El problema es que los remedios del Derecho general, en ambos ordenamientos, están previstos para incumplimientos de cierta gravedad, lo que genera que, en caso de incumplimientos de deberes de información que puedan calificarse de menor importancia, el consumidor se enfrente a una total desprotección propiciada, precisamente, por la ausencia de remedios específicos. Así se pone de relieve, por ejemplo, en el recurso a los remedios previstos cuando el contrato adolece de vicios en el consentimiento. Ambos ordenamientos requieren el incumplimiento de un requisito de información de carácter material, de tal naturaleza que el consumidor ha sido inducido a celebrar el contrato sobre la base de dicha información, adquiriendo la misma un papel determinante de la voluntad contractual. El Derecho inglés contempla, no obstante, en los remedios específicos un requisito de naturaleza semejante en la reg 27A de UTR 2008.

DÉCIMO QUINTA

Mención especial merece, por las importantes diferencias que presentan los dos ordenamientos analizados, las consecuencias previstas en cada uno de ellos para los supuestos de omisión de información.

Si bien el Derecho español la contempla de forma expresa y prevé recursos frente a la falta de información, el Derecho inglés se centra en la provisión de la información falsa, sobre la base de las normas relativas al error provocado (*misrepresentation*) según las cuales solo de las declaraciones expresas, y no del silencio, puede surgir la responsabilidad. El Derecho general español no reconoce una distinción similar y trata el dolo por la provisión de la información falsa y por la omisión – dolo reticente – de manera prácticamente igual.

La división entre desinformar de forma activa y a través de la omisión es también relevante para los remedios específicos previstos en el Derecho inglés, consagrados solo por la acción engañosa del reg 5 de UTR 2008 y no por la omisión engañosa del reg 6 de UTR 2008, quizá por la similitud entre las normas del derecho general sobre el error provocado (*misrepresentation*) y las nuevas disposiciones sobre la acción engañosa.

La distinción entre la falta de suministro de la información y la provisión de información falsa alcanza, sin embargo, más allá de la acción engañosa. Por ejemplo, la sección 12(2) del CRA 2015 considera cada información suministrada (que no sea

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sobre las características principales del bien objeto del contrato) como integrada en el contrato, pero no sanciona la omisión de la información, que solo da lugar a la aplicación de la reg 18 de los Consumer Contracts Regulations 2013, conforme a la cual se entiende que empresario cumplió con sus deberes de información.

En Derecho español también se ofrecen diferentes remedios ante la desinformación voluntaria y la omisión de la información, sin embargo, estas distinciones son naturales y se deben a las características de los deberes de información y de su incumplimiento. A título de ejemplo se puede señalar el remedio previsto para el consumidor que no ha sido informado de que su pedido conlleva obligación de pago y que consiste en la no obligación por su parte.

La distinción que se puede observar en el Derecho inglés es fruto de la elección o decisión consciente del legislador. En nuestra opinión, el planteamiento tradicional del Derecho inglés al que nos referimos en este párrafo, se adapta bien a la realidad del comercio electrónico B2C, a las opciones que ofrece el Mercado *on line*. En la práctica, es más fácil diferenciar entre omisión de información e información falsa puesto que las opciones que ofrece este Mercado al consumidor son mayores que en el Mercado tradicional. Si al consumidor no se le facilita información relevante tiene más posibilidades de encontrarla, adoptando una actitud activa, que, en el Mercado tradicional, y en cualquier caso, la ingente oferta de bienes y servicios propia del Mercado electrónico, la comodidad, hace que descarte la oferta sin información a favor de aquella que contiene toda la información que considera necesaria. Por el contrario, cuando al consumidor se le facilita información falsa, las dificultades para contrastarlas son mayores, viéndose abocado, caso de aceptar la oferta sobre la base de dicha información, a recurrir a los remedios que ofrece el ordenamiento.

DÉCIMO SEXTA

Hemos intentado plasmar a lo largo de las conclusiones precedentes la importante influencia que ejerce tanto el Derecho que podemos calificar de tradicional, como la propia tradición jurídica materializada en la mentalidad de los legisladores, sobre la consagración de los deberes de información y de los remedios frente a su incumplimiento en el ámbito de la contratación electrónica. Buen ejemplo de ello, son los remedios específicos por el incumplimiento de los deberes que hemos analizado, pues si bien la influencia comunitaria es evidente, también es evidente la influencia del

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Derecho patrio, quizás más acusada en el Derecho inglés por su alejamiento de la tradición continental a la que suelen acomodarse las Directivas comunitarias.

