

Article 5: Information

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CHAPTER II: GENERAL PROVISIONS

ARTICLE 5: INFORMATION

Information to be provided under this Directive must be clear and transparent.

1. Main content and function

This provision sets out a requirement for the transparency and intelligibility of all the information that is to be provided by the parties in the relationships governed by the Discussion Draft. It is a type of provision well-known under EU law. The purpose of the duty to inform another party is to minimise the information asymmetry between the parties and to improve the contractual position of the less knowledgeable party. An improvement of this party's position is possible only if the information is provided in a manner that allows the recipient of the information to acquire real knowledge about the content of the information to be provided. Hence the information must be presented in a way that is accessible to the addressee. The Discussion Draft is addressed to differentiated circles of potential users of platforms. The addressee model, set as a reference for adjusting the level of simplicity and accessibility to the level that will meet the requirement of Article 5, could raise certain doubts. The parties, who use platforms as customers, could be consumers as well as traders. In the case of platforms open exclusively to professional users, it is much easier to establish a convincing profile of the average user, to whose needs the level concerning the formulation and display of information should be adjusted. In the case of a mixed group of potential addressees, the person obliged to provide the information cannot only consider the average user, because that may infringe the interests of more vulnerable users. If the operator of a platform addresses its services to a mixed group of people, he must take into consideration that the information should be also accessible to the average consumer.

The same principle applies to the information duties on the platform operator in relation to suppliers. As a matter of principle, suppliers are professionals and the operator can also expect that more sophisticated information will meet the requirement of Article 5. The provision is applicable only to the information duties arising from the Discussion Draft within its scope. It covers, however, all information irrespective of whether it is pre-contractual or contractual or of any other nature.

A violation of a duty to provide transparent information may lead to sanctions resulting from the applicable law of a Member State. The sanctions are hence not governed by the Discussion Draft but, following the consumer *acquis* model, require supplementation by national laws with sanctions that ensure the effectiveness of the duty imposed by Article 5. Moreover, the Discussion Draft itself provides certain sanctions, which may be used to remedy the lack of transparency of information. Articles 17 (Duty to remove misleading information given by the suppliers) and 19 (Misleading statement made by the platform operator) could be named in this context.¹

While Article 5 sets out transparency and clarity requirement in relation to information duties, the information that has been provided by the parties also completes the content of the contractual relationship between them. This means that this duty indirectly influences the requirement on the content of the contractual relationship.

2. Sources

The duty to provide transparent information is a common feature of all information duties under EU law and could be seen as an underlining principle of EU contract law. It has been expressed in numerous consumer law directives. An example may be found in the Consumer Rights Directive, which mentions this principle in several provisions. So, for example, Article 6 section 1 states that ‘the trader shall provide the consumer with the (...) information in a clear and comprehensible manner.’ In addition, Article 7, governing the formal requirements for off-premises contracts, stipulates a duty to formulate the information in plain and intelligible language. This same duty concerns the formal requirements for distance contracts, under Article 8 section 1.

The Consumer Credit Directive also articulates a requirement of transparency. Article 4 section 2 demands that the required information must be specified in a ‘clear, concise and prominent way.’ Also, the information concerning an ancillary service must be stated in a ‘clear, concise and prominent way’ (Article 4 section 3). Additionally, Article 10 section 2 spells out the

¹ Cf. Art. 17 Commentary; Art. 19 Commentary.

requirements concerning information included in credit agreements, stating that the credit agreement must specify the information ‘in a clear and concise manner.’ The Consumer Mortgage Credit Directive includes a similar requirement (e.g. Article 11 section 2: ‘The standard information shall specify in a clear, concise and prominent way: (...)’). Comparable provision may also be found in the Distance Marketing of Consumer Financial Services Directive, where Article 3 section 2 requires that information ‘shall be provided in a clear and comprehensive manner in any way appropriate to the means of the distance communication used (...)’). The requirement of transparency is also included in Article 10 section 1 of the E-Commerce Directive, which states that information must be clear, comprehensible and not ambiguous. Regarding the content of contractual relationships, the requirement of transparency is spelled out in the Unfair Terms Directive. Article 5 requires that terms offered to the consumer in writing must be drafted in plain, intelligible language.

This is by no means an exhaustive list, and many other examples could be named. This overview clearly shows, however, that the principle of the transparency of information is deeply rooted in European law.

3. Explanation

3.1 Transparency and clarity

Article 5 requires that any information provided under the Discussion Draft must be clear and transparent. The article imposes this duty, regardless of who is the addressee of the information (it could be a customer or a supplier). This covers pre-contractual information (e.g. Article 13) along with contractual information (e.g. Article 9), which means that both categories of information are relevant here (like in the case of Article 11). There is no sharp distinction between the pre-contractual and contractual information duties under the Discussion Draft.