Quizá el legislador europeo debería hacerse eco de las especialidades propias de los ordenamientos nacionales. Somos conscientes de la autonomía de cada uno de los poderes nacionales, pero también de que, en determinadas materias la labor armonizadora debe ser mayor. La contratación electrónica es una de ellas. La ausencia de fronteras espaciales permite que el consumidor pueda adquirir productos o servicios de prestadores establecidos no solo en el espacio de la Unión Europea, sino en cualquier parte del mundo. El consumidor, activo, buscará aquella oferta que satisfaga mejor sus necesidades y buscará, por qué no, aquel ordenamiento que garantice mejor sus derechos. La falta de uniformidad constituye uno de los principales inconvenientes de este Mercado, como ha puesto de relieve el propio legislador europeo, y genera que los consumidores ostenten derechos distintos en un ordenamiento u en otro, en función, precisamente de la influencia del Derecho patrio.

No podemos olvidar, además, la discutida autonomía del denominado Derecho de consumo, ni las voces que defienden cada vez más su integración en los Códigos civiles. Tampoco podemos permanecer ajenos a la interpretación que, de las normas tuitivas de los consumidores hacen los Tribunales, en paralelo siempre con el Derecho general de los contratos en el que, en definitiva, integran el régimen jurídico protector del consumidor.

Tampoco debemos dejar de acusar las deficiencias propias de las normas de consumo. El recurso a la remisión legislativa a otras disposiciones, propio de estas normas, genera, en cierto modo, una importante inseguridad jurídica para los consumidores. Buen ejemplo de ello, es la disposición contenida en el artículo 2 de la LSSICE que, como sabemos, remite el régimen de protección de los consumidores al TRLGDCU, y, dentro del mismo, a las normas sobre contratos a distancia, sin embargo, analizando el artículo 93 del Texto observamos como dichas disposiciones no se aplican a varios contratos de consumo electrónicos, muchos de ellos los más usuales en el Mercado *on line*. Si tomamos como referencia el Derecho inglés, encontraremos un buen ejemplo en la norma contenida en el CRA 2015, y en las continuas remisiones que la misma contiene a normativa secundaria – los Consumer Contracts Regulations 2013.

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DÉCIMO SÉPTIMA

Si tenemos en cuenta lo expuesto hasta el momento observamos un importante fallo en el sistema garantista del cumplimiento de los deberes precontractuales de información. No existe, ni a nivel europeo, ni en los ordenamientos nacionales analizados, una enumeración exhaustiva de remedios específicos a disposición del consumidor.

A esta quiebra a de añadirse otra. El consumidor se enfrenta a un ordenamiento caótico, disperso, desestructurado, lo que genera importantes dificultades a la hora de poder conocer no solo la información a la que tiene derecho, sino, y esto es lo realmente transcendental, los mecanismos con los que cuenta para defenderse ante las carencias o ausencias en el suministro de la misma. Si para un profesional en la materia el sistema es, a todas luces caótico, para el consumidor es prácticamente inasumible y como hemos manifestado potenciador del efecto contrario al pretendido pues la ya denominada "infoxicación" provoca, como decimos, que el consumidor huya de la misma y genera que preste su consentimiento sin conocer, realmente, aquello para lo que está consintiendo.

Al nivel europeo, el carácter casuístico de los deberes de información, y la consagración de los mismos no siempre en normas de armonización máxima, conduce a la fragmentación del Mercado interior, incentivada, además, por la diferente transposición llevada a cabo por los Estados miembros, como se ha puesto de relieve en nuestro análisis de los ordenamientos español e inglés. Este inconveniente se plasma, también, en la falta de establecimiento de un sistema de remedios lógico y efectivo. En el ámbito de los ordenamientos nacionales, si tenemos en cuenta, además, la influencia del Derecho privado propio de cada uno de ellos observamos como la tipología y contenido de los deberes de información difiere, como difiere igualmente la jerarquía de los remedios disponibles.

Se propicia que la concurrencia de posibles acciones derivables del recurso a un remedio u a otro genere un efecto contrario al inicialmente pretendido (la protección del consumidor), problema que se acusa especialmente en el Derecho español, por la ausencia de disposiciones semejantes a las contenidas en las secciones 19(9) a (12) del CRA 2015 y 2(4) del Misrepresentation Act 1967, que prevén, recordemos, la incompatibilidad de las distintas acciones.

El problema expuesto podría acusarse especialmente llevando a los extremos la

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aplicación del deber general de buena fe que debe presidir las relaciones contractuales en el ordenamiento español. De la misma podría generarse un deber de información más amplio que el consagrado en la Directiva sobre derechos de los consumidores, norma que, como sabemos, es de armonización máxima.

En definitiva, el sistema consagrado pone de relieve una gran diversidad de remedios potencialmente disponibles para los consumidores ante el incumplimiento de los deberes de información, en el que podemos encontrar remedios vinculados a la ineficacia del contrato (o pago), remedios indemnizatorios, remedios de conducta forzada para el empresario, o remedios tan *sui generis* como la extensión del período de desistimiento, presente en ambos ordenamientos.

DÉCIMO OCTAVA

El sistema merece duras críticas, las conclusiones que anteceden han pretendido ponerlas de relieve. Sin embargo, somos conscientes de su adecuación a la realidad social y económica del Mercado *on line* y lo somos si comparamos el sistema previsto con el que se derivaría de aprobarse el Marco Común de Referencia.

Como hemos analizado el Marco se sustenta sobre la base del principio de uniformidad de remedios frente al incumplimiento, propuesta en el art II.–3:109. No consideramos que la misma deba llevarse a los extremos, pues entendemos, que aún con sus deficiencias, los remedios frente al incumplimiento deben corresponderse con el propósito del deber de información incumplido, pues, por ejemplo, no es lo mismo proporcionar información falsa sobre las características principales del objeto del contrato, que omitir algún detalle en la dirección del empresario, sobre todo cuando este ha puesto a disposición del consumidor otros medios de contacto, y, en consecuencia, no tiene sentido establecer el mismo tipo de remedio en ambos casos.

Especial consideración merece, siguiendo esta línea, el recurso a la rescisión del contrato, pues si bien se trata de un remedio plenamente satisfactorio para el consumidor, siempre que no tenga que ejercitarla judicialmente, pues recupera la cantidad invertida y puede darle el destino que considere conveniente, no lo es tanto para el empresario, sobre todo en el caso de las PYMES.

Además, no podemos olvidar la existencia o previsión de remedios que afectan exclusivamente a un ordenamiento, como el caso de la rescisión a corto plazo disponible solo en el Derecho inglés.

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DÉCIMO NOVENA

La simplificación del sistema informativo, la unificación del mismo e incluso su consagración en un solo cuerpo normativo, contribuiría a la mejora del sistema de remedios frente al incumplimiento de los deberes analizados.

Como hemos tenido oportunidad de poner de relieve los deberes de información no son clasificados por el legislador de forma sistemática, atendiendo, por ejemplo, a la importancia de los mismos. Sin embargo, si se prevén los remedios disponibles para paliar el incumplimiento de deberes de información especialmente importantes.

Es obvio, en consecuencia, que si bien no de forma directa, indirectamente el legislador considera una información más importante que otra, quizá porque es consciente de que va a ser la que sirve de base para fundar la decisión del consumidor. No queremos con ello decir que el resto de la información suministrada no tenga importancia, reconocemos que la misma sirve a otras funciones y pueden ser especialmente útiles en otros momentos contractuales (pensemos, por ejemplo, en el incumplimiento del contrato), pero debemos ser consciente de que en el momento inicial la ya denominada "infoxicación", la sobrecarga informativa, va a provocar que el consumidor no pueda asumir tanta información, no sea capaz de asimilarla y, lo que es más importante, de hacer un uso adecuado de la misma en los distintos momentos por los que atraviesa la relación contractual.

En un momento inicial será información suficiente, entendemos aquella que permita al consumidor conocer con quién está contratando, como puede contactar con él, qué producto o servicio está adquiriendo, su precio y los remedios que el ordenamiento establece en caso de incumplimiento por parte del empresario de estas exigencias informativas. Cualquier información que exceda de esta que consideramos básica, insistimos, en el primer momento, provocará la temida "infoxicación" del consumidor.