The duty to ensure that the provided information is transparent may apply not only in case of the own information duty of the operator but also to the duty resulting from Article 11 section 2. If the Discussion Draft imposes a duty on the operator to ensure that certain information has been provided by the supplier to the customer, then that duty also covers a requirement addressed to the operator to ensure that the information provided by the supplier complies with the transparency principle.

Article 5 uses two fundamental terms to describe the core of the duty: the information must be clear and transparent. One could question whether this repetition is reasonable and justified by the different meaning of the concept of clarity and the concept of transparency or whether it is rather a typical manner for English with the repetition of synonyms or near-synonyms, mostly for

stylistic reasons to stress a certain idea or order but not to force the interpreter to find different meanings in this wording.

The transparency means a phrasing of the text that allows the reader to understand the content without effort. The way of phrasing the text should be adjusted to the reasonably expected ability of the reader to understand the text without difficulty. This concerns the terminology being used, the structure of the text, its length, lack of references etc. In the recent case law of the CJEU, the concept of transparency covers also the awareness of risks resulting from the kind of transaction entered by the consumer.² This understanding of transparency, however, goes very far and probably must be applied narrowly in the specific context of financial transactions of a type excluded from the scope of the Discussion Draft.

The clarity of the text must be included into the concept of transparency. The way it has been drafted may lead to the impression that clarity and transparency are different concepts. For the future, it could possibly be considered whether it is a good idea to use these two notions in one place.

3.2 Sanctions

Article 5 states only a duty and does not provide explicit sanctions for its violations. Basically, the sanctions are left to the Member States. The Discussion Draft includes, however, some genuine sanctions in Chapter V. A failure by the platform operator to present itself in a prominent way, but also to comply with the requirements of Article 5, deprives the platform operator of the privilege of non-liability for the non-performance of suppliers.³ Article 17 sanctions a failure to remove misleading information given by the supplier.⁴ It could be discussed whether Article 17 has a direct connection with Article 5, since Article 17 contains a complete rule – the sanctioned and sanctioning norm. Article 5 plays a role in the process of interpreting the notion of being “misleading”. Information should be regarded as misleading if it violates the requirement of Article 5. The same applies to Article 19, governing misleading statements by the platform operator itself.⁵

² Decision of the Case C 26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* (2014) EU:C:2014:282.

³ Cf. Art. 16 Commentary 1. Main content and function; 3.1 The meaning of Article 16 section 1.4. Relation to other provisions in the Discussion Draft; 5. Criticism; amendment proposal.

⁴ Cf. Article 17 Commentary, 1. Main content and function.

⁵ Cf. Article 19 Commentary, 1. Main content and function.

4. Relation to other provisions in the Discussion Draft

Article 5 governs all information duties arising from the Discussion Draft. This applies equally to Article 6 (Transparency of listings), requiring that the platform operator provides information on whether the placement within the listing depends on the factors indicated in Article 6 letters a and b.⁶ An information duty covered by requirements of Article 5 results also from Article 8, spelling out the information duties of the operator concerning reputational feedback systems.⁷ In the case of Article 9 (Duty to protect users), the duty to inform is not named directly; but if the adequate measure to protect users is to provide information (notices, warnings),⁸ then it is also covered by the requirement of clarity and transparency under Article 5.

Article 5 applies also to the information duties resulting from Article 11 (Duty to inform about the platform operator and supplier – in Chapter III on the duties of the platform operator towards the customer),⁹ and to such duties arising from Article 13 (Duty to inform about online intermediate platform – in Chapter IV (duties of the platform operator towards the supplier)).¹⁰ Article 5 matters in addition for the duty to provide facilities for informing customers (Article 14),¹¹ although this provision does not burden the operator of the platform with an information duty, but the facility that must be provided by the operator to fulfil the supplier's information duties would not be able to achieve this objective if the facility was not adjusted to observe the duty of transparency. The relation of Chapter V to Article 5 is discussed under 3.2 of these comments.

5. Criticism; amendment proposal

Article 5 refers to both: transparency and clarity. The concept of the “clarity” of information seems to be fully included into the broader concept of transparency. Hence it could be considered whether the language of this provision should be confined only to the explicit requirement of transparency.

The reformulated provision could look like this:

Article 5: Information

Information to be provided under this Directive must be transparent.

⁶ Cf. Article 6 Commentary, 1. Main content and function.

⁷ Cf. Article 8 Commentary, 1. Main content and function.

⁸ Cf. Article 9 Commentary, 3.2. What type of action is required?

⁹ Cf. Article 11 Commentary, 1. Main content and function.

¹⁰ Cf. Article 13 Commentary, 1. Main content and function.

¹¹ Cf. Article 14 Commentary, 1. Main content and function.