VIGÉSIMA

El establecimiento de un sistema adecuado de remedios frente al incumplimiento de los deberes de información va a cumplir dos funciones trascendentales. Por un lado, contribuirá a combatir los problemas derivados de la sobrecarga informativa a los que hemos hecho alusión. Por otro lado, permitirá disipar las preocupaciones relativas al cumplimiento o incumplimiento de dichos deberes, al centrarse más en

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las funciones atribuidas al deber de información que, en la cantidad de información en sí, pues, insistimos, no se trata de cantidad sino de calidad.

Cuando hablamos de un sistema efectivo de remedios, nos estamos refiriendo a aquel que contribuye a que ante un incumplimiento contractual el consumidor tenga acceso a información detallada sobre las vías idóneas para obtener la protección del ordenamiento y, consecuentemente, la satisfacción de sus intereses contractuales, siendo fundamental, que incluya referencia a los remedios contractuales individuales (pensamos por ejemplo, en la necesaria información sobre el derecho a desistir y el procedimiento para su ejercicio).

Los deberes de información, desde esta perspectiva, servirán a la buena fe que debe presidir cualquier transacción, incrementando la transparencia del Mercado, y no siempre porque los consumidores lean la información cuidadosamente y la interioricen antes de formalizar cualquier contrato, sino porque han recibido la información precontractual junto con las cláusulas del contrato (en soporte duradero) y su cumplimiento por el empresario está garantizado gracias a la disponibilidad de los remedios efectivos frente al incumplimiento.

VIGÉSIMO PRIMERA

El Derecho general se presenta insuficiente e inadecuado para resolver los problemas que se plantean en el ámbito de la contratación con consumidores, y más aún, cuando el contrato se celebra por medios electrónicos. Esta afirmación puede parecer obvia, pues de lo contrario, carecería de sentido aprobar normas especiales tuitivas de los consumidores en general y de los "ciberconsumidores" en particular, pero tiene una razón de ser, porque las mencionadas normas cumplen un papel que debe ser puesto de relieve.

Y es que a pesar de los problemas expuestos en relación con la articulación del sistema protector del consumidor, general o especial, es evidente que los remedios específicos del Derecho de consumo o del Derecho del comercio electrónico son más adecuados para resolver los problemas que surgen en los contratos con consumidores y, por supuesto, satisfacen en mayor medida las necesidades de estos, si los comparamos con los remedios que prevé el Derecho general.

Pensamos, especialmente, en aquellos que son de aplicación automática y que pueden ser alegados como tales ante una reclamación judicial efectuada por el con-

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sumidor. Es fácil que un consumidor que no ha sido informado sobre el hecho de que su pedido implique obligación de pago, alegue ex artículo 98.2 TRLGDCU y reg 14 de los Consumer Contracts Regulations 2013, que no queda obligado por el contrato, al recaer sobre el empresario la obligación de demostrar que cumplió con sus obligaciones informativas.

Los remedios específicos, además, están regulados de manera más clara, como sucede, por ejemplo, en Derecho inglés en la fijación de descuentos para los supuestos en los que el consumidor presta su consentimiento sobre la base de información engañosa.

Las consecuencias que ambos ordenamientos prevén ante la falta de información sobre el derecho a desistir son también un buen ejemplo de la teoría que defendemos. El consumidor, como sabemos, ostenta la facultad de dejar sin efecto el contrato sin dar explicación alguna en el plazo de 14 días desde la celebración del contrato. Si el empresario incumple su deber de información sobre el mencionado derecho, dicho plazo se amplía automáticamente, pudiendo llegar al año, lo que sin duda incentivará al empresario a cumplir con sus obligaciones informativas. La idoneidad de este remedio para la satisfacción de los intereses del "ciberconsumidor" es indudable, aunque los legisladores no parecen considerarlo así si tenemos en cuenta el amplio elenco de contratos celebrados a distancia en los que el consumidor es privado de este derecho, fundamental en la contratación "a ciegas".

Analizando los remedios que ofrece el Derecho en general podemos poner de relieve algunos inconvenientes que inciden en la falta de adecuación de los mismos para resolver los problemas generados en los contratos de consumo y, especialmente, en los de consumo electrónico. La resolución judicial de los contratos es un buen ejemplo de ello. Normalmente los bienes adquiridos son de coste reducido, lo que desincentiva el ejercicio de acciones judiciales por parte del consumidor, a ello, debe unirse su obligación de probar los hechos, la duración de los procesos, o, el carácter transfronterizo de los contratos electrónicos.

VIGÉSIMO SEGUNDA

Hemos intentado en nuestra Tesis Doctoral poner de relieve la importancia del deber de información precontractual en los contratos de consumo electrónico. No obstante, hemos reseñado que la imposición de deberes de información a los empres-

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arios no debe ser el único mecanismo de defensa y protección de los consumidores. Un sistema de obligaciones empresariales de información se convierte en inútil para el fin perseguido si no va acompañado de un adecuado sistema de remedios que garanticen su cumplimiento.

El recurso al Derecho general no siempre es la solución óptima, garantista y tuitiva. El legislador europeo y los nacionales deben ser conscientes de las especialidades del Mercado *on line* y dicha conciencia debe ser plasmada en las normas jurídicas. Ahora bien, no queremos parecer unos idealistas, sobre todo si analizamos la solución propuesta desde la óptica armonizadora. El legislador europeo es, quizá, el que tiene más dificultades para conseguir dicho objetivo, toda vez que, como hemos intentado demostrar en nuestro Trabajo, la influencia, la impronta, que el Derecho general patrio impone a todo el anclaje del sistema tuitivo es en ocasiones ineludible.

Es cierto que la aprobación de la Directiva sobre derechos de los consumidores de 2011 ha contribuido notablemente a mejorar el marco jurídico de la contratación a distancia, sin embargo, habrá que esperar a los pronunciamientos de los Tribunales para conocer, en la práctica, su efecto en los ordenamientos nacionales, pues si bien la incorporación de la norma europea al Derecho español e inglés es ya una realidad, no lo es menos, su difícil convivencia con los Derechos patrios y con las normas sectoriales vigentes en ambos ordenamientos y que afectan igualmente a los contratos de consumo electrónicos.

Las recientes disposiciones adoptadas (en transposición de la Directiva, caso de España; o por iniciativa propia, caso de Inglaterra y sus CRA 2015 y Consumer Protection Amendment 2014) siguen estableciendo un elenco desmesurado, desestructurado e injustificado de deberes informativos y siguen, lo cual es a todas luces poco justificable, sin consagrar un régimen general unificado de deberes informativos y de remedios frente a su incumplimiento.

Queremos insistir en los efectos que ello provoca. El establecimiento de disposiciones sobre deber de información y remedios frente al incumplimiento es necesario, por las mismas razones que es necesaria su adecuación a nuestra demanda de calidad y no de cantidad. Se debe identificar claramente la información clave que el consumidor debe recibir *on line* a los efectos de manifestar su consentimiento informado, el resto de la información, aquella que no es transcendental para la conformación de su voluntad, bien podría ser suministrada por otro medio o soporte de

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carácter duradero que el consumidor pueda consultar cuando lo estime conveniente o necesario. No tiene sentido "infoxicarlo" con información, por ejemplo, sobre el incumplimiento en el momento precontractual, tiene sentido que sepa qué, cómo y dónde caso de producirse dicho incumplimiento.

Porque, como hemos defendido, la sobrecarga informativa afecta de forma negativa a todos los sujetos que intervienen en el Mercado de consume electrónico. Es indudable que genera en el consumidor un efecto similar a la falta de información, incide sobre su consentimiento y provoca que el mismo no se adecue a lo realmente pretendido por él. No podemos negar sus efectos perjudiciales sobre los empresarios que se enfrentan a importantes costes derivados de la elaboración de las webs y del mantenimiento de las mismas, desde el punto de vista técnico y jurídico.

A pesar de lo expuesto, no consideramos que el cumplimiento de la exigencia de calidad y no cantidad que defendemos sea suficiente. El legislador debe prever un remedio *ad hoc*, rápido y efectivo, para aquellos casos en los que se incumple el deber de informar sobre esos aspectos claves que conforman el consentimiento informado. No hablamos de resolución judicial, no es efectiva; no hablamos solo de un derecho a desistir; hablamos y demandamos algo más, porque no un sistema semejante al *short-term right to reject* inglés, semejante que no idéntico.

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